SUPREME COURT, STATE OF COLORADO

CASE NO. 91SC769

BRIEF OF THE COLORADO MUNICIPAL LEAGUE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS STATE OF COLORADO and THE COLORADO DEPARTMENT OF HIGHWAYS

STATE OF COLORADO and THE COLORADO DEPARTMENT OF HIGHWAYS,

Petitioners,

v.

DAVID J. MOLDOVAN,

Respondent.

Certiorari to the Colorado Court of Appeals 90CA1286, Division 2
Opinion by Rothenberg, J., Sternberg, C.J., and Tursi, J., concur

Pueblo County District Court 88CV810

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ON BEHALF OF PETITIONERS
STATE OF COLORADO and COLORADO DEPARTMENT OF HIGHWAYS

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COMES NOW, the Colorado Municipal League (the "League") by its undersigned attorney, and pursuant to Rule 29, C.A.R., respectfully submits the following brief as amicus curiae in support of Petitioners, the State of Colorado and the Colorado Department of Highways.

I. STATEMENT OF THE CASE

Amicus adopts and incorporates herein the statement of the case from the brief of the Petitioners, State of Colorado and Colorado Department of Highways.

II. SUMMARY OF ARGUMENT

This case concerns whether the court of appeals was correct in determining the Fence Law, §35-46-111, C.R.S. and the Colorado Governmental Immunity Act, §24-10-106(1)(d), C.R.S. impliedly create a damages remedy for motorists allegedly injured in collisions with livestock on state highways. Neither of the statutes create such a remedy.

The Colorado Governmental Immunity Act ("GIA") was adopted for the purpose of controlling all claims against public entities which are claimed in tort or could be claimed in tort. The purposes of the GIA include to provide in one statute all claims that may be maintained against a public entity and the manner to present and pursue those claims; therefore the Fence Law cannot provide a waiver of immunity against the state. Any claims not specifically

waived in the GIA may not be maintained against a public entity. Because the GIA does not waive immunity for livestock or any other foreign object on a roadway, the state is immune from Moldovan's claims and his action against the state must be dismissed.

III. ARGUMENT

A. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT §24-10-106(1)(d), C.R.S. OF THE COLORADO GOVERNMENTAL IMMUNITY ACT WAIVED SOVEREIGN IMMUNITY FOR THE STATE IN AN ACTION BROUGHT BECAUSE OF INJURIES ALLEGED WHEN A MOTORIST HIT A CALF ON A PUBLIC ROAD.

There were comprehensive amendments to the Colorado Governmental Immunity Act ("GIA") by the state legislature in 1986. The legislation, HB1196, according to the sponsor, Representative Chuck Berry (R, Colorado Springs), was enacted for three reasons: One, to address judicial decisions that had weakened the effectiveness of the GIA; two, to address the "insurance crisis" resulting from cancellation or nonrenewal of insurance policies for local governments; and three, to ensure that the GIA adequately protects public entities and taxpayers from excessive or unpredictable liability, particularly in a time of unavailability or unaffordability of insurance. Berry and Tanoue, Amendments to the Colorado Governmental Immunity Act, 15 Colo.Law. 1193 (1986).[1] Section 24-10-106(1)(d) was one of the provisions amended in HB1196 in response to court decisions and unpredictable liability and specifically in response to the decision in Stephen v. City and County of Denver, 659 P.2d 666 (Colo. 1983). City of Aspen v.

[1]The article is attached as Exhibit A and hereinafter referred to as "Berry and Tanoue".

Meserole, 803 P.2d 950 (Colo. 1990).[2]

In Stephen the Court said "we believe that to construe "dangerous condition" [§24-10-106(1)(d)] to be limited to the physical condition of the road surface gives too cramped a reading to the statute . . ." 659 P.2d at 668. In response, the legislature amended §24-10-106(1)(d) to provide:

> (1) . . . . Sovereign immunity is waived by a public entity in an action for injuries resulting from:
> (d) A dangerous condition *of a public highway, road, or*

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[2]In its decision, the court of appeals relies on its ruling in Schlitters v. State, 787 P.2d 656 (Colo. App. 1989). In Schlitters, the court of appeals stated "we reject defendants' contention that the Stephen ruling is no longer viable." and "the amendments . . . are meant primarily to delete 'traffic signs, signals, or markings, or the lack thereof' from the statutory definition . . ." 787 P.2d at 657. In supporting its argument, the court of appeals quotes only a portion of the article by the sponsor of the amendments to the GIA, and ignores the portion which directly contradicts the result the courts of appeals wants to reach. The entire quote is:

> *The Bill addresses Stephen by making it clear that a dangerous condition on a roadway is indeed limited to the physical condition of a road surface: the bill provides* that a dangerous condition on a roadway is one which physically interferes with the movement of traffic. *The bill also provides that a physical interference with the movement of traffic does not include traffic signs, signals or markings, or the lack thereof.* Berry and Tanoue, at 1194. (italics show the portion omitted by the court of appeals at 657)(emphasis added).

This Court specifically recognized the legislative intent to overturn Stephen by the 1986 amendments, and the authority of the bill sponsor for the legislative history of the 1986 amendments in City of Aspen v. Meserole, 803 P.2d 950, 953-4 (Colo. 1990). For the court of appeals to ignore both the precedent of this Court and the legislative intent of the amendments to the GIA as recognized by this Court is irresponsible. For it to rely on its decision in Schlitters after the grounds therefor were overruled by implication by this Court in City of Aspen v. Meserole, 803 P.2d 950 (Colo. 1990) calls for exercise of this Court's authority to specifically reject and overrule Schlitters v. State, 787 P.2d 656 (Colo.App. 1989).

> *street* which *physically* interferes with the movement of traffic *on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved,* of any public highway, road, street, or sidewalk within the corporate limits of any municipality . . . (Additions to statute italicized)
> See, 1986 Colo.Sess.Laws 875-76; and Bloomer v. Board of County Commissioners, 799 P.2d 946, ftnt 6 (Colo. 1990)

The legislative change added the language limiting the liability of the public entity to a physical condition of the road surface. Berry and Tanoue, at 1194. The intent of the 1986 amendments was to make public entities liable for injuries caused by failure to properly maintain road surfaces, but not to make them insurers that no obstructions will ever get on roads. Public entities have authority to construct and are responsible for maintaining highways, roads, and streets they construct. See for example §31-15-702, C.R.S. for municipal authorization. As a result, a public entity would be liable for buckling of asphalt, potholes, cracks, and other physical conditions of the surface of the pavement on the traveled portion of the highway, road or street by §24-10-106(1)(d), C.R.S. However, they are not responsible for injuries arising from other causes such as dips which are designed in the road, Willer v. City of Thornton, 817 P.2d 514 (Colo. 1991).

Because public entities are not responsible for foreign objects on top of the road which are not part of the physical condition of the surface, they are not responsible for wild or domestic animals which wonder onto the road, car parts or stalled cars on the road, or other foreign items that may be placed, wonder

themselves, or blow on the road because of weather conditions.[3] The public policy reason for no liability for such foreign matters is to encourage public entities to provide public services without making the entities virtual insurers for every one of life's ills at the prohibitive expense to the taxpayers supporting public entities.

B. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT §35-46-111, C.R.S., THE FENCE LAW, CREATED A PRIVATE TORT REMEDY AGAINST THE STATE.

The fact that the rulings of this Court prohibit imposing liability against the state in this case can be determined from both the Fence Law and the Governmental Immunity Act. This Court set forth the procedure to determine whether there was any potential legal liability in Board of County Commissioners v. Moreland, 764 P.2d 812 (Colo. 1988).

In Moreland, this Court reversed the court of appeals when the court of appeals had found a plaintiff entitled to recover against the county for failing to assure that guardrails were constructed around a deck as required by the Uniform Building Code adopted by the county. In its decision in this case, the court of appeals attempts to reinstate its ruling from its decision in Moreland by stating there is a factual difference between the cases. The factual differences relied on are that Moldovan was hurt on public, not private property, and that the Fence Law imposes a direct duty on the state, whereas the duty imposed by the county on its

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[3]The only exception is particular dangerous accumulations of ice or snow as specifically set forth in §24-10-103(1), C.R.S.

building department was only regulatory. These factual differences are of no consequence in view of the rule of law set forth by this Court in Moreland.[4]

In Moreland, this Court found that unless the provisions of the adopting law specifically include a civil liability remedy, an injured party is precluded from pursuing damages against any party. The legal requirement was so important to this Court that it is stated twice in Moreland:

> We agree that based on Quintano, the absence of a clear expression of legislative intent to allow a civil liability remedy for breach of the obligations imposed on the County by the U.B.C. precludes recovery by Moreland in this case. It is therefore unnecessary to resolve the issue of the county's duty to Moreland by engaging in an analysis under conventional tort principles--the approach suggested in Leake v. Cain, 720 P.2d at 160.[5] Board of County Commissioners v. Moreland, 764 P.2d at 817 (Colo. 1988).

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[4]The factual distinctions attempted by the court of appeals are not supportable. The ruling of this Court in Moreland requiring a clear legislative expression to impose liability makes it clear that the legal liability question is the same whether the injury occurs on public or private property. The GIA also is clear that it controls all waivers of liability against a public entity for injuries regardless of whether they are on public or private property. §24-10-105, C.R.S. the court of appeals' delineation between the effect of a state statute on the state highway department and a county resolution on the county building department is a distinction without a difference. The state highway department is created by the state legislature. §24-10-126, C.R.S. A statute adopted by the state legislature (the legislative branch) imposing requirements on the state highway department (the executive/administrative branch) is the same as a resolution adopted by the county commissioners (the legislative branch) imposing requirements on the county building department (the executive/administrative branch) created by the county.

[5]For a legal commentary on the error of Leake v. Cain, supra, see Abolition of the Public Duty Rule and the Status of Governmental Immunity in Colorado. 64 Den.U.L.Rev 733 (1988).

> Our conclusion that the absence of provisions in the resolution or the U.B.C. for a civil liability remedy against the County precludes Moreland's claims in this case is further strengthened by the fact that remedies are specifically provided by statute authorizing enactment of the U.B.C. and by the U.B.C. itself . . . This reflects that the state legislature and the board gave thought to the issue of civil liability but made no provision for imposition of such liability against the county.
> Board of County Commissioners v. Moreland, 764 P.2d at 818 (Colo. 1988).

The situation here is exactly the same as in Moreland. There is no expression of intent in the Fence Law to impose liability against the state. The legislative purpose of the Fence Law was to make Colorado an open range state favoring stock owners whereby farmers are responsible for fencing out livestock rather than stock owners responsible for fencing in livestock. SaBell's, Inc. v. Flens, 627 P.2d 750 (Colo. 1981). Just as in the statute authorizing the U.B.C. described in Moreland, the legislature thought about the issue of civil liability in adopting the Fence Law, but made no provision for the imposition of liability against the state; §35-46-102, C.R.S. of the Fence Law expressly provides for the remedies available to persons who maintain a fence. That statute does not impose liability on the state. In view of this Court's ruling requiring a specific statement of legislative intent to impose liability, the reliance of the court of appeals on "the likely purpose of §35-46-111" and "counsel for defendant has not suggested any other reasonable purpose for enactment of the [Fence Law] statute", Slip Opinion at page 5, ignores the standards set by this Court.

The intent of the legislature that there be no liability

against the state for animals or any other foreign objects on roadways is also exhibited by a review of the Governmental Immunity Act §§24-10-101, et seq., C.R.S. Section §24-10-106.5, C.R.S. was adopted by the legislature in part in response to the decision of the Court of Appeals in Moreland v. Board of County Commissioners, 725 P.2d 1 (Colo.App. 1985), overturned by Board of County Commissioners v. Moreland, 764 P.2d 812 (Colo. 1988).[6] Section 24-10-106.5, C.R.S. specifically provides that, in order to promote the protection of the public health and safety and allow public entities to allocate limited fiscal resources, there is no assumption of a duty of care by the adoption of a policy or regulation unless governmental immunity has been waived. As discussed above, governmental immunity has not been waived for the type of injury occurring in this case.

The legislature, in adopting the GIA, specifically recognized the need and "desirability of including within one article all the circumstances under which the state . . . may be liable in actions which lie in tort or could lie in tort . . ." §24-10-102, C.R.S. The legislature expressly provided that the GIA was "to cover all actions which lie in tort or could lie in tort . . ." and that "No public entity shall be liable for such actions except as provided

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[6]See, Berry and Tanoue, Amendments to the Colorado Governmental Immunity Act, 15 Colo.Law.1193 (1986) attached as Exhibit A. The article and the testimony at the legislative hearings verify that §24-10-106.5 was added to reverse decisions of the Court of Appeals. Subsequently, this Court decided the cases based on legal precedents consistent with the legislative intent of §24-10-106.5. Jefferson County School Dist. R-1 v. Gilbert, 725 P.2d 774 (Colo. 1986) and Board of County Commissioners v. Moreland, 764 P.2d 812 (Colo. 1988).

in this article". §24-10-105, C.R.S. It would be impossible for the legislature to make it more clear that there could be no implied duties creating liability such as that found by the court of appeals in the Fence Law, particularly if such implied liability is found outside the GIA.

IV. CONCLUSION

Among the reasons for the 1986 amendments to the Governmental Immunity Act was to give clear guidance to parties to litigation and the courts as to where liability existed and where it didn't. Clear direction, if followed by the courts, would help accomplish the legislative purpose of the amendments to reduce insurance costs and provide predictability in liability exposure. If the situations where immunity was waived and the situations where immunity was not waived were consistently upheld by the court, the incentive for plaintiffs to sue governments would not exist. As a result, the cost to the taxpayers of having to defend claims through the appellate process for damages for which the legislature intended no liability would be greatly decreased. Therefore, we urge the Court to give clear direction to the court of appeals, trial courts, the state and local governments, and all potential claimants against them, as to the proper manner of interpretation of waivers of immunity for governments.

The first direction to be given is that the Governmental Immunity Act is the only statute which can impose tort liability against a public entity. By the provisions of the Governmental

Immunity Act, there can be no waiver of immunity or implied duty imposing liability against a public entity, except in the Governmental Immunity Act itself. §24-10-105, C.R.S. Therefore, the court of appeals erred by looking to the Fence Law and engaging in tort law analysis that was specifically rejected by this court in Moreland, 764 P.2d at 817.

The second direction to be given is that the dangerous condition of public roads provision of the Governmental Immunity Act waives immunity only for physical conditions of the road surface. This court has already ruled that the Governmental Immunity Act "must be strictly construed to restrict its provisions to the clear intent of the legislature." Bloomer v. Board of County Commissions, 799 P.2d 942, 946 (Colo. 1990). By the cases intended to be changed by HB 1196, the language of HB 1196, and the statements of the sponsor as to the legislative intent, it is clear that there is no liability in this case or for any other animal, car part or whole car, or other object that may be placed on a road by persons other than a public entity. To rule otherwise would contradict the legislative intent of the Governmental Immunity Act and make the state and municipalities virtual insurers of the thousands of miles of road in Colorado.

Respectfully submitted this 10th day of June, 1992.

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CERTIFICATE OF MAILING

I hereby certify that on this 10th day of June, 1992, I placed a true and correct copy of the foregoing in the United States mail, first class postage prepaid at Denver, Colorado, and addressed as follows:

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