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DISTRICT COURT, LARIMER COUNTY, COLORADO
201 LaPorte Avenue, Suite 100
Fort Collins, CO 80521-2761
Phone: 970-498-6100

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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Attorneys for Defendant City of Fort Collins
Peter C. Middleton, Esq., #32335
HALL & EVANS, L.L.C.
1001 17th St., Suite 300
Denver, CO 80202
303-628-3300
303-628-3368 / Fax
middletonp@hallevans.com

John R. Duval, #10185
Deputy City Attorney
City of Fort Collins
300 LaPorte Avenue
Fort Collins, CO 80522-0580
970-416-2488
jduval@fcgov.com

Case No. 2017-CV-030903

Div. 3C

DEFENDANT CITY OF FORT COLLINS'
REPLY IN SUPPORT OF 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 Reply in Support of Motion to Dismiss Plaintiff's Complaint pursuant to C.R.C.P. 12(b)(1) and C.R.S. § 24-10-106.

INTRODUCTION

There were no construction or maintenance activities being done to the bus stop shelter or to the road at the time of the incident. While Plaintiff alleges that a construction site for nearby underground utilities was being staged, the crux of her allegations amounts to negligent design, failure to warn, and failure to close, all of which are jurisdictionally insufficient to constitute a waiver of governmental immunity. Plaintiff cannot show any structural or physical defect in the bus stop shelter or road. Plaintiff cannot show her injuries resulted from any construction or maintenance or condition of the bus stop shelter or road. Rather, her injuries resulted from her own conduct when she walked into the road and, regrettably, a truck driven by a third-party backed into her. She does not allege and cannot prove that her injuries resulted from a dangerous condition caused by the construction or maintenance of a public building or from a dangerous condition of a road which physically interfered with the movement of traffic. Therefore, the City has not waived immunity.

LEGAL STANDARDS

"Dangerous condition" means:

> [A] physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee **in constructing or maintaining such facility**. For the purposes of this subsection (1), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. **A dangerous condition shall not exist solely because the design of any facility is inadequate**. The mere existence of

> wind, water, snow, ice, or temperature shall not, by itself, constitute a dangerous condition.

C.R.S. § 24-10-103(1.3) (emphasis added).

"Maintenance" does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility. C.R.S. § 24-10-103(2.5).

A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort […] except as provided otherwise in this section. C.R.S. § 24-10-106(1). Immunity is waived by a public entity in an action for injuries resulting from:

(c) A dangerous condition of a public building; and

(d)(1) A dangerous condition of a public highway, road or street which physically interferes with the movement of traffic […]. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack therof. *Id.*

As with any statutory interpretation exercise, the focus of the analysis is legislative intent. *St. Vrain Valley Sch. Dist. RE-1J v. Loveland*, 395 P.3d 751, 754 (Colo. 2017) *citations omitted*. To determine legislative intent, the court must construe the statute as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *Id.* When the statutory language is ambiguous, courts give effect to the statute's plain and ordinary meaning and look no further. *Id.* If the statutory language is ambiguous, courts may resort to aids to statutory construction to determine legislative intent. *Id.*

ARGUMENT

A. Seventh Claim – Bus Shelter: There is no factual or legal basis for the argument that "curtilage" is part of a "public building" and no credible evidence that Plaintiff was anywhere but on a road when she was injured.

For purposes of the City's Motion, even if it is assumed for the sake of argument only that the bus stop shelter is a "public building" for purposes of C.R.S. § 24-10-106(1)(c), the Plaintiff was not injured in the shelter or due to any condition of the shelter. Had she been in the shelter when the truck driver was backing up, this accident would not have occurred. Since she was no longer in the bus stop shelter, it cannot rationally be argued that her injuries resulted from a dangerous condition of the shelter. Plaintiff's Seventh Claim therefore necessarily hinges on her strained argument that she was on the "curtilage" of the building (the bus stop shelter), therefore enabling her to tap into Section 106(1)(c). Her argument is unavailing.

The term "curtilage" is never mentioned or used in the CGIA statutes. Nor does any case law interpret "curtilage" as being a part of a "public building" for purposes of waiver. In *Stanley v. Adams County School District 27J*, 942 P.2d 1322 (Colo. App. 1997), the Court of Appeals considered the question of whether the dangerous condition of a driveway for service trucks accessing the cafeteria in a high school building constituted part of that building for purposes of waiver under Section 106(1)(c). In concluding that it did not, the Court stated: "This condition arose from circumstances on the grounds surrounding the building rather than the building itself. To the extent the driveway was physically connected to the building, we conclude that this connection is insufficient to make the driveway part of the public building for purposes of § 24-10-106(1)(c)." *Id.* at 1323-24. Therefore, since there is simply no question that Plaintiff was not in the shelter when she was injured, and that the "curtilage" of the shelter is not part of it for purposes of Section 106(1)(c), the Plaintiff cannot argue that her injuries resulted from a dangerous condition of a public building, the shelter.

In addition, as shown in Exhibit 1 of the City's Motion, Plaintiff was on the road when she was injured. The State of Colorado Traffic Accident Report itself states that Plaintiff "stepped into the roadway." *Id.* Witness Scott Walker gave a written statement and told Officer Chenoweth that he "saw a person laying face down in the road…" *Id.* Officer Jurkofsky, upon arriving at the scene, noted that he "saw the collision occurred in the westbound lanes of Harmony…" (Road). *Id.* Anthony Jansa told Officer Jurkofsky that he believed that Plaintiff was "in the roadway…" *Id.* Witness Chad Willschau told Officer Chenoweth that he "observed the female [Plaintiff] standing in the roadway, approximately a lane over…" *Id.* First responder Sarah Walton told Officer Chenowith that the female was "in the roadway" when attended to. *Id.* Even the Plaintiff, in her Response to the City's Motion, admits she was "on the road shoulder." Plaintiff's Response, p. 6. The road is the road, it is neither the bus stop shelter nor its "curtilage."

Plaintiff's citation to *St. Vrain Valley Sch. Dist. RE-1J v. Loveland*, 325 P.3d 1014, 1017 (Colo. 2014) is curious, since it ultimately was the first in a long line of cases which ultimately held that "dangerous condition" requires a physical defect in the construction or maintenance of the apparatus that caused injury. *St. Vrain v. Loveland*, 395 P.3d at 756 (Colo. 2017). Nonetheless, it does not support Plaintiff's argument and is distinguishable. First, nowhere in that case is the word "curtilage" used, addressed or discussed. Second, the question posed in that case was not whether a playground was a public building under Section 106(1)(c) but whether it might be a public facility under Section 106(1)(e). 325 P.3d at 1021-23. Regardless, comparing a playground with zip line equipment on the one hand, to a bus stop and a nearby road on the other hand, is an apples-to-oranges comparison. The road is not "curtilage" of the bus stop shelter; it is the road.

And, as the Court of Appeals essentially concluded in *Stanley*, areas around and connected to a public building "are not part of the building for purposes of § 24-10-106(1)(c)."

Plaintiff cannot rely on the waiver provision of Section 106(1)(c), which requires a showing of injuries resulting from a "dangerous condition" of a "*public building*." (emphasis added). Plaintiff cannot point to anything about the condition of the bus stop shelter or the use thereof which was dangerous or which resulted in her injuries, and she was clearly not even in the shelter when she was injured.

B. Eighth Claim – Road: There is no legal or factual basis for Plaintiff's assertion that there was physical interference with the movement of traffic or that there was construction or maintenance of the roadway which caused the allegedly dangerous condition.

Plaintiff must prove the existence of a "dangerous condition" which is caused by a negligent act or omission of a "public entity or public employee *in constructing or maintaining such facility.*" *See* Section 103(1.3) (emphasis added). In other words, Plaintiff must show that the public entity was constructing or maintaining the thing claimed to be dangerous. At the time of this incident, the City was neither constructing nor maintaining the road.

The law clearly states that the "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof. *See* C.R.S. § 24-10-106(1)(d). The law is also clear that the 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,* 25 P.3d 443, 449 (Colo. 2001) *citations omitted*. Likewise, immunity is not waived when an injury occurs due to design of temporary traffic control. *Estate of Grant v. State*, 181 P.2d 1206-07 (Colo. App. 2008). Tellingly, Plaintiff makes little to no attempt to address or distinguish *Medina* or *Estate of Grant*.

Instead, Plaintiff erroneously contends (on p. 12 of her Response) that "there is no dispute that the 'construction zone' interfered with the movement of traffic." Not only is there a dispute, but the facts clearly show any purported "interference" alleged is exempted from the language of Section 106(1)(d). Despite protestations to the contrary, the heart of Plaintiff's argument about the "dangerousness" of the roadway is that there were no "flagman or lookout or audible backup warning for the Jansa semi-tractor/trailer" and that the design of the staging area created a dangerous condition which proximately caused her injuries. No matter how one slices it, it amounts to allegations of negligent design and failure to warn. Even when viewing Plaintiff's allegations in the light most favorable to her, they still amount to claims of lack of warnings, defective design of temporary traffic control, and/or failure to close the road or bus stop shelter, which are insufficient to form the basis of a waiver of immunity.

Plaintiff's references to *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1182 (Colo. 2001) and *Dempsey v. Denver Police Department*, 353 P.3d 928, 932-33 (Colo. App. 2015) are equally unavailing. In *Padilla*, the appellate court affirmed immunity finding that negligent use of the closet as a seclusion room did not constitute negligent maintenance for the purposes of the "dangerous condition" exception, which ruling was affirmed by the Colorado Supreme Court. Here, Plaintiff essentially argues something similar: that the City negligently used the road as a construction staging area. This does not constitute negligent maintenance for the purposes of waiver. In *Dempsey*, a case that Plaintiff admittedly states is not "directly applicable in this case," the question involved the operation of an emergency vehicle subject to C.R.S. § 42-4-108. *Dempsey* does not apply to this case either directly or indirectly, and lends nothing to the analysis.

Plaintiff also misguidedly cites to *Walton v. Colorado*, 968 P.2d 636 (Colo. 1998) for the proposition that a "combination of factors" can create an exception to immunity. While that general proposition may be true, it is not the case here. As *Walton* and other cases make clear, the dangerous condition must be associated with construction or maintenance, not solely the design, of the public facility. *Id.* at 644. In *Walton*, it was not solely the design of the building that was at issue. The public entity was using members of the public to engage in the use of a building connected with its maintenance, cleaning the loft, without providing a safe means for doing so. In other words, in *Walton* there was an actual link between the injury and maintenance, in fact it was the plaintiff that was doing the maintenance. Here, there is no such link. Plaintiff's allegations relate only to negligent design, failure to warn and failure to close, all of which have been deemed insufficient for purposes of immunity waiver. There was no construction or maintenance being done to the road at the time of the incident.

CONCLUSION

WHEREFORE, for the reasons states herein and in its underlying motion, the Defendant City of Fort Collins 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 any and all other appropriate relief deemed warranted.

Dated: January 5, 2018

/s/ Peter C. Middleton
Peter C. Middleton, Esq., #32335
of HALL & EVANS, L.L.C.
ATTORNEYS FOR DEFENDANT CITY OF FORT COLLINS

/s/ John R. Duval
John R. Duval, Esq., #10185
Deputy City Attorney
of City of Fort Collins
ATTORNEY FOR DEFENDANT CITY OF FORT COLLINS

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 5th day of January, 2018, I electronically filed and served the foregoing **DEFENDANT CITY OF FORT COLLINS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT 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:

David M. Herrera, Esq. HERMS & HERRERA, L.L.C. 3600 South College Avenue, Suite 204 Fort Collins, CO 80525 david@hhlawoffice.com *Counsel for Plaintiff*	James M. Meseck, Esq., #33021 Joseph W. Mark, #48644 White and Steele, P.C. 600 17th Street, Suite 600N Denver, CO 80202 jmeseck@wsteele.com jmark@wsteele.com *Counsel for Anthony J. Jansa and Jansa Trucking, LLC*

Original Signature on File

/s/*Julie Eaglesham*
Julie Eaglesham