COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203	
COURT OF APPEALS, STATE OF COLORADO Hon. Judge Dunn; Graham and Sternberg, JJ., concur Appeals Court Case No. 14CA0228 El Paso District Court No. 13CV1469 Honorable Timothy J. Schutz, Judge	**▲COURT USE ONLY ▲**
Petitioners: SMOKEBRUSH FOUNDATION, KATHERINE TUDOR, and DONALD HERBERT GOEDE, III, v. **Respondent:** CITY OF COLORADO SPRINGS.	Case No: 2015SC627
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENT, CITY OF COLORADO SPRINGS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☒ It contains 4,495 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

COLORADO MUNICIPAL LEAGUE

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The Colorado Municipal League ("CML" or the "League") by undersigned counsel and pursuant to C.A.R. 29, submits this brief as *amicus curiae* in support of Respondent, City of Colorado Springs ("Colorado Springs" or "the City").

INTEREST OF AMICUS CURIAE

CML was formed in 1923. The League is a non-profit, voluntary association of 269 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 168 of the 171 statutory municipalities and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. Participation by CML is intended to provide the Court with a statewide municipal perspective because the outcome of this case will likely have an impact on all cities and towns in Colorado.

The outcome of this appeal may significantly broaden statutory waivers of governmental immunity under the Colorado Governmental Immunity Act (CGIA) and, thereby, create an indeterminate, but unquestionably large and unmanageable fiscal burden on municipalities. The Appellants, Smokebrush Foundation, Katherine Tudor, and Donald Herbert Goede, III ("Appellants"), argue for an expansion of the governmental tort liability based on principles of policy and

equity, departing from the plain meaning of the statutory waivers of immunity for public buildings and utilities. Leaving the bounds of statutory construction would erode the structure of governmental immunity, permitting unlimited liability in many instances. Further, under the continuing tort theory, sovereign immunity could effectively be nullified for past periods. For these reasons, CML has grave concerns about the potential consequences to municipalities' ability to manage the risks and costs of tort claims. CML urges the Court to affirm the Court of Appeals and conclude that no subject matter jurisdiction exists in this case.

ARGUMENT

The City provides several distinct arguments in support of its response, and CML will not reiterate every aspect of the City's Response Brief. Rather, CML wishes to reinforce the widespread and significant impact that the decision this Court may have beyond the specific facts of this case.

A. Exceptions to Governmental Immunity Are Interpreted Narrowly

The Appellants argue that this Court should reverse the Court of Appeals decision, deviating from the plain meaning of the statutory terms of the waivers of governmental immunity. However, to broaden the waivers in this case would effectively impose liability for torts that the Colorado General Assembly did not

intend. *See Richland Development Co., L.L.C. v. East Cherry Creek Valley*, 934 P.2d 841, 843 (Colo. App. 1996).

The first step in establishing whether the Appellants have met their burden to show that a waiver applies is to look to the statutory text itself. *Moore v. City and County of Denver*, 42 P.3d 82, 84 (Colo. App. 2002). In this case, the Court of Appeals noted that statutory definitions of the CGIA should not be expanded so as to create an implied waiver. *Smokebrush Foundation v. City of Colorado Springs*, 2015 COA 80, slip op. ¶ 22 (citing *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34, 37 (Colo. App. 1995)). Here, because no express waiver of immunity exists for either demolition activities in the dangerous condition of a public building waiver under C.R.S. § 24–10–106(1)(c) nor for a coal gasification plants under C.R.S. § 24–10–106(1)(f), the Appellants have failed to meet their burden of establishing that a waiver of governmental immunity allows subject matter jurisdiction in this case.

The Appellants argue that there is jurisdiction to hear their claim under the public building waiver because demolishing a building falls under "constructing" and/or "maintaining" a public building in the definition provided by C.R.S. § 24–10–103(1.3). Appellants' Opening Brief at 22-26. Regardless of the novelty of this specific question in Colorado, there is ample case law that illustrates that the scope of the dangerous condition of a public building waiver is construed

narrowly, maintaining the plain meaning of the statutory language and declining to expand the scope of the waiver to create implied exceptions. *See Pack*, 894 P.2d at 37-38 (refusing to apply a broad definition of "operation" to the public building waiver of governmental immunity when a slip and fall injury occurred in the parking lot of a correctional facility); *Jenks v. Sullivan*, 826 P.2d 825, 827 (Colo. 1992) (disagreeing with the injured party's assertion that the plain meaning of "or the use thereof" included security in a courthouse and stating instead that the legislature did not intend such an expansive reading dangerous condition exception) (overruled on other grounds); *Jilot v. State*, 944 P.2d 566, 570 (Colo. App. 1996) (concluding that the dangerous condition of public building waiver may not be combined with other waivers to create an implied waiver). The Appellants' argument on this point is a convoluted and rhetorical assertion. It does not rely upon the plain meaning of the statutory terms of the waiver.

Wyoming's waiver for public buildings, which applies to injuries resulting from governmental negligence in operation or maintenance of buildings, is similar to C.R.S. § 24-10-106(1)(c). The Wyoming Supreme Court addressed whether this statute allowed a wrongful death claim from the demolition of a building during a fire training exercise in *City of Cheyenne v. Huitt*, 844 P.2d 1102 (Wyo. 1993). The court concluded that "[t]he plain and ordinary meaning of the words

'operation or maintenance of any building' does not encompass the deliberate destruction of it." *Id.* at 1105. This observation likewise applies to the Appellants' argument. Demolition simply does not meet the definition of any plain meaning of the words "constructing" or "maintaining."

On the Appellants' public utility waiver arguments, the City has already exhaustively briefed this issue and the *Jilot* case. For purposes of brevity, CML believes that *Jilot* is dispositive, and agrees with the conclusion of the Court of Appeals that an office building is not a "gas facility." *Smokebrush Foundation*, ¶¶ 23-26.

The waivers of governmental immunity provided in C.R.S. §§ 24-10-106(1)(c) and (f) do not apply to the Appellants' tort claims. The Appellants' cause of action is barred by sovereign immunity and must be dismissed. *Jilot*, 944 P.2d at 569. There are sometimes harsh results from this jurisdictional bar. Court decisions have noted this stark reality in cases where the injuries were grave, but where the plaintiffs could not maintain a tort claim without a clearly articulated statutory waiver. *See Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1385 (Colo. 1997) (holding that, although it created a harsh result for the child injured by riding his bike into a ditch, poor design of roadway improvements was not within the plain reading of the statutory waiver for the maintenance and operation of public roads and that the court could not replace the judgement of the

legislature with its own); *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1182-83 (Colo. 2001) (holding that a child injured by tipping out of a stroller and fracturing her skull when Denver Public School staff left her unattended in a stroller did not allege sufficient jurisdictional facts associating her injuries with actions or omissions of the school district in constructing or maintaining the facility).

The Appellants argue that the statutory waivers of governmental immunity can be imbued with inferred or vague meanings. However, the case law is clear that courts interpret these waivers using the plain meaning of the terms – and that the dangerous condition of a public building and a public utility waivers have plain and discrete meanings. Since the Appellants have failed to demonstrate that the statutory waivers in either C.R.S. §§ 24-10-106(1)(c) or (f) apply, there is no subject matter jurisdiction and their claims must be dismissed.

B. A Lack of Legislative Intent Precludes Retroactive Applicability and Continuing Torts in the CGIA

CML provides a discussion below of the Appellants' theory that the provisions of the CGIA may apply retroactively or to continuing torts. CML provides this discussion to preserve the arguments should the Court reach them. However, we note that since no waivers exist in this case, the Court need not reach these issues.

General rules of statutory construction dictate that changes in the law apply only prospectively for good reason. "We make this presumption in accordance with statutory and common law guidance mandating that unless intent to the contrary is shown, legislation shall apply only to those transactions occurring after it takes effect." *City of Colorado Springs v. Powell*, 156 P.3d 461, 464 (Colo. 2007). Without a strong presumption of prospective application, retroactive changes in the law would create problems of epic proportions. This is because prospective application of statutory law protects vested rights from efforts to reach back in time and re-write the law. Further, prospective applicability provides certainty for personal, business, and governmental planning purposes. "This presumption [of prospective application] is rooted in policy considerations, namely the notion of fair play and the desire to promote stability in the law." *Powell*, 156 P.3d at 464.

While retroactive application is strongly disfavored, it is not necessarily prohibited. Rather, it may be permissible if no vested right is impaired; if a vested right is impaired, such application is unconstitutionally retrospective. *Id.* at 465. In assessing whether a statute is permissibly retroactive, courts make a two-step inquiry: (1) did the Legislature intend the statute to operate retroactively; and, (2) if so, is the statute unconstitutionally retrospective. *Id.* On the first step, this intent

is not a motivation which may be intuited or implied; rather, it must be evident. *Id.* at 466.

The Appellants' argument on this ground has shifted and evolved through the course of this appeal. Setting aside whether these arguments were properly raised below, the General Assembly has not affirmatively articulated its intent to either permit retroactive application or to allow subject matter jurisdiction for a continuing tort claim under the CGIA.

On the Appellants' first argument that the CGIA may have application to governmental actions taken prior to its enactment: the condition precedent for that argument to prevail is to have a clear statement of legislative intent for retroactivity. The Court of Appeals correctly identified that the General Assembly never placed language in the CGIA indicating that its provisions should be applied retroactively. *Smokebrush Foundation*, ¶¶ 11-18. There is no retroactive applicability clause of the CGIA, which is the clearest manner of expressing retroactive intent; nor is there express language elsewhere in the CGIA that indicates this intent. *Smokebrush Foundation*, ¶ 17; s*ee also* C.R.S. §§ 24-10-101 to 120 (2014). Furthermore, there is an affirmative legislative statement that the CGIA applies prospectively: "…The general assembly also recognizes that the supreme court has abrogated the doctrine of sovereign immunity effective July 1,

1972, and that thereafter the doctrine shall be recognized only to such extent as may be provided by statute. …" C.R.S. § 24-10-102.

Since there is no language evincing the legislative intent that the CGIA shall apply retroactively, this Court may end its inquiry there. Beyond this absence of any evidence of legislative intent, court decisions have already addressed the question of whether the CGIA may be applied retroactively. For example, in *Ochoa v. Sherman*, 534 P.2d 834 (Colo. App. 1975), the appellate court overturned the trial court's retroactive application of a governmental immunity waiver in a dog bite case. The plaintiff argued that the City of Northglenn was negligent for returning a vicious dog to its owners after impoundment. The dog bite and the alleged injuries occurred prior to the enactment of the CGIA. The trial court ruled that since the City of Northglenn had liability insurance at the time the injuries occurred (again, before the enactment of the CGIA), it had waived immunity under the CGIA. *Ochoa*, 534 P.2d at 835.[1] However, the appellate court reversed this decision, holding that the CGIA may not be applied retroactively. *Id.* The *Ochoa* court refused to weaken the prospective-only application of the CGIA – even where the injuries occurred immediately before the enactment of the CGIA and

[1] At the time *Ochoa* was decided, the CGIA included a waiver of liability when a governmental entity held liability insurance. C.R.S. § 24-10-104 (1973). This waiver was later removed by the enactment of H.B. 1196 (1986); *see also City of Aspen v. Meserole*, 803 P.2d 950 (Colo. 1990).

also where it was arguable that the fiscal impact on the public for providing payment for the claimed injuries was minimal since the City of Northglenn was insured.

This presumption of prospective application in absence of legislative intent applies equally to governmental entities asserting immunity under the CGIA. *See generally Powell*, 156 P.3d at 464-68. Indeed, in *Powell* the Court found that the General Assembly did not intend retroactive application even though the legislation at issue specifically stated that the modifications and additions to the definitions in the CGIA were "necessary to clarify the intent of the general assembly in adopting the Act." *Id.* at 465-66. These cases are dispositive here: the CGIA may not be applied retroactively to waive liability for actions that took place prior to its enactment or amendment in the absence of legislative intent. On the retroactivity argument, the Court of Appeals correctly applied these principles of statutory and constitutional construction: "Because no contrary intention appears, we conclude the CGIA operates prospectively." *Smokebrush Foundation*, ¶ 17. Since no legislative intent for retroactive applicability exists for the Appellants' claimed waivers, the two-step inquiry ends there.

The Appellants also raise the theory of continuing torts in another attempt to establish governmental liability for acts that took place prior to the enactment of the CGIA. Citing *Hoery v. U.S.*, 64 P.3d 214 (Colo. 2003), the Appellants state

that the Court of Appeals failed to follow the doctrine of continuing torts adopted in that case. Appellants' Opening Brief at 16-17. In *Hoery*, the Tenth Circuit certified two state law questions to the Colorado Supreme Court: does the migration of toxic chemicals constitute trespass and does the presence of those chemicals constitute a continuing trespass. *Hoery,* 64 P.3d at 215. This Court in *Hoery* answered both questions in the affirmative and returned the case to the federal court for further proceedings. *Hoery,* 64 P.3d at 215-16.

In contrast with *Hoery*, the specific statutory waivers of the CGIA do not include any provision for continuing torts. *See* C.R.S. §§ 24-10-101 to 120 (2014). Indeed, continuing tort claims would undermine the policy goals underlying the specific CGIA waivers, which is to provide relief for injuries while constraining the financial risks to the public. *Swieckowski,* 934 P.2d at 1387. In contrast to the CGIA, the Federal Tort Claims Act at issue in *Hoery* imposes liability on the United States government "in the same manner and to the same extent as a private individual." 28 U.S.C. § 2674; *see Hoery,* 64 P.3d at 217. *Hoery* is not dispositive because it speaks to the substantive tort law in Colorado which applies to the federal government; *Hoery* does not abrogate the immunity conferred to governmental entities by the CGIA. This difference in governmental liability between the FTCA and the CGIA is not unusual. Different types of governmental immunity, depending on the jurisdiction, are more common than

not.[2] As discussed above, the CGIA establishes governmental immunity with limited exceptions – an allowance for continuing tort claims originating in pre-CGIA conduct would fundamentally change this structure. This directly contradicts the legislative intent of the CGIA, as well as the case law interpreting its provisions. The Appellants' do not show that the General Assembly intended to permit retroactive application or to allow subject matter jurisdiction for a continuing tort claim under the CGIA. Thus, even if the Court were to address these theories, the Appellants' arguments fail to show that a statutory waiver of governmental immunity exists for these claims.

C. Governmental Immunity Exceptions Carefully Weigh Remedies for Injury against the Public Interest in Risk Management

1. Legislative Intent

The purpose of avoiding creative statutory interpretation is to serve the legislative intent of waivers of governmental immunity. The Appellants invite the Court to engage in a dialogue about the policy purposes that could be served by broadening these waivers. However, courts have refused to engage in such complex rhetorical arguments. *Bertrand v. Board of County Com'rs of Park*

[2] For citations to the 50 states' governmental immunity statutes and a general overview of types of approaches to state sovereign immunity, see *State Sovereign Immunity and Tort Liability*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated Sept. 8, 2010), http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx.

County, 872 P.2d 223, 228-29 (Colo. 1994) (rejecting a strained and complex definition of "motor vehicle" and concluding it was fair to assume that the legislature intended to apply the plain and ordinary meaning). The first step of statutory construction is to apply the plain and ordinary meaning of the text. *Id.* at 221. Despite the Appellants' best efforts, the meanings of the terms in C.R.S. §§ 24-10-106(1)(c), (f), and § 24–10–103(1.3) are not ambiguous. The statutory language of the dangerous condition of a public building and public utility waivers at issue in this case are plain; thus the Court need not look further. *Springer v. City and County of Denver*, 13 P.3d 794, 799 (Colo. 2000); *see Ceja v. Lemire*, 154 P.3d 1064, 1066 (Colo. 2007) ("We need only turn to other rules of statutory construction if we find a statute to be ambiguous.")

The Court's role in interpreting and effectuating the legislative intent of the CGIA is in recognition of the Legislature's role in establishing public policy. "[W]e are constrained by limiting principles of judicial review to interpret statutory language consistently with the intent of the General Assembly and with the plain meaning of the words chosen by this body when it enacts a statute. We may not substitute our view of public policy for that of the General Assembly." *Swieckowski*, 934 P.2d at 1387. In the context of the CGIA, the legislative intent is to give statutory authority for governmental immunity while providing limited

waivers for injury from governmental negligence. Which limited waivers should exist is a matter of public policy for the General Assembly to weigh and decide.

In the *Evans* trilogy, this Court already determined that the General Assembly should decide questions of government liability and risk. The purpose of those cases was not to invalidate the notion of governmental immunity, but rather establish it in the proper forum. *Evans v. Board of County Comm'rs*, 482 P.2d 968 (Colo. 1971); *Flournoy v. School Dist.*, 482 P.2d 966 (Colo. 1971); *Proffitt v. State*, 482 P.2d 965 (Colo. 1971). This was in recognition that the General Assembly, and not the courts, should determine when governmental entities should enjoy immunity from suit. *See Open Door Ministries v. Lipschuetz*, 2016 CO 37M, ¶ 13, 373 P.3d 575 (Colo. 2016).

The General Assembly enacted the CGIA to balance an individual's interest in recovering damages for an injury against the need to protect the public interest from excessive fiscal burdens. The historical default of common law sovereign immunity remains: in principle a claim pled in tort cannot lie against the government. Although now, waivers of this immunity provide relief for injury in limited circumstances that result from government negligence. These waivers encourage responsible action and maintenance by governmental entities. *See Swieckowski*, 934 P.2d at 1387. This balancing of interests is shown in the CGIA Declaration of Policy, C.R.S. § 24-10-102, which expressly recognizes that

unlimited liability could disrupt essential public services, that tax payers would ultimately bear the fiscal burden of unlimited liability, and that unlimited liability would discourage public employees from providing such services. Therefore, under the CGIA, governmental entities are liable for their actions, and those of their agents, only to such an extent and subject to such conditions as provided by the CGIA. *See Jilot* , 944 P.2d at 569 ("[S]overeign immunity protects public entities against the risk that unforeseen tort judgments will deplete public funds, resulting in the termination or curtailment of important government functions, by limiting waiver to specific categories of claims. Thus, waivers to sovereign immunity should themselves be strictly construed.")

2. Risk Management

Governmental immunity against torts is an important tool in the larger effort to manage risk and to provide effective and efficient government services. Expanding the scope of the waivers under C.R.S. §§ 24-10-106(1)(c) or (f) by applying a statutory construction analysis beyond the clear and plain meaning of the terms or by the retroactive application of the waivers would make risk related to tort liability impossible to manage for governments in Colorado. Expanding tort liability under the Appellants' various arguments would remove the certainty necessary for establishing the procedures, the priorities, and the appropriations to

continue the business of government. There would be great social and financial cost to the citizens of Colorado from such an expansion.

Municipalities deliver the basic health, welfare, and safety functions that make life possible in these communities by providing utilities, building and maintaining streets and other infrastructure, policing, responding to emergencies, and adjudicating disputes. Insurance or settlement costs for government tort liability reduce the resources that would otherwise be available for infrastructure or government services. The limitation of municipal liability is essential to maintaining resources for direct government services; this is especially so in the restrictive environment of the Taxpayer Bill of Rights. TABOR makes risk management to limit deleterious fiscal impacts all the more necessary for Colorado's cities and towns. Further diminution of resources from payment of claims under expanded CGIA waivers could, ironically, contribute to the eventual failure of municipalities to responsibly operate and maintain government infrastructure and services. Audit data for all Colorado municipalities from 2013 illustrates this point: 70 (or 26%) of Colorado municipalities have annual revenues less than the statutory maximum recovery amount of $350,000 for a single person for a single tort event; 116 (or 43%) of municipalities have annual revenues that are less than the maximum recovery amount of $990,000 for two or more persons

for a single event.[3] Uninsurable torts or unlimited liability would be disastrous for Colorado's municipalities.

Moving further away from the temporal or linguistic bounds of the CGIA, statutory waivers will also have a chilling effect on the decisions of municipal employees and elected officials. Citizens are not best served by hesitancy in their civil servants during emergencies. In recognition of this, the General Assembly has tempered the default of governmental immunity by setting out specific instances where careful consideration of government action is necessary.

Expanding governmental immunity waivers without the full vetting and study of the legislative process, as the Appellants ask the Court to do, could create unintended consequences. For example, there is no consideration that comprehensive general liability (CGL) policies, which insure municipalities' claims for injury or property damage, include an absolute exclusion of coverage for pollution.[4] If CGIA waivers were broadened to allow the Appellants' continuing

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[3] DEPARTMENT OF LOCAL AFFAIRS, *County and Municipal Compendium*, https://www.colorado.gov/pacific/dola/county-municipal-financial-compendium (last visited Sept. 27, 2016).

[4] For a general discussion of the emergence and evolution of this exclusion in insurance policies, see Daniel P. Hale, *How Absolute is the Absolute Pollution Exclusion*, CAMBRIDGE PROPERTY & CASUALTY SPECIAL REPORT (11-2008), http://cambridgeunderwriters.com/wp-content/uploads/2013/05/How-Absolute-is-the-Absolute-Pollution-Exclusion.pdf. The Colorado Supreme Court has addressed the absolute pollution exclusion in the context of the contractual duty to defend; the leading cases provide useful discussion of the exclusion: *Hecla Mining*

tort claim, municipalities could face liability for pollution migration claims that were uninsurable.

Regardless of whether an insurance policy excludes coverage for a claim, a government liable for a tort under the CGIA waivers must still make payment somehow. In fact, the CGIA compels governments to make payment within the fiscal year of the settlement or judgment from any or all following: available funds from self-insurance reserves; unappropriated unrestricted funds; and funds appropriated for judgments, but not encumbered. C.R.S. § 24-10-113(1) and (2). If the governmental entity is unable to pay a judgment due to a lack of funds in the fiscal year in which it is final, the entity must levy a tax to pay the judgment. C.R.S. § 24-10-113(3). These are strong statutory requirements to compel entities, like municipalities, to make full and expeditious payment. Were the CGIA waivers to be expanded, municipalities would need the opportunity to plan for any fiscal impacts for payment of uninsurable claims and remediation so that taxpayers would not have to pay a special levy as a last resort. It is this deliberative and public process for which the policy making role of the General Assembly exists.

The Colorado General Assembly is the appropriate venue for policy arguments for broadening the CGIA waivers, whether by definitional expansion or

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Co. v. N.H. Ins. Co., 811 P.2d 1083 (Colo. 1991); *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999); and *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004).

by reaching into the past to apply its provisions. Any such proposals would need to be vetted through the legislative process to balance the interests discussed above. Absent the municipal participation in modifying governmental immunity waivers, it would be impossible to predict or manage the impacts of implied waivers on municipalities' finances and operations.

CONCLUSION

For the reasons set forth here and in the City's Answer Brief, CML urges the Court to uphold the Court of Appeals' decision. The Appellants' broad and evolving appeal to the Court to find subject matter jurisdiction for their tort claims on any and all bases would undermine the structure of the CGIA, as well necessary policy-making process for any legislative amendments thereto. The Appellants have failed to prove that a waiver applies in this case. CML therefore requests that this Court affirm the Court of Appeals.

Respectfully submitted this 27th day of September, 2016.

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