COURT OF APPEALS, STATE OF COLORADO Two East 14th Ave. Denver, Colorado 80203 District Court, Jefferson County, Colorado The Hon. Dennis James Hall, Judge Trial Court Case No. 2012 CV 2550 **Plaintiffs-Appellants:** American Family Mutual Insurance Company, et al., v. **Respondent-Appellant:** American National Property and Casualty Company, and **Defendants-Appellees:** Colorado Department of Public Safety and Denver Water Board. The Law Office of Steven J. Dawes, LLC Steven J. Dawes, No. 13193 100 Fillmore Street, Suite 500 Denver, Colorado 80206 Tel.: 303-720-7541 E-mail: steve@sdaweslaw.com Attorneys for Amici Colorado Municipal League, Colorado Counties, Inc., and the Special District Association of Colorado.	▲ COURT USE ONLY ▲ Case Nos.: 2014 CA 950 & 2014 CA 968

BRIEF OF AMICI CURIE THE COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND THE SPECIAL DISTRICT ASSOCIATION OF COLORADO

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 3211 words.

s/ Steven J. Dawes

Steven J. Dawes

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CASES

STATUTES

I. ISSUES PRESENTED FOR REVIEW

1. Are the Carriers' facts as pleaded sufficient to state a claim based on inverse condemnation as required by C.R.C.P. 12(b)(5)?

2. Did the district court abuse its discretion in denying the Carriers' motion to conduct discovery before the case was at issue and while Rule 12(b)(5) motions were pending?

II. STATEMENT OF THE CASE

Amici Curie respectfully adopt and incorporate the Statement of the Case presented by The Denver Water Board.

III. SUMMARY OF THE ARGUMENT

Local governments in Colorado engage in a myriad of activities that touch upon the daily lives of their citizens. To protect local governments from excessive liability and conserve their financial resources, the Colorado General Assembly has limited their liability to specific, defined circumstances, as specified in the Colorado Governmental Immunity Act (CGIA). Inverse condemnation is not barred by the CGIA, and local governments cannot insure against inverse condemnation claims. Consistent with the public policy of Colorado to preserve the financial resources of local governments, the Court should reject this attempt

by the Appellants to create liability under a theory of inverse condemnation when the damage was the result, at most, of simple negligence.

The elements of an inverse condemnation claim are not met. No bases exist to conclude that there was a taking or damaging of a property interest for a public purpose or that there was an intent to take property or to do an act which had the natural consequence of taking any property.

ARGUMENT

I. CONSISTENT WITH PUBLIC POLICY, THE COURT SHOULD NOT ALLOW THE INSURERS TO CONVERT A TORT CLAIM FOR NEGLIGENCE INTO AN INVERSE CONDEMNATION CLAIM.

The Colorado Municipal League (CML), Colorado Counties, Inc. (CCI), and the Special District Association of Colorado (SDA) represent nearly every local government in the State of Colorado. Their members are involved in innumerable activities on behalf of their citizens, including but not limited to: airports; ambulance services; animal control; arts centers; building inspections; business licenses; cemeteries; code enforcement; coroners; courts; correctional and detention facilities; development and land use planning; economic development; elections; employment assistance and unemployment compensation; fire and rescue services; forestry services; gas, power, and electrical facilities; hospitals; landfills; legal aid; libraries and cultural services; licensing and inspections for

restaurants, liquor establishments and marijuana dispensaries; marriage licenses; motor vehicle and boat registration; museums; open space; parks and recreational amenities; police services; probation services; public health; public housing; recording of public records; road and bridge construction and maintenance; social services for children, elderly, disabled, and indigent citizens; snow removal services; tax collection; urban drainage and flood control; urban renewal; vital statistics; wastewater treatment and delivery; water treatment and delivery; youth services; and zoning.

It is no exaggeration to say that local governments in Colorado touch the lives of every citizen in numerous ways. The effect of this means that without some limitations on the types and amounts of liabilities they are exposed to innumerable claims just because of the scope and breadth of their activities affecting every citizen of Colorado. So, the public policy of this state, as expressed in the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.* ("CGIA"), is to limit the liability of local governments to protect their limited resources. Otherwise, there could be no end to liability of local governments, which means that the substantial financial burden would be passed on the taxpayers.

In enacting the CGIA, the Colorado General Assembly has recognized as a matter of public policy that political subdivisions in Colorado "provide essential public services and functions and that unlimited liability could disrupt or make prohibitively expensive the provision of essential public services and functions." C.R.S. § 24-10-102. The General Assembly has recognized that "taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against successive fiscal burdens." Public employees are to be "provided with protection from unlimited liability so that such public employees are not discouraged from providing the services or functions required by the citizens or from exercising the powers authorized or required by law." *Id.*

As result, to protect the limited financial resources of local governments and to avoid the cost of liability from ultimately being passed on to their citizen taxpayers, under the CGIA local governments are immune except for specifically enumerated activities, *see* C.R.S. § 24-10-106(1).[1]

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[1] A public entity waives its immunity for injuries resulting from: (a) the operation of a motor vehicle; (b) the operation of a public hospital, correctional facility, or jail; (c) a dangerous condition of a public building; (d) a dangerous condition of a public highway or road; (e) a dangerous condition of a public hospital, jail, park or recreation area, or public utility; (f) the operation and maintenance of a public water, gas, sanitation, electrical, power or swimming facility; (g) operation and

In this case, the Appellants are seeking to circumvent the limitations of the CGIA by attempting to convert a negligence claim into an inverse condemnation claim. This effort should not be allowed as it is in contradiction to the above-stated public policy - to protect the limited financial resources of local governments and to avoid the financial burden from being passed on to taxpayers.

An inverse condemnation action is neither contractual nor tortious in nature. Because an inverse condemnation claim could not lie in tort, it is not barred by the CGIA. *Casey v. Colorado Higher Education Ins. Benefits Alliance Trust*, 310 P. 3d 196, 205-6 (Colo. App. 2012) citing *Jorgensen v. City of Aurora*, 767 P.2d 756, 758 (Colo. App. 1988). Therefore, local governments in Colorado do not have the protection of sovereign immunity from inverse condemnation claims and have to bear the financial burden of any adverse judgment on an inverse condemnation claim.

However, insurance companies won't local insure governments for inverse condemnation. So, if local governments are found liable, the financial burden ultimately has to fall on their taxpayers, which is exactly the result the General Assembly has sought to avoid. *See* C.R.S. § 24-10-102.

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maintenance of certain qualified state capital assets; or (h) the failure to perform an education employment required background check. C.R.S. § 24-10-106(1).

Insurance coverages for public entities uniformly have exclusions for inverse condemnation claims. *See Town of Cumberland v. Rhode Island Interlocal Risk Management Trust, Inc.,* 860 A.2d 1210, 1219 (R.I. 2004) (citing the "Inverse Condemnation Exclusion Clause":

> This policy does not cover claims for loss or damage or any liability of [the town] arising out of or in any way connected with the operation of the principles of eminent domain, condemnation by whatever name called regardless of whether such claims are made directly against the [town] or by virtue of any agreement entered into by or on behalf of the [town]."

See also City of Hartsville v. South Carolina Municipal Ins. & Risk Financing Fund, 677 S.E. 2d 574, 577, fn. 3 (S.C. 2009), citing the inverse condemnation exclusion:

> Inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain; adverse possession or dedication by adverse use.

See also South Carolina Municipal Insurance and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 628 S.E.2d 276, 277 (Ct. App. 2006) (policy listed certain actions as exclusions to coverage, noting in particular that "this coverage under this section does not apply: ... to inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain, adverse possession or dedication

by adverse use."); *see also Al-Nasra v. Cleveland County*, 691 S.E. 2d 132 at *5 (N.C. App. 2010) (Public Officials Liability Coverage specifically excluded "any claim "for loss, damage to or destruction of any tangible property, or the loss of use thereof by reason of the foregoing ....[and] arising from inverse condemnation ....").

Consistent with these exclusions, inverse condemnation claims against local governments are found not to be covered by liability insurance. *See Scottsdale Indemnity Co. v. Beckerman*, 992 N.Y.S. 2d 117, 121 (N.Y.A.D. 2 Dept. 2014); *City of Choctaw v. Oklahoma Municipal Assurance Group,* 302 P. 3d 1164 (Okla. 2014); *Missouri Intergovernmental Risk Management Association v. Gallagher Bassett Services, Inc.,* 854 S.W. 2d 565, 568 (Mo. App. E.D. 1993) (inverse condemnation exclusion applied); *City of Laguna Beach v. Mead Reinsurance Corporation*, 276 Cal. Rptr. 438, 442 (Cal. App. 4 Dist. 1990) (inverse condemnation exclusions of liability policies issued to city applied to city's liability arising from settlement); *Nutmeg Ins. Co. v. Clear Lake City Water Authority*, 229 F. Supp.2d 668, 696 (S.D. Texas 2002) (exclusion barred plaintiff's taking claim). Because local governments have no immunity from inverse condemnation, and because they have no insurance coverage, they are financially exposed to damages resulting from such claims.

Appellants, on the other hand, are insurance companies. The genesis of their claims in this case derives from the fact that pursuant to policies of property insurance they issued, in exchange for premiums paid by their insureds, they were obligated to honor their contracts of insurance and pay their insureds for property losses. Having done so, they seek to pass on their financial obligations by hoping for reimbursement from Denver Water and the State of Colorado under an inverse condemnation theory, thus attempting to avoid the CGIA.

Amici Curie respectfully request that this Court reject Appellants' theory. The importance of protecting the limited resources of local governments and avoiding financial losses from ultimately being passes on to taxpayers as the policy of this state should be strongly considered to preclude a negligence claim from being converted into an inverse condemnation claim.

II. AS A MATTER OF LAW, THE ELEMENTS OF AN INVERSE CONDEMNATION CLAIM ARE NOT MET.

Applicable Law

"To establish a claim for inverse condemnation under the Colorado Constitution, a property owner must show that (1) there has been a taking or damaging of a property interest; (2) for a public purpose; (3) without just compensation; (4) by a governmental or public entity that has the power of eminent domain, but which has refused to exercise that power." *Betterview Investments,*

LLC v. Public Service Company of Colorado, 198 P.3d 1258, 1262 (Colo. App. 2008) citing *Scott v. County of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007): "A taking may be effected by the government's [or the public entity's] physical occupation of the land..." and *Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs*, 38 P.3d 59, 63 (Colo. 2001).

Generally, a taking of property occurs when the entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. Colorado appellate courts are clear that conduct which amounts to simple negligence is not sufficient to state a claim for inverse condemnation. *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916, 922 (Colo. 1993); *Scott v. County of Custer*, 178 P.3d 1240, 1247 (Colo. App. 2007).

For a governmental action to result in a taking, the consequence of the action which is alleged to be a taking must be at least a direct, natural or probable result of that action. In other words, the government must have the intent to take the property or to do an act which has the natural consequence of taking the property. *Betterview Investments, LLC, supra* at 1263-64, citing *Scott v. County of Custer*, 178 P.3d 1240, 1244 (Colo. App. 2007). *See Trinity Broadcasting of Denver, Inc. v. City of Westminster*, *supra*, 848 P.2d at 921.

In this case, as a matter of law, the Appellants cannot establish that there was a taking or damaging of property for a public purpose. Nor can the Appellants establish that there was an intent on the part of Appellees to take the property or to do an act which had, as a direct, natural or probable consequence, the taking of property.

No Public Purpose

Amici Curie adopt and incorporate herein the argument on this issue made by Appellee Denver Water Board. *Amici* also observe the following. First, if there is no intent to take property, and if there is an insufficient basis to conclude that there was an intent on the part of the government to do an act which has the direct, natural or probable consequence of taking property, it cannot be said that the property was taken for a public purpose.

Second, no doubt exists that the purpose of the prescribed fire was to improve forest health and reduce wild fire risk. There is no basis to conclude that the damage to Appellants' insureds' property advanced that purpose. When property damage is an unintended result of the government's act, it cannot be said that the property was taken or damaged for public use. The fact that property of the Appellants' insureds was damaged does not mean that the property was damaged in order to effectuate a public purpose. The trial court correctly concluded that the

losses caused by the fire after escaped the property of Denver Water provided no benefit to the public. *See Cary v. United States*, 552 F.3d 1373, 1380 (Fed. Cir. 2009), *cert. den.*, 557 U.S. 937 (2009) (no public benefit from a wild fire that damaged the plaintiffs' properties); *City of Austin v. Liberty Mutual Insurance*, 431 SW. 3d 817, 826-27 (Tex. App. 2014) (no public purpose in a wild fire started by slack power lines crossing in high winds and arcing).

No intent to take the property or to do an act which has the natural consequence of taking the property.

The court in *Scott, supra*, observed that the language of the *Trinity* test suggests two alternative methods for proving a taking through inverse condemnation. It requires a plaintiff to prove either (1) an intent on the part of the defendant to take the plaintiff's property; or (2) an intent on the part of the defendant to do an act which has the natural consequence of taking the property. The first prong focuses on the subjective intent of the defendant, while the second prong focuses on objective causation and considers whether the governmental interference was substantial enough to constitute a taking. *See Scott, supra*, 178 P.3d at 1246.

In the case at bar, the first prong does not apply. There is no evidence or allegation that there was an intent on the part of the Appellees to take the Appellants' insureds' property. Nor does the second prong apply because no bases

exist to conclude that the intended act, the prescribed burn, had the natural consequence of taking the Appellants' insureds' property.

In *Scott*, the court found that the facts constituted a taking under the second prong. The county had removed trees while the county was working on an authorized road improvement project. The county did not accidentally or negligently destroy the trees while attempting to fix the road. The county intentionally removed trees in furtherance of the project, albeit unaware that the trees were on plaintiff's property.

The court concluded that it was reasonably foreseeable that trees would be removed as a result of the road improvement project and that tree removal was unavoidable given the nature of the work. The court concluded, therefore, the tree removal was direct, natural, and probable consequence of the actions authorized by the county in authorizing the road improvement project. *Scott* at 1248.

The act in which the Appellees engaged was the prescribed fire on Denver Water land, which was conducted pursuant to a forest land management services agreement to improve forest health and reduce wild fire risk. Unlike the tree removal in *Scott*, in the case at bar the fire on the Appellants' insureds' property was not the direct, natural, and probable consequence of the actions authorized by the Appellees, which was a controlled burn on Denver Water's property.

The same conclusion was reached by the court in *Cary v. United States, supra*. The court noted that there must be a showing that the asserted invasion was "the direct, natural, or probable result" of an authorized activity and not the "incidental or consequential injury inflicted by the action." *Cary, supra*, at 1377, citing *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). The words "direct, natural, or probable result" of an authorized activity mean that "the injury must be the likely result of the act, not that the act was the likely cause of the injury." *Id.* at 1377, citing *Moden v. United States,* 404 F.3d 1335, 1343 (Fed. Cir. 2005). In *Cary*, a wildfire started from an illegally set fire, and the adjacent landowners contended that the government's land management fire suppression policies created a risk that fires would escape government land and damage the landowners' property. The court concluded that the landowners' injuries were not the direct, natural, or probable result of the authorize government action, i.e., the land management fire suppression policies.

Similarly, in the case at bar, no basis exists for the conclusion that damage to the Appellants' insureds' property was anything more than an incidental result of the prescribed fire on Denver Water's property. No conclusion can be reached that the prescribed fire intended to result in the damage to the adjoining property. *See Thune v. United States*, 41 Fed. Cl. 49 (1998) (claim brought by the owner of a

hunting camp, which was destroyed when a controlled burn in a national forest spread beyond intended area due to wind, was not a takings claim. The damage was not a direct, natural, and probable consequence of the project functioning as designed; rather, the damage resulted from intervening government negligence or unanticipated natural events). *See also City of Austin v. Liberty Mutual Insurance*, *supra*, (high winds caused power lines to sway and touch, resulting in arcing, thereby causing molten metal to fall onto dry vegetation, resulting in a fire. Inverse condemnation failed because plaintiffs could not show that the city intended to cause the fire or that the city's reduced maintenance of power lines was likely to cause the fire).

CONCLUSION

This case presents this Court with the opportunity to stop this attempt by the insurance companies to avoid the limitations imposed by the CGIA in their attempt to create a claim for inverse condemnation when, at most, the damage to their insureds resulted from simple negligence. This isn't the first time insurers have sought to pursue this theory against local governments, *see, e.g., City of Austin v. Liberty Mutual Insurance, supra*, and it will be inevitable that they will continue to claim reimbursement from municipalities, counties, and special districts when local government conduct is at issue. But local governments and their taxpayers are not

the reinsurers of these insurance companies, and consistent with public policy in Colorado, the limited resources of local governments should be protected, and the potential exposure of taxpayers to these claims should be curtailed. Further, and also consistent with public policy in Colorado and the cases discussed above, any subrogation the insurers pursue in, at most, negligence should be governed by the CGIA. The Appellants have not met the elements of an inverse condemnation claim, and this Court should uphold the trial court's decision dismissing the inverse condemnation claims.

Respectfully submitted,

THE LAW OFFICE OF STEVEN J. DAWES, LLC

s/ Steven J. Dawes

Steven J. Dawes

CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 15th day of December 2014 a true and complete copy of the foregoing **BRIEF OF AMICI THE COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., AND THE SPECIAL DISTRICT ASSOCIATION OF COLORADO** was filed and served on the following via ICCES:

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In accordance with C.A.R. 30(f), a printed copy with original signature is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.