SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Court of Appeals, State of Colorado Case No. 16CA1652 Opinion by Judge Lichtenstein	
Mesa County District Court Case No. 13CV30147 Honorable Brian J. Flynn, Judge	
City of Grand Junction, Colorado, Petitioner, v. Roberto Lopez, Jordan Pierson, and Kolby Gimmeson, Respondents.	**▲ COURT USE ONLY ▲** Case Number: 2018SC571
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AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF GRAND JUNCTION'S PETITION FOR A WRIT OF CERTIORARI

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 1,898 words (does not exceed 1,900 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.

By: */s/ Marni Nathan Kloster*
Marni Nathan Kloster, #34947
Nicholas C. Poppe, #47507

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The Colorado Municipal League ("CML"), by its undersigned attorneys and pursuant to C.A.R. 29, submits this brief in support of the City of Grand Junction's Petition for Certiorari.

I. Interest of the *Amicus*

CML was formed in 1923. It is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado, including all 101 home rule municipalities, 169 of the 171 statutory municipalities and the lone territorial charter city.

CML's participation in this petition is intended to provide the Court with a statewide municipal perspective on the negative effects of the Court of Appeals' opinion in *Lopez*. Were the decision to stand, it would not only greatly expand the scope of liability for electrical facilities (and presumably other facilities), but also require every municipality to re-assess its use of independent contractors. The decision will also have the unintended and negative consequence of reducing public works projects because municipalities will be unable to evaluate or mitigate the risk posed by the use of third-party experts. As *Lopez* expands the scope of the operation and maintenance waiver well beyond the intent of the General Assembly, and simultaneously subjects Colorado municipalities to a particularly unfair form

of strict liability for the acts of third-party contractors, CML believes it is imperative for this Court to review the Court of Appeals' opinion.

II. Grounds for granting the City of Grand Junction's petition for a writ of certiorari.

It is believed that the City will set forth the primary legal bases warranting review of the Court of Appeals' decision; thus, CML will focus on the broader implications of the Court of Appeals' considerable expansion of liability under the Colorado Governmental Immunity Act ("CGIA").

A. The Court of Appeals has broadened the waiver of immunity for operation of an electrical facility beyond the General Assembly's intent and in conflict with other divisions considering the same legal issue.

The Court of Appeals concluded, without a clear analysis as to why, and with what appears to be little perspective towards the ultimate consequences, that injuries caused by boring a hole in the ground and striking an unrelated gas line "resulted from" the operation of an electrical facility. The Court of Appeals' decision is notwithstanding the fact that no electricity was involved, nor did it result in an injury caused by an electrical malfunction from any City facility.

While no other appellate court in Colorado has examined what constitutes an injury resulting from the operation of an electrical facility,[1] several other divisions of the Court of Appeals have analyzed whether injuries have "resulted from" the operation of correctional facilities and hospitals, which utilized the same legal framework that should be applied here. *See Pack v. Ark. Valley Corr. Facility*, 894 P.2d 34 (Colo. App. 1995); *Daley v. Univ. of Colo. Health Scis. Ctr.*, 111 P.3d 554 (Colo. App. 2005). In both *Pack* and *Daley*, the courts held that immunity was not waived because the injury was the result of an "ancillary function," as opposed to one related to the primary purpose of the facility. *Pack*, 894 P.2d at 37; *Daley*, 111 P.3d at 556. For example, although correctional facilities certainly need parking lots for visitors and employees, the failure to maintain a parking lot does not result in a waiver of immunity because the primary purpose of a jail or correctional facility is to house inmates. *Pack*, 894 P.2d at 37.

The decision in *Lopez* conflicts with *Pack* and *Daley*, principally because boring a hole in the ground is, at best, ancillary to the overall purpose of an electrical facility. While the underground hole may facilitate the installation of conduit, it is completely unrelated to the actual transmission or distribution of

[1] A division of the Colorado Court of Appeals considered only the narrow issue of what constitutes a "public electrical facility," which is not relevant here. *Ellis v. Town of Estes Park*, 66 P.3d 178, 181 (Colo. App. 2002).

electricity. The Court of Appeals cited no precedent indicating that the General Assembly intended upon such a broad expansion of the CGIA's operation and maintenance waivers.

While the lack of precedent and the conflict among divisions in *Pack*, *Daley*, and *Lopez* are more than sufficient justifications to grant certiorari, the Court should also consider how the decision in *Lopez* will affect the determination of immunity in future cases.

As but one example, under *Lopez*, a municipality that hires a third-party contractor to install utility poles for a new transmission line would lack immunity for operation of an electrical facility if the contractor caused damage to adjacent property when installing the poles. Again, neither the transmission of electricity, nor an actual electrical facility would be implicated in such an accident. Despite that, the municipality would be strictly liable for the damage caused by the independent contractor because the utility poles were ultimately destined, at some point in the future, to support lines that would carry electricity. Such a ruling would be in direct conflict with one of the stated purposes of the CGIA: limiting liability and prevent excessive fiscal burdens on municipalities. C.R.S. § 24-10-102.

Failure to correct the Court of Appeals' decision broadens the scope of the waiver for operation of electrical facilities beyond any rational definition supported under the CGIA. It is the province of the General Assembly, not the Court of Appeals, to decide whether to expand the scope of liability under the CGIA. *Swieckowski by Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1388 (Colo. 1997). For these reasons, the Court should review the reasoning adopted by the Court of Appeals in *Lopez*.

B. The Court of Appeals' opinion is an unwarranted departure from, and expansion of, *Springer v. City and Cnty. of Denver*, thus warranting review under C.A.R. 49.

The Court of Appeals was correct in noting that it was confronted with a matter of first impression: is immunity waived under the CGIA's "operation and maintenance" waivers for acts of independent contractors? The Court of Appeals looked at this Court's decision in *Springer* in considering that question. Yet in so doing, the Court of Appeals failed to recognize that application of *Springer* to the CGIA's operation and maintenance waivers is not only unwarranted, but also has significant negative outcomes for municipalities in Colorado.

The "linchpin" of this Court's rationale in *Springer* was that in the context of dangerous conditions, a governmental entity waives immunity for "its omission in failing to reasonably discover and correct [an] unsafe condition." 13 P.3d 794, 801

(Colo. 2000). But this Court's reasoning in *Springer* was necessarily cabined to the three CGIA waivers concerning dangerous conditions, principally because governmental entities have the *opportunity* to inspect and "reasonably discover" a dangerous condition after a contractor works on a public facility. *Id*. As this Court held:

> In each such subsection [waiving immunity for dangerous conditions], a public entity lacks immunity, not because it necessarily *causes* a dangerous condition, but because it is in a position to discover and correct the condition.

Id. (emphasis in original). In applying *Springer*, the Court of Appeals in *Lopez* simply presumed that any time a municipality engages an independent contractor, it is in a position and has the expertise to observe and act, and thus avoid any injuries to third parties that may be caused by the contractor.

Yet the Court of Appeals ignores one of the chief reasons for engaging a third-party contractor: governmental entities often lack the resources or expertise to complete the task required. Indeed, as the Court of Appeals noted in this case, the very reason the City retained Apeiron was because it "did not have the personnel or equipment to bore under the road to place the conduit…" *Lopez v. City of Grand Junction*, 2018 COA 97, at ¶ 11 (Colo. App. July 12, 2018).

The engagement of experts outside of a municipality's traditional personnel resources or expertise is an activity that occurs routinely in Colorado. Highly

technical skills, such as complex engineering projects, are not always capable of being completed by municipalities' in-house resources, hence the reason why they are contracted out. The Court of Appeals' expansion of liability under *Springer* fails to acknowledge this reality, and in so doing simply assumes that municipal employees have the expertise and ability to intervene, in real-time, to prevent an injury caused by the negligence of a more experienced third party. While it may be reasonable to hold a governmental entity liable for the existence of a dangerous condition caused by an independent contractor in a public building, it is another matter entirely to hold that a governmental entity should be liable for an injury it cannot anticipate given a lack of expertise in the task being performed.

The Court of Appeals' opinion will be particularly harmful to municipalities in rural Colorado (and smaller metro municipalities), which must retain and rely on outside experts with much greater frequency than their large urban counterparts. As recently found by Colorado's Office of Economic Development & International Trade, the "brain drain" away from rural Colorado counties results in a lack of educated professionals in certain professions in areas of the state, thereby mandating that municipalities contract out technical services or projects.[2]

[2] COLORADO OFFICE OF ECONOMIC DEV. & INT'L TRADE, RURAL ECONOMIC RESILIENCY IN COLORADO 8 (NOV. 4, 2016) (available at https://choosecolorado.com/wp-content/uploads/2016/07/Resiliency-Study.pdf)

Imputing liability in these instances amounts to an unfair form of strict liability, for which municipalities have no ability to prevent and no real ability to defend in any subsequent lawsuit. The same holds true for almost any other activity that might implicate one of the three CGIA waivers for operation and maintenance of certain facilities. *See* C.R.S. § 24-10-106(1)(a, b, f).

The practical effect of the Court of Appeals' opinion will be an overall reduction in public projects involving any form of specialized work or expertise that might be implicated by the operation and maintenance waivers. While municipalities can evaluate and measure the risk attendant to conduct of their own employees, it is much more difficult to evaluate the potential risk posed by a third-party contractor, *especially* when the municipality lacks employees with the expertise to perform such oversight or inform such risk assessments. This result again runs directly contrary to one of the stated purposes of the CGIA, which is to allow municipalities to plan and prepare for liability and protect taxpayers against excessive fiscal burdens. C.R.S. § 24-10-102. At a time when infrastructure development is critical in Colorado, the Court of Appeals' opinion constitutes an unwarranted and crippling setback to municipalities.

CONCLUSION

The decision in *Lopez* contains all the necessary ingredients to make review by this Court necessary. It presents a matter of first impression, relying (erroneously) on analysis from a dissimilar case. It conflicts with at least two other divisions of the Court of Appeals on the proper interpretation of the term "resulting from" for purposes of immunity. Finally, and most importantly, the decision in *Lopez* will require each and every municipality to reevaluate its use of and relationship with third-party contractors and reduce investment in infrastructure. An entity that does not have the technical expertise to evaluate the risk posed by a third-party contractor will have to refrain from engaging in such activity. Indeed, the alternative is to accept possible liability for the full measure of damages under the CGIA, or as much as $1,093,000 for any one claim.

Respectfully submitted this 13th of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2018, a true and correct copy of the foregoing ***AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF GRAND JUNCTION'S PETITION FOR A WRIT OF CERTIORARI*** was served via the State of Colorado's ICCES E-Filing system upon each of the following:

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