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Appeal from El Paso County District Court The Honorable Michael P. McHenry Case No. 2021-CV-030904	▲ ▲ COURT USE ONLY
JOHN H. BRUCE, JR. **Plaintiff-Appellee** v. JONATHAN WEBB, FALCON FIRE PROTECTION DISTRICT and WILLIAM YODER **Defendant-Appellants.**	Case No.: 2022CA2034
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APPELLEE'S ANSWER BRIEF

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 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).

> ☒It contains 5,367 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/ R. Todd Ingram
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Issues on Appeal

Issue 1: Does the record support the district court's finding that Webb, in proceeding past the stop sign in question, failed to slow down as may be necessary for safe operation?

Issue 2: Did the district court abuse its discretion in allowing Bruce to present "expert" testimony at the *Trinity* hearing?

Issue 3: Is the district court's written order somehow erroneous or insufficient?

Statement of the Case

Most of the facts in this case are undisputed. The core issue is what those facts mean in the context of the Colorado Statutes governing the conduct of emergency vehicles, and in particular whether Appellant Jonathan Webb (Webb) complied with Colorado Statute, rendering both him and Falcon Fire Protection District (the District) immune from suit. *See* CF, p. 21–30, 48–78. Following briefing from the parties on Appellants' Motion to Dismiss for lack of subject matter jurisdiction, the district court set a hearing under *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993) (*Trinity* hearing). CF, p. 79. That hearing occurred on October 21, 2022. TR (Oct. 21, 2022), p. 1-2.

How this crash occurred is undisputed. Chief Webb was responding to an emergency on April 8, 2020 when he drove his SUV through a stop sign at the intersection of Curtis Road and Judge Orr Road, colliding with an SUV hauling a trailer, driven by William Yoder. Supp. EX Hearing, p. 3; *see* Supp. EX Hearing, p. 25–56. Following the first collision, Webb's vehicle spun out of control and collided with a motorcycle stopped and waiting at that intersection. *Id.* Appellee John Bruce (Bruce), the rider of that motorcycle, was taken by helicopter to Memorial Hospital and sustained grievous injuries from the crash. *See* Supp. EX Hearing, p. 20.

The facts about the conditions existing at the time of the crash are also undisputed. The posted speed limits on both Curtis Road and Judge Orr Road near this intersection are 45 mph. *See* Supp. EX Hearing, p. 24. At the intersection, north and southbound traffic on Curtis Road is controlled by stop signs, while east and westbound traffic on Judge Orr Road are uncontrolled and have the right-of-way. *See* CF, p. 30. On April 8, 2020, in addition to Yoder and Bruce, several other vehicles were near the intersection, primarily on Judge Orr Road. TR (Oct. 21, 2022), p. 22; *see* Supp. EX Hearing, p. 14–18, 58. The weather was clear, and nothing would have obstructed Webb's view[1] of the cross-traffic or Bruce's motorcycle while Webb was

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[1] Because the appellant's brief focuses so much on Yoder's point-of-view, line of sight, and failure to stop for Webb, it is worth mentioning here that Plaintiff has

approaching the intersection. TR (Oct. 21, 2022), p. 163:3–7, 103:1–104:23; Supp. EX Hearing p. 27, 42, 57–58; *see also* Supp. EX Hearing 10(a), (b), and (c).[2]

There has been no dispute as to the accuracy of the data retrieved from the event data recorder (EDR) in Webb's vehicle after the crash. *See* CF, p. 25–29. At five seconds before the collision, Webb had reduced his speed to 53 mph—8 mph over the posted speed limit of 45 mph. Supp. EX Hearing p. 24. Webb slowed to an eventual low of 38 mph—three seconds before the crash. *Id.* But then Webb applied maximum acceleration, reaching 42 mph at the time of first impact with Yoder's SUV. *Id.*

Deputy Sabrina Rogers, formerly a trooper with the Colorado State Patrol, was the lead investigator on the crash. TR (Oct. 21, 2022), p. 11:21–12:12, 16:2–17:9. According to Rogers, it is serious for one law enforcement organization to say that another first responder was unsafe, which is why she involved Captain (then Sergeant) Scott Hophan in her investigation. *Id.* at 27:1–28:4. She ultimately

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named Yoder as a defendant and contends Yoder's conduct contributed to his injuries, damages, and losses. However, more than one defendant may be liable for a crash, and for purposes of the district court's ruling and this appeal, the focus is on Webb's conduct and whether there is governmental immunity. *See Giron v. Hice*, 519 P.3d 1083, 1087–88 (Colo. App. 2022) (emphasizing that the focus in a *Trinity* hearing is not whether the government was negligent, but rather whether the district court has the ability to hear the case).

[2] These exhibits are videos created by Plaintiff's Expert Brent Graham and provided to the district court on a USB thumb drive.

concluded—based on her extensive training and experience on how to respond to emergencies with lights and sirens engaged (a.k.a. "run code")—that Webb did not take into account the safety of others when running the stop sign at Judge Orr Road. *See id.* at 34:8–35:19; 63:5–64:5. She also testified that in her experience running code a first responder cannot assume other drivers will see the emergency vehicle and stop. *Id.* at 51:4–52:21, 63:5–64:5. For these reasons, it is Rogers' practice to come almost to a complete stop before traveling through a red light or stop sign. *Id.*

Captain Hophan, a 23-year veteran of the Colorado State Patrol and member of the Vehicular Crimes Unit, also testified at the *Trinity* hearing. TR (Oct. 21, 2022), p. 65:9–67:17. He testified that he got involved in the investigation because "another government unit"—the District—was involved. *Id.* at 67:20–22. And Hophan has experience investigating crashes that involve emergency vehicles running code as well as experience running code himself. *Id.* at 68:25–70:22. He testified that in his training and experience:

> You can't simply run through a stop sign or a red light against normal traffic. You need to slow down, observe that traffic has stopped prior to you entering the intersection and clearing the intersection. And even when traffic's stopped, it's still a very dangerous position that you're putting yourself in, because you don't know if those people are going to go or if there's another vehicle that you can't see coming into that intersection, as well.

Id. at 70:23–71:10. An emergency responder can "absolutely not" assume that every car is going to see the responder and yield. *Id.* at 71:11–17. In this case, Hophan ordered the EDR download and accompanied Rogers to the scene of the crash to take measurements and evaluate line of sight for the vehicles involved. *Id.* at 76:3–83:11. Ultimately, the Colorado State Patrol investigators determined that Webb was at fault for the crash and had traveled through the intersection "at a higher rate of speed than what all of us involved thought was reasonable and safe." *Id.* at 83:3–84:9.

Sergeant Robert Wolf, a 30-year veteran of the Colorado Springs Police Department, witnessed the crash. TR (Oct. 21, 2022), p. 109:13–24, 114:13–115:9. Wolf testified at the *Trinity* hearing that from his unobstructed vantage point behind Bruce's motorcycle, Webb was traveling "at speed" toward the intersection at the same time that Yoder was traveling at speed toward the intersection and he could see "clearly they were going to collide." *Id.* at 116:20–118:14. Wolf testified that he could not hear Webb's sirens, but that doesn't mean Webb wasn't using them. *Id.* at 118:19–119:22. Rather, in Wolf's training and experience, sirens can be inaudible to vehicles in front of an emergency vehicle, be inaudible when the emergency vehicle is moving quickly, and be difficult to locate even once a person hears them. *Id.* As Wolf explained, that is why when he is responding to an emergency with lights and sirens engaged he slows down coming to an intersection to give other vehicles a

chance to orient and "figure out what's happening." *Id.* In fact, Wolf testified that he typically "come[s] to a stop or very close to it," before "creep[ing] into the intersection" when he is proceeding past a red light or stop sign with lights and sirens engaged. *Id.* at 120:3–25.

Even the defense witness, Payton Fire Protection District Deputy Chief James Revels,[3] testified that when an emergency vehicle is running code and the driver can't see whether the cross-traffic is going to stop, it is not safe to run a stop sign. TR (Oct. 21, 2022), p. 188:20–191:12. In fact, his fire department has a policy that its emergency vehicles stop at all stop signs and red lights, even when running code. *Id.* at 191:13–23.

The evidence of Chief Webb's unsafe driving immediately persuaded the district court; at the close of evidence and argument, the district court orally ruled:

> . . . Plaintiff has met their burden of proof in demonstrating that the sovereign immunity has been waived and this is because the Defendant did not meet the requirements of C.R.S. [§] 42-4-108(2) that requires that due regard be given to the safety of the community in the intersection at the time that a stop sign or a red light is run. The Court bases this primarily on the objective data black box recording that shows the speed. It does show a brief momentary slow down an[d] braking right before entering the intersection, but as a matter of law it was not sufficient. Every lawyer in this room is familiar with the notorious unreliability of eyewitness identifications. Eyewitness testimony is subject to so many neurological and human psychological

[3] TR (Oct. 21, 2022), p. 171:11–18.

> impingements that we witnessed in this hearing here today, as people can believe something firmly and be completely refutedly [sic] wrong. And so, the Court believes that the black box imaging data speaks the loudest here and the Court is finding that it does have subject matter jurisdiction and is denying the Defense Motion to Dismiss.

TR (Oct. 21, 2022), p. 211:14–212:5. The court also requested that Plaintiff draft a proposed written order to circulate to Defense counsel and then submit it to the court for final approval. TR (Oct. 21, 2022), p. 214:25–215:17. Plaintiff did so, and the court ultimately adopted the proposed order as the final Order of the court. CF, p. 247–253; *see also* CF, p. 246 (noting the defendants' "concerns" but finding that the proposed order "accurately embodies the court's ruling").

The district court's written Order concluded, in pertinent part, that:

> [h]aving observed all of the evidence adduced during the in-person *Trinity* hearing, having considered all attendant circumstances present (including the close presence of cross traffic and Plaintiff's exposure on his motorcycle) at the time Defendant Webb was making the decision to run the stop sign in question, and having reviewed in particular Plaintiff's Exhibit 3, [EDR data report], which was stipulated to by the parties prior to the hearing, and includes objective evidence of the speed at which Defendant Webb was traveling when he proceeded through the stop sign, this Court finds governmental immunity has been waived as to the claims against Defendants Falcon Fire Protection District and Jonathan Webb, and the Court has jurisdiction to hear those claims. Specifically, this Court hereby finds that Defendant Webb, in proceeding past the stop sign in question, failed to slow down as may be necessary for safe operation in violation of Section 42-4-108(2)(b).

CF, p. 252.

Argument Summary

The District fundamentally disagrees with the trial court's finding that Defendant Webb failed to slow down as may be necessary for safe operation when proceeding past a stop sign in his emergency vehicle as required by C.R.S. § 42-4-108(2)(b). But, as summarized above and discussed below, the record developed at the *Trinity* hearing overwhelmingly supports the district court's finding. There was no procedural or substantive error in the proceeding. The court properly found that Plaintiff carried his relatively lenient burden of establishing the district court's subject matter jurisdiction. This Court should affirm the decision to allow Bruce's claims to go forward.

Argument

Issue 1: Does the record support the district court's finding that Webb, in proceeding past the stop sign in question, failed to slow down as may be necessary for safe operation?

A. Response to Standard of Review:

Appellee Bruce generally agrees with Appellant's stated standard of review. This Court applies a mixed standard of review to orders on motions to dismiss for lack of subject matter jurisdiction. This Court reviews the district court's factual findings for clear error. *Bilderback v. McNabb*, 474 P.3d 247, 250–51 (Colo. App.

2020). Because the grant of sovereign immunity is in derogation of Colorado common law, any provision granting sovereign immunity is narrowly construed. *Id.* at 250.

B. Preservation:

Bruce agrees the District's challenge to the factual finding below has been properly preserved.

C. Discussion:

The caption for the District's first argument contends that the trial court "opposed [sic] a nonexistent legal duty on Chief Webb." Aplt. Br. at 12. There is no support for that contention. The district court was well aware of the jurisdictional question at issue.

> Under section 24-10-106(1)(a) of the CGIA, a public entity's immunity is waived in an action for injuries resulting from the "operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of employment, except emergency vehicles operating within the provisions of section 42-4-108(2) and (3), C.R.S." In this case, there was no dispute that an emergency vehicle was being operated by a public employee, Jonathan Webb, of the Falcon Fire Protection District, while in the course of his employment.
>
> Thus, the issue in dispute was whether the vehicle was operating within the provisions of section 42-4-108(2) and (3), so as to come within the exception to the otherwise applicable waiver of immunity. Section 42-4-108(2)(b) states that the driver of an authorized emergency vehicle, when responding to an emergency call "may . . .

> (b) [p]roceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation . . . .”
>
> . . .
>
> Again, the parties do not dispute that Defendant Webb was responding to an emergency call, or that he had proceeded past a stop sign. Rather, ***the issue before the Court was whether Chief Webb had slowed down as may be necessary for safe operation of his emergency vehicle***.

CF, p. 252 (emphasis added). And there can be no serious dispute that the district court resolved this precise factual question.

> Having observed all of the evidence adduced during the in-person *Trinity* hearing, having considered all attendant circumstances present (including the close presence of cross traffic and Plaintiff’s exposure on his motorcycle) at the time Defendant Webb was making the decision to run the stop sign in question, and having reviewed in particular Plaintiff’s Exhibit 3, Colorado State Patrol District 2 Vehicular Crimes Unit Supplement Report to Case 2B200836, which was stipulated to by the parties prior to the hearing, and includes objective evidence of the speed at which Defendant Webb was traveling when he proceeded through the stop sign, this Court finds governmental immunity has been waived as to the claims against Defendants Falcon Fire Protection District and Jonathan Webb, and the Court has jurisdiction to hear those claims. ***Specifically, this Court hereby finds that Defendant Webb, in proceeding past the stop sign in question, failed to slow down as may be necessary for safe operation in violation of Section 42-4-108(2)(b)***.

Id. (emphasis added).

In sum, the district court correctly understood that Defendant Webb owed a duty to slow down as may be necessary for safe operation when he ran the stop sign

in question. The court correctly considered how Defendant Webb proceeded through the intersection—specifically emphasizing the evidence that Webb never slowed below 38 m.p.h.—and found that Defendant Webb did not slow down as was necessary for safe operation. Accordingly, the District's apparent contention that the trial court imposed some improper "legal duty" on Defendant Webb lacks merit.

The District takes a similarly murky position when arguing that a "hindsight approach in making a factual determination as a matter of law has no place in this determination." *See* Aplt. Br. at 11 (citing *Quintana v. City of Westminster*, 56 P.3d 1193, 1197 (Colo. App. 2002)). *Bilderback* instructs that, in evaluating whether Chief Webb slowed down "as may be necessary for safe operation," the district court was required to "take into account how the [first responder] proceeded through the intersection." 474 P.3d at 251. In other words, the law required the district court to evaluate the circumstances leading up to the crash at issue. There is no evidence the trial court was influenced by the mere fact an accident occurred, or improperly analyzed the evidence of how Webb proceeded through the intersection.

The District also curiously cites different cases only to ultimately declare those cases different. For example, the District examines *Giron v. Hice*, 519 P.3d 1083 (Colo. App. 2022), *cert. granted*, No. 22SC671, 2023 WL 2159655 (Colo. 2023), a case in which the court of appeals enunciated a bright-line rule that officers in pursuit

of suspects must activate lights or sirens as soon as they exceed the speed limit in order to receive immunity. *See* Aplt. Br. at 17-18, 19-20. But whether Chief Webb timely activated his lights and sirens is not an issue in this case.

The District also summarizes *Corsentino v. Cordova*, 4 P.3d 1082 (Colo. 2000), a case which required the court to interpret what it means for an officer to "endanger life or property" while speeding. *See* Aplt. Br. at 20-21. Again, this case did not require the district court to apply the statute having to do with "endanger[ing] life or property."

Finally, the District discusses *Tidwell v. City and County of Denver*, 83 P.3d 75 (Colo. 2003), where the court found an officer in pursuit of a suspect failed to activate lights and sirens. Once more, this case has never been about whether Chief Webb activated his lights and sirens. It has always been about whether Webb slowed down as necessary for safe operation when running the stop sign.

After summarizing these (inapposite) cases, the District oddly proclaims that they are distinguishable on the facts and applicable law. *See* Aplt. Br. at 17–18 ("The basis for which the Court in *Tidwell*, *Corsentino* and *Giron* determined that the governmental entity was liable is due to the facts, not necessarily the situation and those facts are vastly different than the ones present in this case."), 23 ("The . . . cases cited *supra* all had substantial differences the [sic] instant case that impact on the way

the Colorado Courts analyze the relevant portion of the statutes."). Undersigned counsel agrees that none of those cases remotely touches on the determinative issue in this case. Accordingly, the District's pontification on those cases can only be a red herring serving no analytical purpose.

The District's additional arguments range from abstract to mere false alarms. *See* Aplt. Br. at 39 (arguing that the "elephant in the room" is the question of "when is an accident not really an accident?"); 41 (arguing that the district court's finding means "there would be no need for the legislature granting immunity for situations that involve accidents at all"). In fact, there is no slippery slope. There is no "elephant in the room," whatever that means. This appeal boils down to the District's stubborn refusal to acknowledge the facts showing Chief Webb failed to slow down as necessary for safe operation before charging through the stop sign. Indeed, it takes no more than common sense to understand why the district court found a waiver of sovereign immunity here.

As described in more detail above, the black box data proved Chief Webb ran a stop sign at a busy intersection at almost 40 miles per hour—and accelerated to 42 m.p.h. at the time of impact. Numerous witnesses—specifically including fellow first-responders—unequivocally testified that Chief Webb's conduct was unsafe. *See* *Bilderback*, 474 P.3d at 251 (discussing how "safe operation" at an empty

intersection would be different than "safe operation" at a busy intersection, and that in some circumstances, "safe operation could require police officers to refrain from increasing their speed while in the intersection . . . if the officers are unable to determine whether all cross-traffic has stopped").

To be sure, Bruce agrees that Yoder is also a proper defendant below. But the *Trinity* hearing was not about evaluating whether Yoder did something wrong. In every case involving an evaluation of "safe operation," there is someone with whom a collision occurred. The finding below only means the District and Webb must defend this case on the merits.

A trial court's findings of fact in support of a determination under the Governmental Immunity Act are "accorded great deference." *Quintana*, 56 P.3d at 1196; *Trinity*, 848 P.2d at 925 (discussing how the trial court is free to weigh the evidence in determining whether it has jurisdiction and that the standard of appellate review is "highly deferential"). The record, summarized above, supports the district court's decision. The trial court considered all of the evidence and circumstances and properly concluded Chief Webb did not slow down as necessary for safe operation. That finding is eminently correct, not clearly erroneous, and should be affirmed.

Issue 2: Did the district court abuse its discretion in allowing Bruce to present "expert" testimony at the Trinity hearing?

A. Response to Standard of Review:

Bruce agrees that evidentiary rulings are reviewed for abuse of discretion. A trial court has considerable discretion when ruling on the admissibility of evidence; to show an abuse of discretion the objecting party must show that the trial court's decision was manifestly arbitrary, unreasonable or unfair. *Vu v. Fouts*, 924 P.2d 1129, 1131 (Colo. App. 1996). Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *Id.* An error may be harmless unless it can be said with fair assurance that the error influenced the outcome of the case or impaired the basic fairness of the hearing itself. *Id.*

B. Preservation:

Bruce agrees that the District objected to Officer Rogers testifying as an expert in emergency response and accident investigation, thereby preserving review of that ruling.

However, the District did not object to the qualification or testimony of Captain Hophan in the fields of accident investigation, reconstruction and emergency response. TR (Oct. 21, 2022), p. 73:6-10. The District did not object to

the qualification or testimony of Sergeant Wolf in the field of emergency response on any grounds raised in this appeal. *See id.* at 114:4-12. Accordingly, the District has not properly preserved its challenge to the testimony of Hophan or Wolf.

C. Discussion:

Colorado law clearly instructs trial courts to afford the parties latitude to introduce evidence tending to prove or disprove jurisdiction. *Tidwell*, 83 P.3d at 86. The burden to establish jurisdiction is relatively lenient. *Id.* And the law recognizes that "because discovery by the time of the *Trinity* hearing has been limited, the trial court should afford the plaintiff the inferences of his allegations." *Id.*

With these pronouncements in mind, the District's arguments are undeveloped and difficult to follow. *See* Aplt. Br. at 29–33. First, the District—without pinpoint citation—relies on *Saturn Systems, Inc. v. Militare*, 252 P.3d 516 (Colo. App. 2011) for the proposition that "it is incumbent on the parties to comply with the respective Colorado Rules of Civil Procedure for purposes of the evidentiary hearing." Aplt. Br. at 30. The District's reliance on *Saturn Systems* is misplaced.

Saturn Systems did not involve a *Trinity* hearing or the trial court's determination of any issue under the Governmental Immunity Act. That case involved a bench trial over the alleged misappropriation of trade secrets. *See Saturn Systems, Inc.*, 252 P.3d at 523–26. The appellate court affirmed the trial court's

admission of expert testimony because the appellant had been aware of the information presented by the expert long before trial and therefore could not demonstrate prejudice. *See id.* at 524-25. Saturn Systems does not hold that a trial court must utilize and enforce formal ***pretrial*** disclosure rules before conducting a *Trinity* hearing in the early stages of a case. Indeed, no such procedural mandate exists. A *Trinity* hearing is a limited hearing wherein the parties are afforded latitude to introduce jurisdictional evidence. *Tidwell*, 83 P.3d at 86. The district court was not required to, and did not, impose any Rule 26 expert disclosure obligations on any party for purposes of the *Trinity* hearing.

Next, the District cannot credibly claim that it was surprised by the testimony of Deputy Rodgers. Deputy Rodgers wrote the Colorado State Patrol Case Report. *See* Supp. EX Hearing, p. 1–20. That Report expressly charged Defendant Webb with Careless Driving in violation of C.R.S. § 42-4-1402(2)(B). Supp. EX Hearing, p. 1, 8. The District knew the contents of the investigation report all along. In fact, the District objected to a request to allow Deputy Rodgers to testify via videoconferencing, stating: "Deputy Rodgers (formerly Trooper Rodgers) was actually the person ***who wrote the citation to EMT Chief Webb*** and was on the scene following the accident." CF, p. 179 (emphasis added). The entire police case file was admitted into evidence, and the District does not challenge the admission of that

exhibit on appeal. *See* TR (Oct. 21, 2022), p. 21:10–21. In sum, the District has not claimed (and could not claim) it was surprised or unfairly prejudiced by anything Deputy Rodgers said on the stand.

The same analysis applies to Captain Hophan. To begin, the District has waived any attempted challenge to Captain Hophan's expert testimony. The District affirmatively stated it had "no objection" to qualifying Captain Hophan as an expert in the fields of accident investigation, reconstruction, and emergency response. TR (Oct. 21, 2022), p. 73:6–11 ("THE COURT: Any objection? MR. LANE: In those fields, no objection."). The District also did not object to the testimony it now quotes in its brief. *See* Aplt. Br. at 31–32; TR (Oct. 21, 2022), p. 70:23–71:10. Accordingly, the District cannot now be heard to object.

And again, even if the District had preserved an objection, it cannot seriously claim surprise or resulting prejudice. The District has always known that Captain Hophan assisted Deputy Rodgers with the investigation that resulted in Careless Driving charges against Chief Webb. TR (Oct. 21, 2022), p. 73:19–74:7; *see* Supp. EX Hearing, p. 23. The District did not object when Captain Hophan described how he, along with others involved in the investigation:

> made a determination . . . that he [Chief Webb] was traveling at a higher rate of speed than what all of us involved thought was reasonable and

> safe . . . and that's when . . . Trooper Rogers [sic] made the decision to charge Mr. Webb in this case.

TR (Oct. 21, 2022), p. 83:3–11. The District's opening brief fails to mention that Sergeant Wolf also testified, consistent with his on-scene statement, that Chief Webb failed to slow down enough to safely clear the intersection. TR (Oct. 21, 2022), p. 126:2–12; *see* Supp. EX Hearing, p. 16. The District does not challenge that testimony on appeal. In sum, the District always knew that Webb's colleagues would proffer testimony supporting the conclusion that Webb failed to slow down as necessary for safe operation.

Finally, as an additional point on the issue of prejudice, it's worth reiterating that the trial court's oral pronouncement and written order clearly reflect the court's principal reliance on the objective black box data to support its finding that Defendant Webb failed to slow as necessary for safe operation under the circumstances. The occasional references to "due regard" at the hearing, as well as the witnesses' conclusions that Chief Webb's speed was unsafe, were not critical to the trial court. The objective, stipulated, data from the black box, in light of the attendant circumstances at the intersection, was more than enough to convince the court it had jurisdiction over Bruce's governmental claims.

In sum, the District's undeveloped, scattershot complaints that certain witnesses testified as "experts" do not demonstrate any manifestly arbitrary, unreasonable, or unfair evidentiary ruling below.

Issue 3: Is the district court's written order somehow erroneous or insufficient?

A. Response to Standard of Review:

The District's third issue on appeal defies understanding. The District appears to be rearguing its first issue on appeal. To that end, the District's challenge to the factual findings below would be reviewed for clear error. To the extent the District intended to present another question for this Court's review, the district court's actions would presumably be reviewed for abuse of discretion.

B. Preservation:

The District vaguely alleges that the district court's entry of a written order—after it had previously ruled from the bench—somehow preserves the "issue" for appeal. Bruce disagrees. The record shows the district court made some oral comments on the record. In accordance with the rules of procedure, it instructed Plaintiff's counsel to prepare a draft order for circulation and approval, and later adopted the draft prepared by Plaintiff's counsel. The District did not object to that procedure or submit a different written order for the judge's consideration.

Furthermore, the District did not object to the proposed, written Order by arguing that the district judge's oral ruling reflected a misapprehension of the law or a failure to consider the facts established at the hearing. *See* CF, p. 241. Accordingly, to the extent the District is stating some new issue that materially differs from its first issue (*i.e.* its fundamental disagreement that Chief Webb failed to slow as necessary for safe operation), Bruce respectfully submits that any such issue has not been preserved for appellate review.

C. Discussion:

Again, the District's third stated issue—contending the court's order is "factually insufficient" and "legally incorrect"—appears on its face to mirror its previous arguments. *See* Aplt. Br. at 34. It is also improper for the District to attack the court's oral ruling from the bench. The trial court accurately cited the governing statute and provided clear insight into the evidence and circumstances upon which it was basing its finding of no sovereign immunity. *See* TR (Oct. 21, 2022), p. 211:14–212:9 ("The Court bases this primarily on the objective black box recording that show the speed. It does show a brief momentary slow down an[d] braking right before entering the intersection, but as a matter of law it was not sufficient.").

Moreover, even if the oral ruling had been wholly erroneous (it clearly was not), the law is well-established that a court's written order takes precedence over

any oral remarks or findings. *See In re Marriage of West*, 94 P.3d 1248, 1250 (Colo. App. 2004) (repeating the rule that a court has the authority to supplement or modify any oral remarks or opinions until a written order or judgment enters); *People in Interest of O.J.S.*, 844 P.2d 1230, 1232–33 (Colo. App. 1993). The written order is the basis for this interlocutory appeal, not the oral comments at the close of the *Trinity* hearing. *See* CF, p. 264 (Notice of Appeal). In sum, the District's new criticisms of the district court's oral ruling are both factually wrong and substantively immaterial.

The district court itself clarified that the written Order "accurately embodies" the court's oral comments and overall conclusions at the *Trinity* hearing. CF, p. 246. That written Order: (1) identified the testifying witnesses and the nature of their testimony, (2) framed the correct legal issue, and (3) explained the factual basis for the court's finding of no sovereign immunity. CF, p. 251–53. That evidence included, once again and without limitation, the presence of cross traffic, Plaintiff's exposure to injury on his motorcycle, and the speed at which Webb was traveling when he proceeded past the stop sign. *See* CF, p. 252. The court's passing reference to "due regard" during its oral comments does not violate any pronouncement in *Bilderback* or any other case, and the District's arguments to the contrary are rank advocacy.

Bruce respectfully requests that this Court reject the District's repetitious effort to distract the focus away from the clearly correct, fully supported findings of the district court.

Conclusion

The record supports the district court's finding that "Defendant Webb, in proceeding past the stop sign in question, failed to slow down as may be necessary for safe operation in violation of Section 42-4-108(2)(b)." CF, p. 252. The district court conducted a fair hearing and allowed the parties to introduce evidence pertaining to the jurisdictional question. The court did not commit any error, and did not act arbitrarily or unreasonably in any way. And while the District obviously still disagrees with the outcome, it did not object to most of the evidence it now challenges on appeal. Finally, the written order below, supplemented by the congruent remarks by the district court at the conclusion of the hearing, accurately and sufficiently reflect the basis to conclude that Bruce's governmental claims are properly before the district court.

For these reasons, fully discussed above, Bruce respectfully requests that this Court affirm the district court's denial of Appellants' motion to dismiss.

Respectfully submitted this May 5, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this May 5, 2023, a true and correct copy of the above and foregoing **APPELLEE'S ANSWER BRIEF** was, unless otherwise indicated, filed with the Court who provides notice to the following:

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