COURT OF APPEALS, STATE OF COLORADO

CASE NO. 94CA393

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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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TIMOTHY W. SWIECKOWSKI, a minor by
S. MICHAEL SWIECKOWSKI and
CATHERINE A. SWIECKOWSKI,
his parents and next friends,
S. MICHAEL SWIECKOWSKI, individually
and CATHERINE A. SWIECKOWSKI, individually,

Plaintiffs-Appellants,

vs.

CITY OF FORT COLLINS,
a Colorado Municipal Corporation, and
K. BILL TILEY,

Defendants-Appellees
Cross-Appellants

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Appeal from the District Court of the County of Larimer.

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January 9, 1995

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Comes now the Colorado Municipal League (the "League") as amicus curiae and submits this brief in support of the position of the defendant-appellee, City of Fort Collins.

## I. Interests of the League

The League is a voluntary non-profit association of 257 municipalities located throughout the state of Colorado, including all Colorado municipalities above 2,000 population and the vast majority of those having a population of 2,000 or less. The League's membership represents 99.9% of the municipal population of Colorado. The League has for many years appeared before the appellate courts as amicus curiae to present the perspective of Colorado municipalities.

As "public entities" all municipalities are subject to the provisions of the Governmental Immunity Act, Sec. 24-10-103 (5), C.R.S., including provisions related to the waiver of immunity for dangerous conditions in roadways as set forth in Sec. 24-10-106 (1) (d). The maintenance of a system of public streets and roads is one of the most pervasive and conventional functions of municipalities. See: Secs. 31-15-702, 43-2-123, et seq., C.R.S. Also, as in the instant case, it is extremely common for municipalities to require the dedication of additional street right of way and the construction of street improvements as a condition of new subdivisions and developments under both statutory planning and zoning authority, Secs. 31-23-101, et seq., 29-20-104, C.R.S., and their plenary home rule authority. In particular, municipalities routinely require the dedication of right-of-way and construction of improvements

along roadways immediately adjacent to newly developed lands on the theory that such exactions can only be required to the extent they are reasonably related to the land being developed. Bethlehem Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981). Thus, it is not uncommon for municipalities to have roadways which jog in and out, in various stages of improvement, as adjacent parcels of private property are developed.

Factually, therefore, the circumstances present in this case are common to many Colorado municipalities. By allowing claims which arise from injuries sustained off the roadway, and for a "dangerous condition" which, to the extent it exists at all, clearly arises from the design of the road, the trial court in this case has created the potential for a vast new realm of roadway liability for all Colorado municipalities.

## II. Issues Presented for Review

The League hereby adopts by reference the issues presented for review as contained in the opening-answer brief of the City of Fort Collins.

## III. Statement of the Case

The League hereby adopts by reference the statement of the case as contained in the opening-answer brief of the City of Fort Collins.

## IV. Summary of Argument

The express language of the Governmental Immunity Act as well as prior case law are thoroughly dispositive of the claims arising in this case. However, the court should additionally take into account the declaration of legislative policy underpinning the Act and, in particular, the legislative history behind 1986 amendments to the Act which adopted the roadway liability language which is at issue in this case. This legislative history further underscores the fact that dangerous conditions which exist outside the paved portion of a roadway cannot give rise to a claim under the Act.

Every roadway liability claim which has been sustained by the courts since the 1986 amendments to the Act has been based upon a physical obstruction in the travelled way. Thus, the trial court's ruling in this case is totally unprecedented.

The claims in this case against the City are indistinguishable from prior cases where the courts, based upon the plain language of the Act, have eschewed allegations of negligent design masquerading as allegations of negligent construction and maintenance.

A finding by the trial court or this court in favor of the plaintiff on the issue of subject matter jurisdiction merely establishes the power of the court to hear the case. It does not establish the law of the case.

## V. Argument

### A. The Court should take into account the policy and purposes reflected in the Governmental Immunity Act in general and, in particular, the statutory provisions related to roadway liability.

Although the Supreme Court has recently reaffirmed that the scope of governmental immunity which is available to public entities under the Act is to be strictly construed, Bertrand v. Board of County Commissioners, 872 P.2d 223 (Colo. 1994), the courts have consistently rejected claims which involve "forced, subtle, strained or unusual interpretations" of the Act. Willer v. City of Thornton, 817 P.2d 514, 518 (Colo. 1991). In recent decisions, culminating in State Department of Highways v. Mountain States Telephone and Telegraph Company, 869 P.2d 1289 (Colo. 1994),the courts have been especially careful to be rigorously textual in construing the Act and have refused to draw inferences which are unsupported by the text itself or which derive from other statutes.

In supporting the principle that tort claims against public entities may properly be limited legislatively, the courts have repeatedly acknowledged one of the expressed purposes of the Act:

> The general assembly also recognizes that the state and its political subdivisions provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of such essential public services and functions. The general assembly further recognizes that the taxpayers would ultimately bear the fiscal burden of unlimited liability and that limitations on the liability of public entities and employees are necessary in order to protect the taxpayers against excessive fiscal burdens.

Sec. 24-10-102, C.R.S. Among other things, the courts have found the foregoing language to express a legitimate governmental purpose in the face of constitutional challenges to the Act in cases such as State v. DeFoor, 824 P.2d 783 (Colo. 1992).

In regard to the legislative policy behind provisions of the Act regarding roadway liability, as contained in 1986 amendments to the Act, the Courts have specifically acknowledged that the general assembly's purpose was to limit roadway liability:

> We have previously recognized three primary goals sought to be achieved by the general assembly in amending the Act in 1986: to address certain judicial constructions perceived to have unduly limited the effect of the prior governmental immunity act, to address a perceived insurance crisis faced by municipalities, and to reduce the circumstances in which municipalities and taxpayers could experience excessive or unpredictable liability.

Willer, supra, 817 P.2d at 519; City of Aspen v. Meserole, 803 P.2d 950, 953; see also, C. Berry and T. Tanoue, "Amendments to the Colorado Governmental Immunity Act," 15 Colo. Law. 1193 (July 1986).

One way in which the 1986 amendments pointedly attempted to limit roadway liability for public entities was to clarify in no uncertain terms that a"dangerous condition" related to a road must be one which "physically interferes with the movement of traffic" on the paved portion of the road. One of the prior "judicial constructions" which this amendment was intended to correct was Wheeler v. County of Eagle, 666 P.2d 559 (Colo. 1983), wherein the dangerous condition bore a striking resemblance to the alleged dangerous condition at issue in

the instant case, i.e. "a narrow shoulder which dropped off into a ditch" which placed a pedestrian in peril by forcing her to walk in the roadway. Id. at 560.

It is instructive to compare the pre-1986 language of the Governmental Immunity Act to the current language. Prior to the 1986 amendments, roadway liability as set forth in Sec. 24-10-106 (1) (d), C.R.S. extended to:

> A dangerous condition which interferes with the movement of traffic on the travelled portion and shoulders and curbs of any public highway. . . .

City of Aspen v. Meserole, supra, 803 P.2d at 951. In contrast, current language in the same section deletes any reference to the shoulders or curbs and limits liability exclusively to conditions on the pavement or the travelled way.

Therefore, prior to the 1986 amendments and according to cases such as Wheeler which were decided pursuant to prior statutory language, the plaintiff in the instant case may have had a claim on the theory that the dangerous condition existed due to a drop off on the shoulder of a public road. However, the 1986 amendments barred such claims.

In light of the overall legislative purpose expressed in the Governmental Immunity Act, it is not difficult to understand why the general assembly has extended immunity protection to public entities for conditions beyond the travelled way of roads. Perhaps more than any other state in the union, Colorado has untold numbers of highway miles adjacent to which there is a

precipitous slope, sometimes measuring thousands of vertical feet. An extensive network of state, county and municipal roads is bounded by barrow ditches, irrigation structures, and low shoulders. If the state and each of its political subdivisions were required to install guard rails and other devices in each and every location where a vehicle might foreseeably leave the roadway, the "fiscal burden" on public entities and the taxpayers who support them would be extreme.

While this case centers upon the not uncommon situation where a roadway tapers quickly, the implications of a ruling adverse to the city may go well beyond the facts and circumstances in this case, in effect making public entities the guarantors of public safety whenever a vehicle leaves the road. This outcome would be contrary to both the letter and the spirit of the Act.

### B. Only physical conditions on the roadway itself qualify as "dangerous conditions" under the Act.

At the outset, the League would echo arguments made by the City of Fort Collins and urge the court to affirm the trial court's ruling dismissing claims related to the failure to post signs. The express language of the Act at Sec. 24-10-106 (d) (1) as well as all case law since the 1986 amendments is consistent on this point. Meserole, supra; Willer, supra; Lafitte v. State Highway Department, 17 B.T.R. 1652 (Colo. App. 1994). Most importantly, the Supreme Courts recent decision in State Department of Highways v. Mountain States Telephone and Telegraph Company, supra, squelches any notion that governmental liability in this state can be inferred from other statutes, and reinforces the principle that the Governmental Immunity Act

itself is fully self-contained. "The language of the GIA is clear and unequivocal. It manifests the intent of the legislature to confine the circumstances in which sovereign immunity may be waived to the exceptions specified within the GIA." Id. at 869 P.2d 1289, 1291.

Furthermore, the League would briefly underscore the City's defense that immunity is not waived under the Act for claims which relate to the fundamental design of the road under Sec. 24-10-103 (1), C.R.S. The prior decisions in Willer, supra, and Szymanski v. Department of Highways, 776 P.2d 1124 (Colo. App. 1989) should be deemed to be thoroughly dispositive on the claims against the city which the plaintiff has asserted in this case. The abrupt taper in the road in this case is legally indistinguishably from the dip in the road in Willer or the configuration of the intersection in Szymanski. The characteristic of the roadway, if any, which related to the plaintiff's accident was solely and completely a function of the roadway's design, not the roadway's construction or maintenance.

To the extent the trial court found that injuries which occurred due to a condition beyond the paved portion of the roadway could support a claim under the Act, it is completely unprecedented. Since the 1986 amendments to the Act, every single appellate decision which has found a public entity potentially liable has been based upon some sort of obstruction which physically interferes with the movement of traffic in or upon the roadway itself. Whether it be boulders as in Schlitters v. State, 787 P.2d 656 (Colo. App. 1990) and Belfiore v. Colorado State Department of Highways, 847 P.2d 244 (Colo. App. 1993); a stubby remnant of a signpost as in City of Aspen v. Meserole, supra; or a cow as in State v. Moldovan, 842 P.2d 220 (Colo.

1992), cf. Deneau v. State, 18 B.T.R. 945 (Colo. App. 1994); the theme in all of these cases is consistent. The dangerous condition which physically interferes with the movement of traffic must be in or upon the roadway itself.

A superficial reading of these decisions may lead to the erroneous conclusion that facts or circumstances outside of the travelled way can constitute a "dangerous condition" within the meaning of the Act. After all, the boulder in Schlitters was pushed into a bus by a maintenance worker clearing the shoulder. The boulders in Belfiore were thrown onto the roadway by a private party blasting adjacent to a roadway. The cow in Moldovan entered the highway through a gap in an adjacent right-of-way fence. However, the dispositive factor in each of these cases was not the origin of the dangerous condition but its ultimate destination, i.e. the paved portion of the roadway, where it ultimately physically interfered with the movement of traffic.

In any event, none of these precedents supports the proposition that Sec. 24-10-106 (1) (d), C.R.S. provides the basis for a claim against a public entity when a vehicle leaves the paved portion of the road and only then encounters a dangerous condition.

**C. A ruling by the court on jurisdiction under the Governmental Immunity Act should not be deemed to be a finding on the merits, such that it would bind the jury in a subsequent trial.**

Again the League would largely echo arguments heretofore made by the City to the effect that the court's jurisdictional ruling on the existence of a dangerous condition should not be considered res judicata to the extent of being binding on the jury. The League would, however,

make the following additional observations. The supreme court in Trinity Broadcasting v. Westminster, 848 P.2d 916 (Colo. 1993) did indeed seem to make a distinction between a ruling under Rule 12(b)(1) wherein a court would merely be acting to "satisfy itself as to the existence of its power to hear the case," as contrasted with a ruling under Rule 12(b)(5) (and by implication Rule 56) wherein the court is making a "determination on the merits." Id. at 848 P.2d 925, citing Boyle v. Governor's Veteran Outreach & Assistance Center, 925 F.2d 71, 74 (3d Cir. 1991). While the court is undoubtedly making a factual determination in the face of a Rule 12(b)(1) motion, as explained in Trinity the purpose of that determination is strictly circumscribed and relates exclusively to permitting the case to go forward at the outset.

It is generally acknowledged that "a dismissal under b(1) in not on the merits and is thus not given res judicata effect." 2A Moore's Federal Practice, Sec. 1207 (2-1) at 12-49. It is difficult to understand, therefore, how a refusal to dismiss under the same rule would be afforded any greater force and effect.

At least one observer has reached a conclusion contrary to the trial court on this issue. In commentary which is nothing if not prescient, the author opined:

> The language in Trinity is clear that the facts on which the trial court's jurisdiction depends are for the court to determine, not the jury. However, because some of these same facts also determine liability if the case proceeds to trial, the public entity is probably still entitled to a jury instruction requiring the jury to find certain facts under the GIA before liability is imposed.
>
> For example, at the evidentiary hearing, the trial court might determine that the public entity is not immune and that the court has subject matter jurisdiction

because the case involves a "dangerous condition" of a public highway which resulted from failure to maintain rather than a design defect. If no interlocutory appeal is taken, or the interlocutory appeal is lost, the case will then proceed to trial. At trial, the public entity will be probably be entitled to a jury instruction requiring the jury to find a dangerous condition of a public highway resulting from a failure to maintain--as well as negligence, causation and damages--before the jury can impose liability. The trial court determined these facts to find that it has jurisdiction, but the jury is entitled to reconsider these facts to determine whether there is liability.

Stiegelmeier, Kurt G., "Asserting Governmental Immunity by Attacking Subject Matter Jurisdiction," 22 Colo. Law. 2551 (Dec. 1993).

## VI. Conclusion

Wherefore, the League respectfully urges this court to affirm the trial court's order of January 14, 1994 dismissing Plaintiff's first claim for relief, and reverse the order of the same date denying the City's 12(b) motion to dismiss. In the alternative, the League urges the court to reverse the trial court's order of February 1, 1994 wherein the trial court held that its ruling on its own jurisdiction regarding the alleged "dangerous condition" would be deemed to be the law of the case.

Respectfully submitted this 9th day of January, 1995.

COLORADO MUNICIPAL LEAGUE

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## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Colorado Municipal League as amicus curiae was placed in the U.S. Postal System on the 9th day of January, 1995, addressed to the following:

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