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COURT OF APPEALS, STATE OF COLORADO
2 E. 14th Avenue
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District Court of the 10th Judicial District, County of Pueblo, State of Colorado
The Honorable Allison P. Ernst
Trial Court Case No.: 2017CV30670

Plaintiffs-Appellants: DELORES CRUZ AND JOE CRUZ,

v.

Defendants-Appellees: STATE OF COLORADO, COLORADO DEPARTMENT OF AGRICULTURE, THE COLORADO STATE FAIR AUTHORITY.

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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

■ It contains 4,050 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

□ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

□ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ William S. Finger
Signature of attorney or party

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Delores and Joe Cruz, through their attorney, submit this Reply Brief in support of their contention that the trial court below erroneously dismissed this matter. This brief intends to point out the inaccurate analysis that has been conducted by the Defendants/Appellees (hereinafter the State) and that error below was committed.

I. REPLY TO STATEMENT OF ISSUE FOR REVIEW BY STATE DEFENDANTS/APPELLANTS

Defendants/Appellees in their brief assert on the first page that the Plaintiffs/ Appellants are asserting that there is an issue relating to waiver of governmental immunity under CGIA because of a failure to upgrade the design of a ramp at the Agricultural Palace, the location where Mrs. Cruz fell and was injured. This is a mischaracterization and inaccurate analysis of Plaintiffs' theory relating to waiver of governmental immunity. Plaintiffs' theory of waiver of governmental immunity and liability is that the State built/constructed a ramp at the Agricultural Palace after the 2007 Historic Structural Inspection and knew what the requirements were for compliance with the building code for ingress and egress by the pedestrian public. The ramp was built/constructed for loading and unloading purposes for motor vehicles and equipment, but not in compliance with building code requirements for ingress and egress by the pedestrian public. Thus, the ramp

was inherently dangerous for pedestrian use. Despite this knowledge that the ramp did not meet the requirements for pedestrian public use for ingress and egress, the State allowed or converted the ramp at an unknown date from a structure that was used and designed for vehicle use and equipment loading and unloading, to a use that included ingress and egress of the pedestrian public to attend events in the Agricultural Palace. This conversion was a management and maintenance decision relating to the public building that was a blatant disregard of safety. Not only was this dangerous conversion made, but as part of maintenance of the facility, no warning signs about the ramp and its use were posted. As such, the way the State managed and maintained this dangerous, non-compliant building structure created liability under the CGIA. An alternative to managing and maintaining the building and stopping pedestrian use of the ramp would have been to provide code compliant modifications, but the Defendants' liability is not based on any claim that there was a duty or requirement to modify the ramp. The theory on which liability is based is that the ramp, the structure, as maintained by management, was unsafe for pedestrian use. Defendants knew this fact, but disregarded this safety issue, failed to warn the public about the known danger, and Mrs. Cruz was severely injured as a result to these actions and inactions.

It is Plaintiffs' position that both the Defendants and the court below have

narrowly construed the waiver provisions and failed to analyze the teachings of the Supreme Court that broadly construe the concept of constructing and maintenance of a public building. The Defendants additionally fail to acknowledge that a facility or structure can be designed to be safe for a particular use or purpose, but that changing its use in violation of code requirements creates liability because the public building is not being maintained consistent with its original design and intended purpose and is maintained in an inherently dangerous fashion.

II. STANDARD OF REVIEW

Defendants do not dispute the legal principles set forth in Appellants' Opening Brief relating to the standard for review and what is the governing law relating to CGIA waiver of immunity provisions being broadly construed in favor of waiver, as matter of public policy. Although conceding the legal principles, the State argues for a narrow construction of the governmental immunity waiver statutory language, including the concepts of "maintain" or "maintenance", "physical condition" and "construction". In *Padilla v. School District No. 1*, 25 P.3d 1176 (Colo. 2001), the Supreme Court noted that courts must take into account in its required case by case analysis the varying definitions of the above terms and that principles of broad construction should apply.

III. REPLY TO FACTUAL STATEMENT BY THE STATE DEFENDANTS/APPELLEES

The Statement of Facts submitted by the State is very limited and leaves out many salient facts that have been set forth in Plaintiffs' Opening Brief. There appears to be no factual dispute between the two briefs. It is, however, noteworthy that some of the additional facts provided by the State support Plaintiffs' position. The following are some of those facts:

On page 3 of Appellees' brief, the State acknowledges that the Agricultural Palace has several available entrances and exits other than the unsafe ramp in question, including a handicap-accessible entrance that was added to the south side of the building. This information demonstrates that there was an improper maintenance of the facility with no warning or directional signs to avoid the unsafe ramp. Proper maintenance would have been to post warning signs concerning the unsuitable and dangerous ramp entrance and exit, saying that visitors should not use that exit, and use other exits. The record is absolutely clear that no such warnings or directions were given. At the hearing below, the State had no explanation as to why it did not maintain the ramp as a non-pedestrian means of ingress and egress for vehicles, and why there was a failure to post warning and directional signs.

On pages 3-4 of Appellees' Brief, it is admitted that the ramp in question

was not built for pedestrian use, but rather built for the purpose of vendor use to move their wares into and out of the Palace for trade shows and also as a means to move heavy equipment or vehicles into and out of the building. The State does not dispute that the ramp failed to comply with building code standards for pedestrian use, as was testified to by Plaintiffs' expert witness, or that the ramp failed to comply with the standards for pedestrian use called for in the 2007 Assessment of the Agricultural Palace.

The State also states it doesn't know when the ramp was built, but does not claim it was built before the 2007 Agricultural Palace Assessment that discusses only a temporary ramp at that location. The reasonable and logical inference is, therefore, that this permanent ramp was built/constructed after the Assessment and that the requirements for pedestrian use were known at the time the ramp was built, and the ramp was constructed for non-pedestrian use only. Thus this is not a case where a question of grandfathering for code compliance exists. These facts show that, contrary to the State's position that this is a case of inadequate design, such is not the case. The ramp was designed and constructed for vehicle use only, and not pedestrian use. The decision to allow non-conforming pedestrian use that violated safety code standards was a decision relating to management and maintenance that implicated safety standards and posed an unreasonable risk to the public. The ramp

as constructed was adequately designed for the purpose that was contemplated. It should never have been used for pedestrian traffic.

IV. REPLY TO LEGAL ARGUMENT

A. A Dangerous Physical Condition Existed at the Agricultural Palace under the CGIA

The State claims in its brief that CGIA definition of a "dangerous condition" cannot be shown by Plaintiffs because the Plaintiffs cannot demonstrate that the building with the unsafe pedestrian ramp was a condition proximately caused by a negligent act or omission by the public entity in constructing or maintaining the facility.

The Defendants do not to contest the issues of the ramp being dangerous for pedestrian use, the ramp not meeting code standards for pedestrian use, Defendants' knowledge that the ramp did not conform to code standards and that Defendants created a condition where injury was fully predictable; nor do the Defendants assert that the failure to post warnings or directional signs about not using the ramp constituted landowner negligence.

Defendants also do not contest that the unsafe and code non-compliant ramp proximately caused or was a part of the causation for serious injury to Mrs. Cruz.

The Appellees' argument is technical, claiming that they should be excused

from legal responsible for Mrs. Cruz's severe injuries because what they did in allowing pedestrian use of the unsafe ramp and failing to warn had nothing to do with constructing or maintaining the facility. Defendants compare the facts of this case to that of *Padilla, supra*, where a special needs child was put in her stroller and the stroller leaned against a closet door. The injuries resulted when the stroller tipped over as the child became agitated. In deciding that there had been no waiver of immunity under CGIA, the Supreme Court stated that there was an insufficient connection between use of the state of the building and a construction or maintenance activity or omission for which the School District is responsible. *Id.* at 1182. The Court looked at the case as one where negligence might have occurred because of a failure to supervise the child, not one related to the physical structure or a physical component of the public building. The Court rejected the proposition that upgrading the closet for the intended use was a viable legal position for waiver of immunity.

This case, however, is substantially different. Here, there is a structure involved, a ramp that was part of the public facility building that directly caused or was related to the injury. This ramp, as noted above, was designed and constructed for non-pedestrian use. As constructed it was a danger for pedestrian use. Thus, this was not simply a design problem causing injury for which there is no waiver of

immunity. Rather, this is a use or a change of use of a physical component of a building that was unsafe, under code requirements and common sense that was put to use for pedestrian ingress and egress. This distinguishes the instant case from *Padilla,* since in *Padilla* the closet itself was not defective, dangerous or a violation of code or safety requirements. Here, the ramp was itself dangerous as constructed if it was for pedestrian use. When the public entity allowed the pedestrian use, the physical structure became dangerous. Construction plus use in a highly dangerous fashion causing injury is the hallmark for public entity liability.

The instant case has a similarity to the case of *Hendricks v Weld County School District No. 6*, 895 P.2d 1120, 1123 (Colo. App. 1995) (an unpadded gym wall, along with its use, constituted a dangerous condition). The unpadded wall was not dangerous until the gym was used in a particular way. Thus, waiver of immunity occurred because of the construction coupled with use.

This case also has similarities to the case of *Walton v. State*, 968 P.2d 636 (Colo. 1998). There, the public entity created a structure with a storage area and an injury occurred when a student attempted access to the second floor on a ladder. The ladder's use was unsafe under the conditions that existed. The Court in *Walton* pointed out that liability attaches from the public's use of a dangerous or defective physical condition of the building with the linchpin being the use inquiry.

Walton, supra at 644.

In *Padilla, supra*, the Court, after examining the holding in *Walton*, stated that to be actionable, the state of the building or use and the injury resulting therefrom: 1) must have occurred in connection with a negligent act or omission of the government entity; 2) Must be associated with "constructing or maintaining" the facility, and 3) Must not solely be due to the facility design.

Appellees argue that second element, "Must be associated with constructing or maintaining the facility," cannot be shown by the Plaintiffs. Appellees in brief provide legal authority that a facility design alone cannot be the basis for waiver of immunity, but do not indicate that Plaintiffs are making such an argument because the record fully demonstrates that this is not the Appellants' position. If such an argument had been made, the response to the argument is that waiver of immunity arose because of how the ramp was constructed and its improper use in violation of code requirements, not design. No authority cited by the Appellees defeats that position. The ramp was knowingly constructed so it was not safe for pedestrian use, but then was improperly put to use or allowed to be used for pedestrian ingress and egress. Therefore, design alone is not the theory under which Plaintiffs have brought this action.

B. The Injury to Mrs. Cruz is Associated with Constructing and Maintaining the Facility

Plaintiffs as one claim in their complaint asserted liability against the Public Entity as a landowner, pursuant to C.R.S. § 13-21-115, as amended. Plaintiffs' status at the State Fair was that of an "Invitee". The Defendants/ Appellees owed to Mr. and Mrs. Cruz and others in attendance a duty of care that required inspection of the premises and maintenance of Agricultural Palace, so as to protect the invitees from an unreasonable risk. *Springer v. City and County of Denver*, 13 P.3d 794 (Colo. 2000). This duty included a duty to warn and protect invitees from dangers that were not ordinarily present on property of the type involved and which the landowner knew existed. See C.R.S. § 13-21-115 and specifically § 13-21-115 (3)(c) and (3.5). This duty to warn arises from the known dangerous condition, inspections, and a maintenance function. Defendants had specific knowledge that the ramp on which Mrs. Cruz fell as being non-compliant with code standards for pedestrian use and, thus, clearly knew it posed a danger if pedestrians were allowed to use such. This danger increased if the ramp became wet because of weather conditions. Defendants had a duty to maintain the ramp in compliance with the code, warn pedestrians of the danger, or stop its use by pedestrians.

The record below is clear that the Defendants provided no warnings relating

to the ramp being dangerous. No signs were posted. No one employed by the public entity was there to tell or warn Mr. or Mrs. Cruz or others attending the Fair on this Senior Citizens Day that was advertised, to be careful about descending the ramp. The fact that a large number of senior citizens would be attending the Fair on that day is, of course, directly relevant to the issue of the unreasonable risk. *See Martinez v. Weld County School District RE-1,* 60 P.3d 736 (Colo. App. 2003), cert. denied. In *Martinez, supra*, immunity was found to have been waived based on the failure to act to correct a known dangerous condition, ice on the sidewalk. This holding is in line with numerous other cases finding immunity waiver based on the failure to act to correct a defect or dangerous condition. It is no different to this case, where the dangerous condition was known and there was a failure to act to correct the condition and prevent injury.

The holding in *Padilla, supra*, also confirms that the statutory requirement for waiver of immunity is not the narrow definition ascribed to it by the Defendants. In *Padilla*, the Court referenced its holding in *Swieckowski v. City of Fort Collins*, 934 P.2d 1380 (Colo. 1997) in which it defined "maintenance". In that definition, the court included not only language about keeping the structure or improvement in the same general state of being, but also "repaired" and "efficient", as originally constructed. The court went on further to say that it did

not intend to circumscribe the jurisdictional inquiry to one particular meaning and that it also contemplated upkeep of the facility if a different use occurs from the original use. Thus, clearly the use of a facility or structures in the facility implicate responsibilities to maintain the structure consistent with its use, and if that cannot be done because of a code violation then the obligation is not to use the structure.

The Court in *Padilla, supra* also noted that constructing and maintaining can intersect or apply to the same set of facts. Here such is the case. The ramp was constructed under specifications for non-pedestrian traffic and was unsuitable for pedestrian use because it did not meet safety code standards. Defendants, however, maintained the ramp and operated it contrary to its specified purpose, creating a safety problem. This use was illegal and did not act in the efficiency it was initially constructed for.

The Defendants both constructed and maintained the Agricultural Palace and the ramp that caused the injury to Mrs. Cruz. As argued in the Opening Brief, this situation is akin to facts in *Walton, supra*.

V. LIABILITY ALSO ARISES UNDER THE RECREATIONAL AREA IN A PUBLIC FACILITY

Appellees have not briefed the issue of liability under the Recreational Area of a Public Facility waiver of immunity. The case of *Daniel v. City of Colorado Springs*, 327 P.3d 891 (Colo. 2014) sets forth the governing principles

relating to such claims. The court below determined that the State Fairgrounds, which includes the Agricultural Palace, met the definition requirements but that Plaintiffs/ Appellants' claim failed for the apparent same reason of not being able to meet the dangerous condition standards, discussed above. Plaintiffs' arguments made above are applicable to this claim of waiver as a Recreational Area in a Public Facility.

VI. CONCLUSION

Appellants assert that the decision of the District Court is in error and should be reversed. This should be remanded to the District Court for further proceedings with instructions that the Motion to Dismiss filed by the State Defendants should be denied.

Respectfully submitted this 2nd day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of May, 2019, a true and correct copy of the foregoing **Reply Brief** was filed via ICCES with service to the following:

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