

DISTRICT COURT, LARIMER COUNTY,
COLORADO
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DATE FILED: November 30, 2017 3:34 PM
FILING ID: 9D3F1C7C6FAD6
CASE NUMBER: 2017CV30903

Plaintiff: ILSE G. WESTPHAL

v.

Defendants: ANTHONY JOHN JANSA; JANSA
TRUCKING, LLC, a Colorado Limited Liability
Company; JANSA TRUCKING, LLC, a North Dakota
Limited Liability Company; THE CITY OF FORT
COLLINS, a Colorado municipal corporation

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Case No. 2017-CV-030903

Div. 3C

**DEFENDANT CITY OF FORT COLLINS'
MOTION TO DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO C.R.C.P. 12(b)(1) and C.R.S. § 24-10-106**

Defendant, City of Fort Collins, by and through its counsel, submits its Motion to Dismiss Plaintiff's Complaint pursuant to C.R.C.P. 12(b)(1) and C.R.S. § 24-10-106.

INTRODUCTION AND SUMMARY OF RELIEF SOUGHT

Defendant, City of Fort Collins (“the City”), seeks dismissal based on governmental immunity. Plaintiff’s claims lie in tort and the City has not waived immunity. Therefore, the City’s motion should be granted and the lawsuit against it should be dismissed.

LEGAL STANDARDS

Under the Colorado Governmental Immunity Act (“CGIA”), a “public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section.” C.R.S. § 24-10-106(1). The CGIA establishes governmental immunity from suit in tort actions, but it waives immunity under specific circumstances, including (but not limited to) (1) when there is a dangerous condition of a public building; and (2) when there exists a dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic. C.R.S. §§ 24-10-106(1)(c) and –106(1)(d)(I).

Governmental immunity is an issue of subject matter jurisdiction. *Dennis v. City & County of Denver*, 2016 COA 140 (Colo. App. 2016) citing *City of Colorado Springs v. Powell*, 48 P.3d 561, 563 (Colo. 2002); *Springer v. City & County of Denver*, 13 P.3d 794, 798 (Colo. 2000). When a plaintiff sues a governmental entity and that entity moves to dismiss for lack of jurisdiction, the plaintiff has the burden of demonstrating jurisdiction and that immunity has been waived. *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001); *Tidwell ex rel. Tidwell v. City & County of Denver*, 83 P.3d 75, 85 (Colo. 2003). Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve after weighing the evidence, finding facts and entering conclusions of law. *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo.

1997). An appellate court will not disturb the factual findings of the district court unless they are clearly erroneous, meaning there is no support for it in the record. *Id.* If there is no evidentiary dispute, governmental immunity or waiver of immunity is a matter of law, and the trial court may rule without a hearing. *Padilla*, 25 P.3d at 1180.

UNDISPUTED FACTS (FOR PURPOSES OF THIS MOTION)

1. On November 22, 2016, Plaintiff was waiting for a Fort Collins bus at a bus stop along the north side of East Harmony Road west of Zeigler Road. *Plaintiff's Complaint* at ¶¶ 4, 23.
2. Plaintiff asserts that various equipment and trucks were situated off of the north side of, or in the northernmost lane of, Harmony Road, and that several traffic cones had been placed on Harmony Road closing portions of the northernmost lane. *Id.* at ¶¶ 17-28.
3. There was no curb or gutter between the bus stop shelter and the roadway. *Id.* at ¶ 25.
4. The bus stop shelter had an advertising panel on its west side acting as a wind break, which obstructed the view to the west. *Id.* at ¶ 34.
5. Plaintiff left the bus stop and took steps toward Harmony Road to look for her bus. *Id.* at ¶ 35.
6. Meanwhile, Anthony Jansa was driving a semi-tractor/trailer. *Id.* at ¶¶ 4, and 7-12.
7. Jansa pulled to the north side of the roadway to prepare to back into a construction zone east of the bus stop. *See* Traffic Accident Report, attached as **Exhibit 1**.
8. Jansa backed his semi-tractor/trailer and ran over the Plaintiff, who was in the roadway, causing injury. Exhibit 1; *Plaintiff's Complaint* at ¶¶ 4, 9, 36, 39, 51-53, 59-60 and 68.
9. There was no flagman or lookout or audible backup warning for the Jansa semi-tractor/trailer. *Id.* at ¶¶ 37, 38, 76, 85 and 87.

10. Jansa told officers that he observed Plaintiff at the bus stop and had no idea why she would walk into traffic. He had not been able to see behind him. Exhibit 1.

11. Based on his investigation, investigating officer Drew Jurkofsky determined that Plaintiff walking into the roadway was the proximate cause of the collision. Exhibit 1.

ARGUMENT

The Plaintiff's first six claims for relief are asserted against Jansa and Jansa Trucking. The Plaintiff's claims against the City are found in Plaintiff's seventh and eighth claims for relief. In the seventh claim, attempting to argue that waiver of immunity pursuant to C.R.S. § 24-10-106(1)(c), Plaintiff alleges that her injuries resulted due to the City's negligence in constructing or maintaining a public building, to wit, the bus stop shelter. *Id.* at ¶ 116. In the eighth claim, attempting to argue waiver of immunity pursuant to C.R.S. § 24-10-106(1)(d)(I), Plaintiff alleges that her injuries resulted due to the City's negligent construction or maintenance of Harmony Road which created a dangerous condition which physically interfered with the movement of traffic. *Id.* at ¶¶ 131-132, 135. Plaintiff's creative allegations aside, they fail to overcome the CGIA. These statutory exceptions to governmental immunity do not apply under the facts of this case and the City therefore has governmental immunity entitling it to dismissal.

A. Nothing in Plaintiff's Complaint supports a finding that Plaintiff's injuries were caused by construction or maintenance of the bus stop shelter.

Plaintiff attempts to assert a combination of various factors which ultimately amount to a "dangerous" public building, i.e., a dangerous bus stop shelter. Her attempt is not unlike the plaintiff's attempt in *Padilla*, who argued that the placement of a stroller combined with the use of a storage room without a window or line of sight created a dangerous condition in a public building, resulting in an injury to a minor. *Padilla*, 25 P.3d at 1179. In affirming the lower courts'

decisions granting immunity and finding no waiver, the Colorado Supreme Court in *Padilla* ruled that the plaintiff failed to allege sufficient jurisdictional facts associating her injuries with actions or omissions of the public entity *in constructing or maintaining* the public building. *Id.*

The same holds true here. Plaintiff alleges that the bus stop shelter, purportedly a public building, was in a dangerous condition. What Plaintiff does not do, however, is link her use of the bus stop with construction or maintenance of the bus stop shelter. There is nothing in Plaintiff's Complaint supporting a finding that her injuries were caused by construction or maintenance of the bus stop shelter. It is indisputable that there was no construction or maintenance being done to the bus stop shelter at the time of the incident whatsoever.

Going one step further, Plaintiff was not even at or in the bus stop shelter when she was injured. She admittedly departed from the bus stop, stepping into the roadway to see if her bus was about to arrive. While she alleges injury due to a combination of factors such as the design of the bus stop (referencing a panel obstructing her view to the west, and the lack of a curb or gutter between the bus stop shelter and roadway) and the conduct of third-party Jansa, these allegations are jurisdictional insufficient. *Padilla*, 25 P.3d at 1180-81 (waiver of immunity under Section 106(1)(c) applies only if alleged injuries occurred as a result of (1) physical condition of the public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining the public building or facility).

Plaintiff's injuries had nothing to do with any construction or maintenance of the bus stop or bus stop shelter. Therefore, the waiver exception found in Section 106(1)(c) does not apply.

B. Nothing in Plaintiff’s Complaint supports a finding that Plaintiff’s injuries were caused by construction or maintenance of Harmony Road that physically interfere[d] with the movement of traffic.

A plaintiff must show as a threshold jurisdictional matter that the condition upon which the plaintiff bases her tort claim existed because of the government’s act or omission in maintaining or constructing the condition rather than the government’s design of the condition. *Swieckowski*, 934 P.2d at 1384. Here, Plaintiff’s injuries had nothing to do with the construction or maintenance of the roadway. There was no construction or maintenance of the roadway being done. Therefore, the waiver exception found in Section 106(1)(d)(I) does not apply.

Plaintiff does not even allege that construction or maintenance of Harmony Road or that the actual physical condition of Harmony Road is what caused or contributed to her injuries. Instead, Plaintiff alleges that third-party Jansa “created a dangerous and hazardous condition on a public highway” by backing up without a “flagman”, “lookout” or “audible backup warning.” *See* Plaintiff’s Complaint at ¶¶ 36-38, 53. Plaintiff also alleges that there was no “curb or gutter between the bus stop shelter and the roadway.” *Id.* at ¶ 25. Plaintiff alleges traffic cones were placed in Harmony Road, but that no cones, tape, signage, or other items indicated a closure of the bus stop shelter. *Id.* at ¶¶ 19, 21. Plaintiff further alleges that the City was “establishing a construction site that encompassed” Harmony Road. *Id.* at 30. Even if true, these allegations are insufficient because Plaintiff is not asserting that there was a dangerous condition caused by construction or maintenance of the roadway, but that the dangerous condition was caused by a lack of warnings and negligent design of temporary traffic control.

Failure to warn and failure to close cannot serve as the basis for finding a dangerous condition and, thus, a waiver of governmental immunity. *Medina v. Colorado State Hwy. Patrol*,

35 P.3d 443, 449 (Colo. 2001); *see also Swieckowski, supra* (failure to post a sign warning of an end of widened portion of pavement); *Willer v. City of Thornton*, 817 P.2d 514 (Colo. 1991) (failure to post sign warning of a dip in pavement); *Szymanski v. Department of Highways*, 776 P.2d 1124 (Colo. App. 1989) (failure to post sign warning of blind spot); *see also* C.R.S. § 24-10-106(1)(d)(I) (the phrase “interferes with the movement of traffic” shall not include traffic signs, signals, or markings, or the lack thereof).

Plaintiff’s allegations that the City was “establishing a construction site” or that the Utilities department was “undertaking a construction project” are mere attempts to muddy the waters. Even accepting the Plaintiff’s allegation as true, the allegations concede that it was the City’s *design* of temporary traffic control, not actual construction or maintenance of the roadway itself, or the underground utility facilities for that matter, which caused her injuries.

In *Estate of Grant v. State*, 181 P.2d 1202, 1206-1207 (Colo. App. 2008), the Colorado Court of Appeals made clear that no immunity is waived when an injury occurs due to the design of temporary traffic control. There, the plaintiff argued, and the trial court initially agreed, that the State had waived immunity in negligently maintaining a highway by failing to employ temporary concrete barriers and failing to require a contractor to employ adequate safety devices and methods of traffic separation during construction. The defendant had argued that there may have been a design inadequacy, but not negligent maintenance. The Court of Appeals agreed with the defendant and reversed the trial court, finding that the design of a chosen traffic control plan, even if negligent, was not a waiver of immunity. *Id.* Here, no construction or maintenance was being done at the time of the incident to either the roadway or to the bus stop shelter. It is only the design of the traffic control and lack of warnings which Plaintiff claims were negligent.

At the heart of Plaintiff's Complaint are allegations of negligent design of traffic control, failure to post warnings and failure to close the bus stop. But Colorado case law makes clear that such allegations are jurisdictionally insufficient. Reading the statute as it was meant to be read, governmental immunity applies and no waiver applies, as a matter of law.

CONCLUSION

Defendant City of Fort Collins therefore requests that this Court enter an Order granting its motion and dismissing Plaintiff's Complaint against it, with prejudice, pursuant to C.R.C.P. 12(b)(1) and C.R.S. § 24-10-106; and for all other appropriate relief deemed warranted.

Dated: November 30, 2017

/s/ Peter C. Middleton

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**ATTORNEYS FOR DEFENDANT
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/s/ John R. Duval

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In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2017, I electronically filed and served the foregoing **DEFENDANT CITY OF FORT COLLINS' MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and C.R.S. § 24-10-106** via the Colorado Courts E-Filing system upon the following:

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Original Signature on File

/s/Julie Eaglesham

Julie Eaglesham