

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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Case No. 2017-CV-030903

Div. 3C

**(PROPOSED) ORDER AND RULING RE: TRINITY HEARING AND DEFENDANT
CITY OF FORT COLLINS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO C.R.C.P. 12(b)(1) and C.R.S. § 24-10-2016**

Defendant, City of Fort Collins (“the City”), by and through their counsel, submits its proposed Order as requested by the Court, to memorialize and set forth the Court’s findings of fact and conclusions of law after conclusion of the *Trinity* evidentiary hearing held June 25, 2018.

C.R.C.P. 121 § 1-15(8) CONFERRAL: Undersigned counsel Peter Middleton has conferred with Plaintiff’s counsel, David Herrera, and forwarded a copy of this proposed order. Plaintiff’s counsel has reviewed it, and has objections to the inclusion of Paragraphs 6 through 9 of the “Introduction and Procedural Background” section, stating that the “procedural aspects of discovery have no place in this proposed order.” Defendant believes that the objection lacks merit and that Paragraphs 6 through 9 are 100% accurate statements and they are appropriate to include to summarize the procedural history leading up to the Court’s ruling. Defendant leaves it up to the Court as to whether to include Paragraphs 6 through 9. Other than the dispute over Paragraphs 6 through 9 of this proposed Order, there is no dispute over this proposed Order.

INTRODUCTION AND PROCEDURAL BACKGROUND

1. Plaintiff filed her Complaint against the Defendants, which included The City of Fort Collins, a Colorado municipal corporation on October 25, 2017. The First through Sixth Claims for Relief are asserted against other defendants. Plaintiff’s Seventh and Eighth Claims for Relief assert claims of negligence against the City.

2. The City filed a motion to dismiss on November 30, 2017. In its motion, the City sought dismissal based on governmental immunity.

3. On December 18, 2017, Plaintiff filed its Response brief in opposition and requested a hearing pursuant to *Trinity Broadcasting of Denver v. City of Westminster*, 848 P.2d 916 (Colo. 1993). Plaintiff also requested limited discovery be allowed prior to the *Trinity* hearing.

4. On January 5, 2018, the City filed its Reply brief in support of its motion.

5. On January 10, 2018, the Court ruled that Plaintiff was entitled to undertake reasonable discovery and was entitled to an evidentiary hearing to determine whether Plaintiff's claims against the City are barred under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*

6. The Court initially set the *Trinity* hearing for May 7, 2018, which was later postponed and reset for June 25, 2018, upon joint motion of the parties.

7. Plaintiff served, and the City answered, written discovery, which included interrogatories, requests for production of documents and requests for admission.

8. Plaintiff also served notices of depositions pursuant to C.R.C.P. 30(b)(1) and 30(b)(6) and ultimately took the depositions of the following City representatives:

May 7, 2018: Travis Walker, Electric Field Services Manager (Utilities, Light and Power)
May 7, 2018: Steve Varnell, Traffic Control Crew Chief (Traffic Control)
May 7, 2018: Chad Willschau, Crew Chief (Utilities, Light and Power)
May 18, 2018: Joseph Olson, City Traffic Engineer (Traffic Operations)

9. The City took the deposition of Plaintiff, Ilse Westphal, on May 18, 2018.

10. The *Trinity* evidentiary hearing was held on June 25, 2018 and lasted from 10:00 a.m. to approximately 5:00 p.m. Both Plaintiff and the City called witnesses and submitted exhibits. The Court took the matter under advisement.

11. On July 12, 2018, the Court issued its oral ruling from the bench, granted the City's motion, and requested defense counsel to prepare a proposed Order consistent with its ruling.

FINDINGS OF FACT

The Court found following the hearing that the evidence in the case was relatively undisputed in terms of what happened, including:

1. The City is a municipal organization.
2. The City was involved in a ductwork project installing electrical utilities.
3. Specifically, on November 21 and 22, 2016, the City was involved in placing vaults on the north side of Harmony Road, west of the intersection with Ziegler.
4. The project required the City to establish a construction zone for the work to be performed, which included equipment at the scene, including a crane, several work vehicles, rigging for the crane, and placement of certain temporary traffic control measures, including placement of what has been described as a “cone zone”, which essentially closed off the designated bike lane and the acceleration lane in the westbound lanes of Harmon Road.
5. The cone zone which the City laid out extended from just west of the intersection with Ziegler Road, to some point to the east of a designated bus stop.
6. While the precise distance from the end of the temporary cone zone to the bus shelter was not presented, the end of the cone zone was approximately four or five longitudinal lane markings east of the bus stop. In other words, the bus stop was west of the cone zone.
7. On the day of the incident, November 22, 2016, Plaintiff was present at the bus stop earlier that morning after having been dropped off at that bus stop. She attended a medical appointment and then returned to the bus stop after her appointment.
8. Plaintiff was at the bus stop in the bus stop shelter, waiting for her bus to arrive.

9. Plaintiff then left the bus stop shelter and walked into the traveled portion of the roadway west of the cone zone. She left the shelter and went into the roadway to look to the east to see if the bus was approaching, claiming that her view to the east was obstructed, although whether her view was obstructed was in dispute.

10. After Plaintiff entered the roadway, co-defendant Anthony Jansa, who was delivering rigging for the crane used for the project, was attempting to back his truck and trailer into the construction zone from the west. He apparently was unable to see Ms. Westphal and he struck her.

11. Ms. Westphal was struck somewhere near the middle of the right-hand lane to the north of the designated bike lane.

CONCLUSIONS OF LAW

Plaintiff alleged that there are two applicable waivers under the Colorado Governmental Immunity Act with regard to the claims asserted against the City. The first waiver she relies on is set forth under C.R.S. § 24-10-106(1)(c) which provides a waiver for a dangerous condition of a public building. She claimed the bus stop shelter was a public building. The second waiver she relies on is set forth in C.R.S. § 24-10-106(1)(d) which provides that immunity is waived for injuries resulting from a dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic.

1. Dangerous Condition of a Public Building - Bus Stop Shelter

Plaintiff first argues that there is waiver for the dangerous condition of a public building, to wit, the bus stop shelter. The definition of “dangerous condition” is set forth in C.R.S. § 24-10-103(1.3) and provides that:

A physical condition of a facility or a use thereof that constitutes an unreasonable risk to the health and 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 in constructing or maintaining such facility.

The definition of “dangerous condition” also specifically provides that a dangerous condition “shall not exist solely because the design of any facility is inadequate.”

The Court is unable to find that Plaintiff’s injuries occurred as a result of the physical condition of the bus stop shelter or the use thereof. There is a lack of evidence before the Court that any physical condition of the bus stop shelter resulted in Plaintiff’s injuries. In fact, the evidence before the Court is that Plaintiff left the confines of the bus stop shelter and was not within the structure at the time of the incident. Further, the case law makes it clear that the injury must result from the construction or maintenance of the structure under the required waiver. The evidence does not support a conclusion that Plaintiff’s injuries resulted from any construction or maintenance of the bus stop shelter.

As it relates to the term “use thereof,” the cases of *Janks v. Sullivan*, 826 P.2d 825 (Colo. 1992) and *Padilla v. School Dist. No. 1*, 25 P.3d 1176 (Colo. 2001) are instructive and support the City’s position. For example, in *Jenks*, the court specifically held that a waiver only exists when the injury is caused by a dangerous condition stemming from a physical or structural defect in a public building, not one when it is caused merely by activities in a public building. *Id.* at 827.

The Court finds, based upon the evidence before it, that even viewing the evidence and inferences from the evidence in the light most favorable to Plaintiff, that Plaintiff has not established a waiver for a dangerous condition of a public building.

2. Dangerous Condition of a Public Highway, Road or Street

Plaintiff second argues that there is waiver for the dangerous condition of a public highway, road or street. This waiver requires a plaintiff to establish that the physical condition of the roadway constituted an unreasonable risk of health or safety of the public, that the defendant knew or should have known of the risk, and the plaintiff's injury was proximately caused by the City's negligent omission in maintaining the street. Additionally, a plaintiff must demonstrate that the dangerous condition interfered with the movement of traffic. The waiver set forth in Section 24-10-106(1)(d) specifically provides that "physically interferes with the movement of traffic" does not include the placement of traffic signs, signals, or markings, or the lack thereof. The Manual on Uniform Traffic Control Devices identifies construction cones as "tubular markers."

In determining whether or not the condition of the roadway constituted an unreasonable risk to the health or safety of the public, the plaintiff must establish that the road condition created a chance of injury, damage, or loss which exceeded the bounds of reason. *City and County of Denver v. Dennis*, 2018 CO 37 (Colo. May 21, 2018).

In *Estate of Grant v. State of Colo.*, 181 P.3d 1202 (Colo. App. 2008), the court held that immunity was not waived by the Colorado Department of Transportation's failure to place concrete barriers in a temporary construction zone. Even if the temporary traffic control plan was negligently or inadequately designed, immunity would not be waived.

Plaintiff here makes essentially the same argument as the Plaintiff did in *Grant*, to wit: that the construction zone as conceived and implemented resulted in a dangerous condition, particularly given its close proximity to the bus stop shelter. Plaintiff argues that the City created an

unreasonable risk of harm by failing to close the bus stop shelter, failing to extent the construction zone, failing to provide other appropriate warnings or to place a flagger at the site.

Again, the definition of a dangerous condition of a public highway, road or street does not require or include the duty to include traffic signs, signals or markings, or the failure to employ these devices. While there may have been evidence that the construction zone established by the City may have been inadequate to address the safety concerns resulting from the existence of the bus stop shelter, the failure to include signals, markings and signs is insufficient to establish a waiver. Likewise, negligent design, if any, of a construction zone does not result in a waiver.

The Court finds, based upon the evidence before it, that even viewing the evidence and inferences from the evidence in the light most favorable to Plaintiff, that Plaintiff has not established a waiver for a dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic.

CONCLUSION

The Court is unable to find that Plaintiff has established a waiver of immunity for a dangerous condition of a public building or public highway, street or road. Therefore, the City is entitled to governmental immunity and the City's motion to dismiss under C.R.C.P. 12(b)(1) is hereby GRANTED WITH PREJUDICE. The City may submit its Bill of Costs and Request for Attorneys' Fees pursuant to C.R.C.P. 54(d), C.R.S. § 13-17-201, and C.R.C.P. 121, Section 1-22, within twenty-one (21) days of this Order being entered by the Court.

Dated: August 6, 2018.

/s/ Peter C. Middleton
Peter C. Middleton, Esq., #32335
of HALL & EVANS, LLC
**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 6th day of August, 2018, I electronically filed and served the foregoing **(PROPOSED) ORDER AND RULING RE: TRINITY HEARING AND DEFENDANT CITY OF FORT COLLINS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO C.R.C.P. 12(b)(1) and C.R.S. § 24-10-2016** via the Colorado Courts E-Filing system upon the following:

David M. Herrera, Esq., #12818 HERMS & HERRERA, L.L.C. 3600 South College Avenue, Suite 204 Fort Collins, CO 80525 david@hhlawoffice.com <i>Counsel for Plaintiff</i>	James M. Meseck, Esq., #33021 Joseph W. Mark, #48644 White and Steele, P.C. 600 17 th Street, Suite 600N Denver, CO 80202 jmeseck@wsteele.com jmark@wsteele.com <i>Counsel for Anthony J. Jansa and Jansa Trucking, LLC</i>
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Original Signature on File

s/Cindy Blanton
Cindy Blanton, Legal Assistant