SUPREME COURT, STATE OF COLORADO Two East 14th Ave., 4th Floor Denver, Colorado 80203	
Colorado Court of Appeals, Case Number 11 CA 1772 Hon. Dennis Graham, Diana Terry, and Jerry N. Jones, Judges Appeal from the El Paso County District Court, Case No. 2011 CV 3157 Hon. Thomas Kelly Kane, District Court Judge	▲ COURT USE ONLY ▲ Case No.: 2012 SC 908
Petitioner: Marilyn Daniel v. **Respondent:** City of Colorado Springs, a Colorado Municipal Corporation and Home Rule City	
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AMICUS BRIEF OF THE COLORADO MUNICIPAL LEAGUE

Certificate of Compliance Pursuant to C.A.R. 32(f)

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 this brief complies with C.A.R. 28(g) because it contains 3,605 words.

s/ Sophia H. Tsai

Sophia H. Tsai

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SUMMARY OF THE ARGUMENT

The Court of Appeals' decision in this case is correct for several reasons. That decision is a reasonable interpretation of the plain language of the Colorado Governmental Immunity Act (CGIA). The CGIA, and in particular the waiver provision at C.R.S. § 24-10-106(1)(e), does not expressly waive immunity for public parking facilities.

Based upon the legislative history and the language of the CGIA, the Colorado Court of Appeals has expressly held that C.R.S. § 24-10-106(1)(e) does not waive immunity for public parking facilities, which include parking lots, in *Jones v. City and County of Denver*, 833 P.2d 870, 872 (Colo. App. 1992). The General Assembly has implicitly adopted this holding, as it has amended the CGIA five times since the opinion in *Jones* was issued, and in none of those amendments did it add language to clearly demonstrate that immunity should be waived for public parking facilities under C.R.S. § 24-10-106(1)(e).

Moreover, that immunity is not waived for public parking facilities under C.R.S. § 24-10-106(1)(e) is consistent with the policy behind the CGIA of providing governmental entities with clearly identified situations in which their sovereign immunity would be waived so that they could adequately prepare for any potential liability. In this case, because there is no clear waiver of immunity for

public parking facilities and the General Assembly has indicated its intent that there be no such waiver of immunity through its amendments of the CGIA, the Court of Appeals' decision should be affirmed as a matter of public policy.

ARGUMENT

Applicable Law Concerning Statutory Construction

The court's primary duty when interpreting statutes is to ascertain and effectuate the intent of the legislature, beginning with the plain language of the statute. *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). Thus, in interpreting the Colorado Governmental Immunity Act, the court's goal is to give effect to the intent of the General Assembly. *Denmark v. State of Colorado*, 954 P.2d 624, 625 (Colo. 1998). "[The court] will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate." *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994), *quoted in Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011). The statutory scheme as a whole must be considered in a manner that gives "consistent, harmonious, and sensible effect to all its parts." *Shelter, supra*, citing *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 255 (Colo. 2006). Strained interpretations of statutory words and phrases should be avoided, and statutory construction that leads "to an illogical or absurd result will not be followed." *See Colonial Penn Ins.*

Co. v. Colorado Ins. Guar. Assn, 799 P.2d 448, 451 (Colo. App. 1990); *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004); *see also* C.R.S. §§ 2-4-201 and 2-4-203.

The Only Reasonable Interpretation of the Plain Language of C.R.S. § 24-10-106 is that No Waiver of Immunity Exists for Public Parking Facilities Adjacent to Parks and Recreational Facilities

No reasonable reading of the plain language of the CGIA gives rise to the conclusion that a parking lot is a "public facility located in any park or recreation area." *See* C.R.S. § 24-10-106(1)(e). Initially, the parking lot is not a "facility." In *Loveland v. St. Vrain Valley Sch. Dist.*, __ P.3d ___, 2012 WL 2581034 (Colo. App. July 5, 2012), the court concluded that piece of playground equipment was a facility because it was (1) a man-made object; (2) a mechanical device; and (3) installed for a particular purpose and function. *Loveland* at *4-*5; *see also* Colorado Legislative Council, *Report to the Colorado General Assembly: Governmental Liability in Colorado*, Research Publication No. 134, at 140 (1968) (finding that a distinction should be made between natural objects, such as rocks and trees, and man-made objects, such as swing sets and buildings). The parking lot in this case does not meet these requirements. In particular, a parking lot is not an object such as a building or a swing set, and parking lots may exist without any man-made improvements. Further, a parking lot is not a mechanical device. Thus,

a parking lot is not a facility, and the waiver provision at C.R.S. § 24-10-106(1)(e) for "public facilities located in any park or recreation area" does not apply.

Even if the parking lot could be construed as a "facility," the plain language of the waiver provision at C.R.S. § 24-10-106(1)(e) does not apply because the parking lot is neither a "park or recreation area" nor located in one. A "park" is "an inclosed pleasure-ground in or near a city, set apart for the recreation of the public." Black's Law Dictionary 6th ed., at 1116. This is consistent with the plain meaning of "recreation area," which the Court of Appeals has discussed as being an area for engaging "in a sport or similar activity." *Denmark, supra* at 626. A parking lot is not an area intended for pleasurable activities, an area set apart for the recreation of the public, or an area for engaging in a sport or similar activity. Thus the parking lot is not itself a park or recreation area, and neither is it located in a park or recreation area, rather, it is adjacent to the golf course. Accordingly, the plain language of C.R.S. § 24-10-106(1)(e) does not apply to waive immunity for a parking lot adjacent to a park or recreation area.

Finding that Immunity is Not Waived for Public Parking Facilities Gives Consistent, Harmonious, and Sensible Effect to the CGIA as a Whole

To interpret section 106(1)(e) as advocated by Ms. Daniel and amicus Colorado Trial Lawyers Association (CTLA), *i.e.* that with respect to C.R.S. § 24-

10-106(1)(e), immunity is waived for parking lots near all of the structures identified in paragraph (1)(e) (public hospitals, jails, parks and recreation areas, utilities, and swimming facilities) but not others, is contrary to Colorado law. As noted by the Court of Appeals, "were we to follow plaintiff's analysis, a governmental entity would be immune for liability with respect to certain parking lots, but not others." Court of Appeals Opinion, ¶ 15. Adopting a rule of law that requires immunity to be determined on a parking lot-by-parking lot is arbitrary, absurd, and illogical. Ms. Daniel's and the CTLA's position should therefore be rejected.

Additionally, such a rule of law fails to give consistent, harmonious, and sensible effect to all parts of the CGIA because it requires that parts of the CGIA be disregarded and calls for a strained interpretation of the statute. In particular, Ms. Daniel's and the CTLA's suggested analysis requires an inconsistent application of the phrase "public facility" in C.R.S. § 24-10-106(1)(e), which is also contrary to that section's plain language.

In section 106(1)(e), the phrase "public facilities" is used only with respect to facilities located in any park or recreation area. Section 106(1)(e) also waives immunity for dangerous conditions of specific facilities, including public hospitals, jails, water, gas, sanitation, electrical, power, and swimming facilities without

referencing the phrase "public facilities." However, despite the fact that the phrase "public facility" in section 106(1)(e) is discussed only with reference to parks and recreation facilities, CTLA asserts that immunity should be waived for parking lots adjacent to all of the facilities specifically identified in section 106(1)(e). *CTLA Brief,* p. 8. In other words, in order to adopt Ms. Daniel's and the CTLA's position, C.R.S. § 24-10-106(1)(e) must be read to include "public facility" before every structure listed therein, even though the legislature referenced "public facility" only with regard to parks and recreation areas. Such a broad reading of section 106(1)(e) is inconsistent with the plain language of that section. Additionally, it does not give consistent, harmonious, and sensible effect to that section as it is written, *i.e*., limiting the application of "public facility" (assuming, *arguendo*, that this term includes parking lots) to those in parks and recreational facilities.

The suggestion that any public hospital, jail, water, gas, sanitation, electrical, power, and swimming facility also includes that facility's parking lot is also incorrect. A similar argument was rejected in *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34 (Colo. App. 1995). In *Pack*, the plaintiff argued that even if immunity is retained for public parking facilities in general, the defendant had waived immunity for an injury that occurred in its parking lot under C.R.S. § 24-10-106(1)(b), which waived immunity for a public entity's operation

of a correctional facility. The plaintiff argued that the parking lot was part of the operation of the correctional facility.

In rejecting this argument, the *Pack* court noted that the operation of a public facility encompassed the defendant's acts and omissions with respect to the purpose of the facility, and it declined to include a facility's parking area as part of that facility's purpose. *Id.* at 37. Specifically, the court noted that the primary purpose of a correctional facility is to confine persons convicted of crimes safely and effectively, and the duty to maintain a parking lot for the correctional facility was not related to the facility's purpose. *Id.* Accordingly, the court declined to find a waiver of immunity for the correctional facility parking lot.

Similarly in the present case, section 106(1)(e) should not be interpreted to include a waiver for conditions of the parking lots to public hospitals, jails, water, gas, sanitation, electrical, swimming facility, or for parks and recreation areas. Parking lots for those facilities are not related to the respective facility's purpose, and they should not be included in the waiver of immunity provided for those facilities. *See Pack, supra*. The CGIA does not waive immunity for parking lots or other public parking facilities. *See Jones v. City and County of Denver*, 833 P.2d 870, 872 (Colo. App. 1992).

The Amendments to the CGIA Support the Conclusion that the General Assembly's Intent was that Immunity Should Not be Waived for Public Parking Facilities

The history of the CGIA supports the Court of Appeals' decision in this case. *See Jones, supra*. In particular, the 1986 amendment narrowed the types of public facilities to which the waiver applies to those specifically enumerated. Previously, section 106(1)(e) provided a waiver of immunity for "a dangerous condition of any public facility" (with certain exceptions, including public parking facilities). By specifying the particular facilities for which the legislature intended to waive sovereign immunity, the exceptions contained in the pre-1986 amendment version of section 106(1)(e), including an exception for public parking facilities, were no longer necessary.

Moreover, the 1986 amendments demonstrate that the legislature intended that immunity be retained for public parking lots and other public parking facilities. *See Jones, supra*. In reaching this conclusion, the *Jones* court made the following observation concerning the 1986 amendment to section 106(1)(e):

> We must presume that in 1986 the General Assembly considered whether immunity should be waived for public parking lots since the previous version of the statute specifically addressed those facilities. Accordingly, in the absence of clear language in § 24-10-106(1)(e) waiving immunity for dangerous conditions in public parking facilities, we must construe that section as expressing the General Assembly's intent to refrain a public entity's sovereign immunity from liability for such claims.

Jones, 833 P.2d at 872, citation omitted. In other words, by limiting the facilities for which section 106(1)(e) applies to waive immunity and not specifying that immunity is waived for public parking facilities, the General Assembly intended to retain immunity for public parking facilities.

This analysis is consistent with the principles of statutory analysis followed in Colorado. *See Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d at 662, citing *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 362 (Colo. 2003) and *People ex rel. S.G.L.*, 214 P.3d 580, 586 (Colo. App. 2009). In *Shelter*, the court considered whether the insurer for the owner of a motor vehicle or the insurer for the operated of that motor vehicle should be obligated to provide primary insurance. The court found significant the fact that no statute spoke to the issue of which insurer should be primary, despite the fact that the General Assembly had previously specified whose insurance must be primary under certain circumstances. *Id.* As such, the court noted that "had the General Assembly wanted to identify an owner's insurer as primary, it knew how to do so," and the court concluded that the General Assembly therefore did not intend that the owner's insurer be primary under current law.

As articulated in *Jones*, when it adopted the 1986 amendments to the CGIA, the General Assembly knew how to specifically include or exclude public parking

facilities from the waiver provisions set forth in C.R.S. § 24-10-106. Accordingly, because the General Assembly did not specifically waive immunity for public parking facilities, the court must presume that the General Assembly intended to retain a governmental entity's sovereign immunity for dangerous conditions of a parking lot when it adopted the 1986 amendments to the CGIA.

The holding of *Jones* has subsequently been presumptively adopted by the General Assembly. The General Assembly has amended the CGIA five times since *Jones* was decided, most recently in April 2013, and it did not include in any express waiver of immunity for public parking facilities. When the legislature reenacts a statute with similar language, it is presumed to have adopted past judicial constructions of that statute. *See Farmers Group, Inc. v. Williams*, 805 P.2d 419, 425 (Colo. 1991), citing *Matter of Estate of Daigle*, 634 P.2d 71, 76 (Colo. 1981). Thus, the General Assembly has indicated its intent to retain immunity for public parking facilities.

The Court of Appeals' Ruling Is Consistent with the Public Policy Reflected by the CGIA of Not Subjecting Governmental Entities to Unlimited and Unforeseen Liability

The Interpretation of Section (1)(e) Called for by Ms. Daniel and the CTLA is Inconsistent with the Policy Considerations Behind the CGIA

Ms. Daniel and the CTLA incorrectly contend that the public policy behind the CGIA is solely to compensate persons who suffer injury due to governmental

negligence. However, compensation of injured parties was not the sole or overriding purpose of the legislature in enacting the CGIA. Otherwise, the legislature would have permitted the doctrine of sovereign immunity to be abrogated by this Court's decision in *Evans v. Board of County Commissioners of El Paso County*, 482 P.2d 968 (Colo. 1971) (prospectively abolishing sovereign immunity effective June 30, 1972, absent legislative action restoring the doctrine in whole or in part). Instead, in lieu of adopting the rule set forth in the holding of *Evans*, the General Assembly enacted the CGIA to strike a balance between compensating injured parties and not burdening governmental entities, which provide the public with essential services and functions, with unlimited liability. *See* C.R.S. § 24-10-102. As discussed herein, the General Assembly achieved this by preserving sovereign immunity except under the circumstances where immunity is expressly waived by the CGIA. Thus, interpreting section (1)(e) as including a waiver of immunity for parking facilities which is not expressly set forth therein is inconsistent with the public policies behind and reflected by the CGIA.

The Legislature's Purpose in Enacting the CGIA was to Subject Governmental Entities to Liability Only as Expressly Set Forth in the CGIA

Prior to enacting the CGIA in 1971, the General Assembly commissioned "a study of the problem of governmental immunity with a view toward developing comprehensive legislation." *See* Colorado Legislative Council, *Report to the*

Colorado General Assembly: Governmental Liability in Colorado, Research Publication No. 134 (1968) (portions attached). In its report, the committee which conducted this study observed that the essential problem with respect to sovereign immunity "lies in weighing the need for compensation for individual injury against the necessity of preserving public funds for general use." *Id.* at 126.

The committee therefore concluded that while any proposed legislation should place more emphasis on providing a remedy to individuals who suffered economic losses, it should also "assure governmental entities of the opportunity to prepare for any newly imposed liability," and thus, "the areas of exposure should be expressly stated." *Id.*, Committee Findings and Conclusions, ¶ 7, at xvi (emphasis added). To this end, the committee proposed legislation (which was eventually introduced in the General Assembly as the first version of CGIA) which "reaffirm[ed] governmental immunity to suit and then proceed[ed] to carve out specific exceptions thereto." *Id.*, Committee Recommendations, at xvii. The committee explained,

> [T]his approach provides a better basis upon which the financial burden of liability can be evaluated in terms of the potential cost of such liability. If the limits of potential liability are known, public entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance, for the risk is more clearly defined and lends itself to more accurate assessment.

When the CGIA was enacted in 1971, the General Assembly included a declaration of policy reflecting the committee's conclusion that the CGIA should prevent governmental entities from being burdened by every possible suit, and further, should make clear the activities with respect to which governmental entities may be liable. This declaration asserts, in pertinent part:

> The general assembly . . . 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 . . . essential public services and functions. . . . It is further recognized that the state, its political subdivisions, and the public employees of such public entities, by virtue of the services and functions provided . . . and the consequences of unlimited liability to the governmental process, should be liable for their actions and those of their agents only to such an extent and subject to such conditions as are provided by this article. The general assembly also recognizes the desirability of including within one article all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort . . . .

C.R.S. § 24-10-102 (emphasis added). As reflected by the committee report and this policy declaration, the intent in enacting the CGIA was that areas where governmental entities were exposed to liability be expressly stated, so as to allow governmental entities to plan accordingly.[1]

[1] Notably, "public parking facilities" is a term that can be broadly construed to include many areas, whether or not those areas are created by a governmental entity or intended by that entity to provide parking. To adopt a general rule of law that waives immunity for "public parking facilities" would expose governmental entities to liability, which, albeit not unlimited, would be significantly increased from what is stated in the CGIA.

The Court of Appeals' Interpretation of Section (1)(e) is Consistent with Public Policy

Interpreting the waiver provision set forth at C.R.S. § 24-10-106(1)(e) in the manner suggested by Ms. Daniel and the CTLA, *i.e.* to apply to a type of government facility not expressly enumerated therein, namely parking facilities such as parking lots, is inconsistent with the public policies integral to the CGIA of not subjecting governmental entities to unlimited and unforeseen liability. As discussed above, section (1)(e) enumerates a variety of facilities with respect to which governmental entities are subject to liability, but fails to list parking facilities among them. Grafting on a waiver for parking facilities adjacent to any of these enumerated facilities, including parks and recreation areas, would open up governmental entities to significantly increased potential liability without a clear legislative directive in section (1)(e). This is contrary to the legislature's intent in enacting the CGIA to expressly provide for the liability of governmental entities.

On the other hand, the interpretation of the General Assembly's 1986 amendment to subsection (1)(e) as retaining immunity for parking facilities by omitting them from the types of facilities listed is consistent with the overarching approach to governmental immunity reflected by the CGIA. As noted above, the original version of subsection (1)(e) established a blanket waiver of immunity with respect to public facilities, with some exceptions including parking facilities. The

1986 amendment, however, makes governmental entities liable with respect to only those facilities expressly enumerated (with parking facilities notably absent), just as the CGIA makes governmental entities liable only under the circumstances described in C.R.S. § 24-10-106(1). This amendment of subsection (1)(e) to specifically express the facilities for which immunity is waived is consistent with the CGIA's overarching policy of providing governmental entities with greater clarity regarding their potential liability. As discussed above, the CGIA does not clearly and specifically articulate a waiver of immunity for public parking facilities. Thus, the only clarity that the CGIA provides to governmental entities concerning their potential liability for conditions of public parking facilities is that those entities are immune from those suits. Accordingly, the policy behind the CGIA supports the Court of Appeals' finding in this case that there is no waiver of immunity for public parking facilities, for parks and recreation areas or otherwise.

CONCLUSION

The plain language of the CGIA does not waive immunity for the parking lot to a park or recreational facility, and to find that immunity is not waived for parking lots is the only consistent, harmonious, and sensible reading of the provisions of the CGIA. Such a finding is also consistent with the General Assembly's intent in adopting the CGIA as well as the amendments to that statute

enacted in 1986, and it furthers the public policy behind the CGIA. Accordingly, the Court should issue a clear holding that the CGIA does not waive immunity for public parking facilities, including parking lots that may serve parks and recreational facilities, and affirm the Court of Appeals' decision in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 30th day of July, 2013 a true and complete copy of the foregoing **AMICUS BRIEF OF THE COLORADO MUNICIPAL LEAGUE** was filed and served on the following via ICCES:

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