Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: May 4, 2023 10:27 AM FILING ID: 791BA12FA9625 CASE NUMBER: 2022SC632 **▲COURT USE ONLY▼**
Response to Petition for Writ of Certiorari Colorado Court of Appeals case number Case No. 2021CA439 Jefferson County District Court Case No. 2020CV30105	
Respondent: BEVERLY STICKLE v. **Petitioner:** COUNTY OF JEFFERSON	**Case No. 2022SC632**
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 32 and 53. It contains 7,888 words, and addresses those topics identified in C.A.R. 53(a)(1)-(3), as required by C.A.R. 53(c)(1).

SILVERN & BULGER, P.C.

By: *s/Thomas A. Bulger*
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STATEMENT OF THE CASE AND SUMMARY

I. INTRODUCTION

This is a dispute governed by the Colorado Governmental Immunity Act ("CGIA"), C.R.S. §24-10-101 *et seq*. Although the technical issue is the Court's subject matter jurisdiction over the claim, the "real" question is very simple; what are the definitions of the words "building" and "maintenance" under the CGIA? Both have common and widely understood meanings that are reflected in Colorado law, case law from other jurisdictions and dictionaries, which the Jefferson County District Court and the Court of Appeals applied to the facts of this case. Petitioner now challenge the use of those definitions. Thus, and stated another way, the question is therefore whether this Court should disregard those common and ordinary definitions, and instead use narrow and legalistic definitions that favor the government's interests, and which operate against the interests of the public?

The Respondent, Ms. Beverly Stickle, respectfully submits that the answer should be no. The government's position violates well settled rules of statutory interpretation, including that the Court should use the common meaning of the words chosen by the legislature, and disregards decades of precedent holding that

the CGIA's grant of immunity must be construed narrowly, and its waiver provisions interpreted broadly in favor of injured citizens. The Court of Appeals Order should be affirmed, and Ms. Stickle should be allowed to seek compensation for her injuries.

On February 6, 2018, Ms. Stickle was a customer at the Jefferson County Motor Vehicle Department, which is in a building owned and operated by the Petitioner, County of Jefferson ("the County"). Court File, at 18-19, 113-116 and 195-200; Transcript at 13-14, 18-19, and 194.[1] That building, commonly referred to as the Jefferson County Administration Building ("Administration Building"), is located at 100 Jefferson County Parkway, in Golden, Colorado, T. at 18-19, and 194, houses several County offices, including the Jefferson County District Court. C.F. at 113-116, and 195-97. Members of the public and residents of Jefferson County like Ms. Stickle, T. 13-14, frequently visit the Administration Building.

The Administration building has two (2) multi-level parking structures, both of which are open to the public. Ms. Stickle parked on the second story of the

1 Court File ("C.F."); Transcript of the evidentiary hearing on August 20, 2021, before the Jefferson County District Court ("T."). The Order of the Court of Appeals entered July 21, 2022 is referred to as "CAO."

northern most parking structure. C.F. at 195; T. at 20-24, and 42. A map of the Administration Building grounds is at C.F. 113-116. The north parking structure has two (2) stories connected by stairs, is enclosed by walls and support columns, has a roof, electricity and other fixtures, and was constructed to shelter vehicles while their owner's conduct business with the County. C.F. at 195-98, and 204-06; T. at 42-50, 60-63 and 92. The roof doubles as a parking area. C.F. at 197-98.

When Ms. Stickle left the Administration Building, she climbed the stairs of the north parking structure, and fell while stepping down from the landing of the stairs to the surface of the parking area. She suffered a compound fracture of her right arm in the fall. T. at 20-24; C.F. at 196-97; CAO at 3-5. Ms. Stickle testified that the color of the landing at the top of the stairs and the surface of the parking area were identical, which created an "optical illusion" of a level walking surface, T. at 36, which prevented her from appreciating the change in levels. T. at 36-37; C.F. at 197.

She was not the first to be fooled. As another victim described it:

> [P]aving the curb and the parking lot (the same color grey) created a hazard…it gives an optical illusion of a flat surface...

C.F. at 15-16, and T. at 76-77, 81-82. This occurred prior to Ms. Stickle's fall. C.F.

at 15-16; T. at 76-77, and 81-82. The Jefferson County District Court found that "after Ms. Stickle's fall, there were additional falls due to the same type of condition with two of them possibly happening the same day in 2019." C.F. at 201, and T. at 76-77, and 81-82. Although it was contested in the District Court, the County seems to acknowledge that this was an unreasonably dangerous condition. Its own safety experts described this as "the fall problem," T. at 109 and 131, and they concluded it was a safety concern. T. at 109 and 131.

It is indeed a safety issue. "As the trial court aptly put it, while it is obvious coming from the parking surface that there is a curb, 'it is not obvious coming from the other way that there is a step down…" CAO at 4, citing the Jefferson County District Court's findings of fact and conclusions of law.

The landing and parking area were re-topped in that grey material during the County's "Major Maintenance Repair and Replacement Plan" ("MMRRP") in 2017. C.F. at 200-12. During the MMRRP, which funds County repair and maintenance projects, T. at 115, the County added a new topping to both the landing and parking surface to "preserve the facility from decline or failure." CAO at 19-20. The purpose was to protect the building, and "to prevent water, mag

chloride and salt from infiltrating into the concrete because those substances will degrade the rebar and concrete itself." CAO at 22. According to the County, and other than the new topping (which was a darker color), there were no other changes made to the layout area and the configuration otherwise remained the same before and after the MMRRP. T. at 81-2, and 122; C.F. at 17-18. The Court of Appeals, at CAO at 22, noted the topping was different than what was there before.

Based on these basic facts, both the Jefferson County District Court and Court of Appeals concluded the parking structure is a "public building" as the word is ordinarily defined and therefore for the purposes of the CGIA. Black's Law Dictionary (11th ed.), for example, defines "building" as "a structure with walls and a roof, esp. a permanent structure" which can include "accessory buildings … such as a garage." CAO at 11-12. Other dictionaries, like the Cambridge Dictionary, define it as "a structure with walls and a roof … to give shelter to people, animals or things." The Courts below reasoned that this encompasses the Administration Building's parking structure which is permanent, is enclosed by walls, has two (2) floors and a roof, and was constructed to shelter property. These definitions are nearly identical to the definition of building this

Court used in interpreting another statute in *Sanchez v. People,* 349 P.2d 561 (Colo. 1960).

The Jefferson County District Court concluded that the condition of the building was unreasonably dangerous, and the Court of Appeals explained in detail that the unreasonably dangerous condition resulted from the building's maintenance, i.e., the resurfacing during the MMRRP. CAO at 19-24. The Court of Appeals applied the common and ordinary definition of "maintenance", as incorporated into the CGIA itself, as "an act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure." CAO at 21-23. Since the re-topping completed during the MMRRP was intended to do just that, it falls within the definition of maintenance. The Court of Appeals correctly rejected the County's argument that this was a "design" issue. First, and even if it was partially due to the building's design, that was not the "sole" cause, and immunity is therefore waived. *Medina v. State,* 35 P.3d 443 (Colo. 2001). Moreover, the County's broad interpretation virtually eliminated the CGIA's "maintenance" waiver. Every maintenance project requires some planning.

If this Court accepts the County's novel interpretation of "design," the maintenance exception would cease to exist.

II. STATEMENT OF THE FACTS

The Order of the Court of Appeals describes the area where Ms. Stickle fell and provides visual references. The Administration Building's multi-level parking structures are essentially identical. CAO at 2-4; C.F. at 42, 113-116, 195 and 196-200. Each has walls, support columns and a roof which also serves as space for public parking. CAO at 2-3, and 6-7. The roof level parking areas connect to the main courtyard (and public entrance to the Administration Building) by a flight of stairs. Photograph included in the at CAO at p. 2.

Ms. Stickle parked on the roof of the north structure before conducting her business with the County. T. at 18-19, 20-24, 194-195; C.F. at 195; CAO at 2-4. For Ms. Stickle to return to her car, she had to walk up the stairs to the second story, heading east, to where the stairs end at a landing. *Id.* Ms. Sickle's view as she climbed the stairs is depicted in photographs at p. 3 of the COA Order (C.F. at 199-200), which were taken the day of her fall. T. at 29-32; CAO at 2-4. These photographs therefore reflect the exact conditions from her exact vantage point.

C.F. at 199-200; T. at 29-32. The landing is raised several inches, requiring a step down to the surface of the parking area. CAO at 3-4; T. at 36. The walkway and parking area were the same color; a dark grey, except for the curb itself, which at the time was painted solid yellow.[2] CAO at 3-4. Photographs of the change in levels, one (1) from the side, and one (1) reflecting Ms. Stickle's view, are at p. 4 of the CAO at 4.

The Jefferson County District Court described it this way: "A review of the credible evidence reveals that when a pedestrian comes up the west stairs, they immediately step onto a raised walkway. The stairs are one shade of gray. However, the second-floor walkway is a considerably darker shade of charcoal. The surface of the second level parking/driving surface is the exact same shade of charcoal as the walkway." C.F. at 197-98. The Court of Appeals confirmed that basic description. CAO at 3-5.

[2] After Ms. Stickle fell, the County's safety and facility team investigated her (and other) falls, describing it as the "fall problem" and a safety concern. T. at 109 and 131, and 96 and 129-30. In response, the County added black striping to the yellow curb area to better alert pedestrians to the change in levels. T. at 96 and 129-30. A warning sign was also added, but the District Court held that the evidence was inadmissible as a subsequent remedial measure. T. at 48-50, 69-71, and 107-11.

The District Court and the Court of Appeals also agreed on the other physical characteristics of the structure, based on the testimony of the County's employees. It is a permanent structure constructed over 25 years ago as a secure place for County employees and the public to park their cars. CAO at 6-8. It is made of concrete; is enclosed by walls and has structural supports; is equipped with lighting, electricity and a fire suppression system; and has multiple levels, connected by stairs and covered by a roof. CAO at 6-8; C.F. 195-6, 204-6; T. at 42-50, 60-63 and 92.

The Court of Appeals found it persuasive that the parking structure is a "building" as defined by the County; "the parking structure - - including the step where Stickle fell -- had to comply with a 'building code.'" COA at 7 and 13-14. The Jefferson County supplement to the 2018 International Building Code defines a building as "any structure utilized or intended for supporting or sheltering…," and includes "motor-vehicle related occupancies" generally and "public parking garages" specifically, CAO at 13-14.

The reason Ms. Stickle fell is also undisputed, and was confirmed by both of the Courts below. The use of the same shades of charcoal gray at the edge of the

landing and parking area created an optical illusion of a level surface. As a result, Ms. Stickle (and others) misjudged the change in levels, mis-stepped and fell, fracturing her arm. CAO at 3-5; T. at 25, and C.F. at 118-20. After weighing all the evidence, including the photographs, Ms. Stickle's testimony and the evidence of other falls, the Jefferson County District Court concluded this was an unreasonably dangerous condition as defined by the CGIA.

How and when that unreasonably dangerous condition came into being was also undisputed and was summarized by the Court of Appeals, based primarily on the testimony of the County's employees. The parking structure, along with the rest of the Administration Building, was constructed between 1991-1992, and opened to the public in 1992. CAO at 6-7. After 15 years, beginning in or around 2017, the County began work to resurface the parking structure as part of the County's MMRRP. CAO at 19-21. The purpose of replacing the topping material was to prevent corrosive substances and water from seeping into and damaging the concrete. CAO at 19-20. Ms. Anne Panza, the County's Assistant Director for Construction Services who helped oversee the MMRRP, T. at 112 and 115, testified that the County used essentially the same topping material that had

originally been in place, although the color was a little darker. T. at 121-122, and 128. Ms. Panza testified she had no idea if the topping used in 2017 was in any other way different than what was there before. T. at 122, and 128. She testified the configuration of the area was unchanged, and that it was basically the same before and after the project (except for the new darker topping material). T. at 128-9, and 133. Although the change to a darker gray material might seem insignificant, it clearly was not. After the change, the area became (to quote the County) "a fall problem."

During the District Court's evidentiary hearing, not even the County seemed to suggest that the MMRPP and the re-topping project was anything but maintenance, and referred to it as such. T. at 9 and 121, in particular:

> Q. Let's turn to the parking structure ***maintenance***. Were there any major pavement projects in 2017…
>
> Q. Can you describe what that ***maintenance*** project entailed…

The documentary evidence confirmed counsel's choice of words. For example, in written discovery, the County stated it "maintains a 5-year capital ***maintenance*** plan, which incorporates inspections and repairs of major parking structures…" The County went on that "repairs" includes "***surface applications***,

joint repairs and significant structural repairs." [Emphasis added]. These discovery responses were Exhibit 12 at the *Trinity* hearing.

The County, unlike in the District Court, now argues this work is part of the building's "design," and that it applied the topping material in 2017 to "upgrade" and "improve" the building rather than to maintain it and protect it from damage from the elements and its snow removal activities (like placing mag chloride). However, the MMRRP document, which was the County's Exhibit I, lists all resurfacing work under the category "repairs." The documents list other work undertaken by the County during the MMRRP under different categories such as "design," "renovations," "upgrades" and "expansion." The resurfacing of the north parking structure was not listed under any of those categories, including under "upgrades" or "design."[3]

Ms. Panza never actually testified in support of the County's current position. At most, she "speculated" (to quote the Court of Appeals) that "the new

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3 In discovery, Ms. Stickle requested all architectural and design documents, plans, etc. Despite its current position that the re-topping of the landing and parking surface was a design decision, the County objected to any design documents as irrelevant. *Trinity* hearing, Exhibit 12.

one [topping material] ***may*** have been darker, a darker aggregate to help snow melt, etc." CAO at 23.

III. PROCEDURAL HISTORY OF THE CASE

Ms. Stickle filed her lawsuit against the County alleging that it was responsible for her injuries due (in part) to its negligence in maintaining the parking structure, which she alleged is a "public building" under the CGIA, C.R.S. §24-10-106(1)(c). The County responded by filing a Motion to Dismiss alleging it was immune from liability on March 16, 2020. The County raised several arguments, including that the parking structure is not a "public building" and that it was not unreasonably dangerous. The County did not argue that the MMRRP, the re-topping project generally, or that the choice of the re-topping material (and its color) was part of the building's "design" or was part of an "improvement" to the building. The County's Reply filed on May 7, 2020, did not raise the "design" or "improvement" arguments either.

The Jefferson County District Court allowed the parties limited discovery (C.F. at 55-67, and 73-83) and held an evidentiary hearing on March 9, 2021, pursuant to *Trinity Board of Denver, Inc. v. City of Westminster,* 848 P.2d 916

(Colo. 1993). Ms. Stickle testified, as did several County employees, including Ms. Panza. On March 13, 2021, the Jefferson County District Court issued findings of fact and conclusions of law, and ruled that the County was not immune from liability under the CGIA. C.F. beginning at 194. The District Court correctly observed that the CGIA generally shields governmental entities from liability for injuries caused by their employees. However, in its findings of fact and conclusions of law, the Court found that an exception to immunity applied, because of the "dangerous condition" of a "public building," for which the County could be held liable pursuant to C.R.S. §24-10-106(1)(c). Ms. Stickle had also alleged that other waiver provisions applied, but the District Court disagreed. Those rulings were not appealed.

The County appealed. The Court of Appeals affirmed the Jefferson County District Court's ruling. The Court of Appeals also held that because the injury occurred at a "public building" as the word is ordinarily used, and because the unreasonably dangerous condition of that building was created during the County's "maintenance" of that building during the MMRRP, immunity was waived under C.R.S. §24-10-106(1)(c). The Court of Appeals concluded that even if the

building's "design" was partly to blame for the dangerous condition (as the County then alleged), it was not the sole cause, and the County therefore remained responsible.

SUMMARY OF ARGUMENT

The facts, as outlined in detail above, are undisputed. The issues certified for review, at their core, call on this Court to define and apply the ordinary meaning of two (2) key words; "building" and "maintenance." However, it is nonetheless important to recognize the overarching purpose of the CGIA.

While the CGIA provides immunity to public entities in some instances, it also balances the need to protect the government from excessive liability with the need to ensure that injured individuals have a means of seeking redress. *Springer v. City & County of Denver,* 13 P.3d 794 (Colo. 2000); *Padilla v. School Dist. No. 1,* 25 P.3d 1176 (Colo. 2001); *City & County of Denver v. Dennis ex rel. Heyboer,* 410 P.3d 489 (Colo. 2018); *Walton v. State*, 968 P.2d 636 (Colo. 1998); *State v. Moldovan,* 842 P.2d 220 (Colo. 1992). That basic (and important) purpose of the CGIA, to allow injured members of the public to recover for their injuries, is all too often "overlooked." *Daniel v. City of Colorado Springs,* 327 P.3d 891 (Colo.

2012). The law however is very clear. Since the CGIA is in derogation of the common law, *Padilla,* 25 P.3d at 1177, the Act's grant of immunity must be construed narrowly. *Daniel*, 327 P.2d at 892. As a necessary and logical corollary, the CGIA's provisions waiving immunity must be interpreted broadly in favor of injured members of the public. *Springer,* 13 P.3d at 798; *Walton,* 968 P.2d at 642; *Tidwell ex rel. Tidwell v. City & County of Denver,* 83 P.3d 75, 86 (Colo. 2003).

One important way in which the Courts effectuate the purpose of the CGIA is by using the ordinary and common meaning of the words used. *Fogg v. Macaluso,* 892 P.2d 271 (Colo. 1995); *Askew v. Industrial Appeals Office*, 927 P.2d 1333 (Colo 1996); *State v. Nieto,* 933 P.2d 493 (Colo. 2000); *Medina, supra*; *Padilla,* 25 P.3d at 1180; *Powell v. City of Colorado Springs,* 25 P.3d 1266 (Colo. App. 2000). As discussed below, most dictionaries, legal dictionaries, and cases have all defined a building in a very similar way; a building is a permanent structure, with walls and usually a roof, for the enclosure and protection of people or property. The dictionary definition is a strong indication of the ordinary meaning of a word. *People v. Voth,* 312 P.3d 144, 149 (Colo. 2013); *Dennis ex rel. Heyboer, supra*.

This Court recognized, relying on the dictionary, a very similar definition over sixty (60) years ago, holding a "building … is an edifice, erected by art, and fixed upon or over soil…thus all stationary structures within Colorado…are within the term building, so long as they are designed for use in the position in which they are affixed." *Sanchez, supra,* 349 P.2d at 561-2, cited with approval in *Armintrout v. People,* 864 P.2d 576 (Colo. 1993); *Smith v. State,* 902 P.2d 712 (Colo. 1995).

In crafting that definition, the Court in *Sanchez, supra*, relied on the cardinal rule of statutory interpretation, which is identify and give effect to the intent of the General Assembly. *Sanchez, supra; Smokebrush Found.,* 410 P.3d at 1240, emphasizing that it is not the role of the Court to re-write the statute. Rather, it is presumed that the legislature meant what it clearly said. *Askew,* 927 P.2d at 1337. The *Sanchez* Court, after considering the dictionary definition, concluded: "***We believe it was the legislature's intent that a building is 'a structure which has a capacity to contain, and is designed for habilitation…or the sheltering of property***.'" 349 P.2d at 562 [emphasis added].

The Jefferson County District Court and Court of Appeals simply followed well settled law and applied that ordinary and common definition. A multi-level

parking structure, which is enclosed by walls and a roof, has electric power, stairs and was designed to shelter vehicles, falls within most dictionary definitions, ***and*** the definition crafted by this Court in *Sanchez, supra,* to reflect the intent of the General Assembly. The holding of the Court of Appeals that the parking structure is a public building under the CGIA should be affirmed.

The District Court Court of Appeals also concluded that the building was in an unreasonably dangerous condition, meaning the danger resulted from a "physical or structural defect in the building," *Jenks v. Sullivan*, 826 P.2d 825, 827 (Colo. 1992), overturned on other grounds in *Bertrand v. Board of City Commissioners,* 872 P.2d 223 (Colo. 1994). "Physical condition" is not defined by the CGIA. However, this Court has interpreted it broadly in the past, holding for example in *Walton*, 968 P.2d at 637-8, that a fall caused by using a ladder on a freshly waxed floor to access a loft while engaged in maintenance satisfied that requirement.

The Court of Appeals specified that the dangerous condition was caused, in part, by the County's "maintenance" of the building, rather than its "design." "Maintenance" is defined by the CGIA as "the act or omission of a public entity or

public employee in keeping a facility in the same general state of repair or efficiency as mutually construed or in preserving a facility from decline or failure." Under the CGIA, immunity is not waived for defects caused ***solely*** by a building's design. *Medina,* 35 P.3d at 459 (holding "it is only when the dangerous condition is ***solely*** attributable to design is the state immune."). [Emphasis added]. "Design" means "to conceive or plan out in the mind." *Swieckowski v. City of Fort Collins,* 934 P.2d 1380, 1386 (Colo. 1997). The distinction between the two (2) is "logically temporal." *Medina*, 355 P.3d at 459. An injury that results from a condition created after the building's initial design is maintenance. *Id.*

Here, the County's witnesses and its documents confirmed that re-topping the landing and parking area a "maintenance" project. They confirmed that the purpose was to prevent water and chemical seepage from damaging the parking structure, which falls squarely within the definition of maintenance under the CGIA. While it may be preventative maintenance, it is nonetheless still maintenance. Indeed, and other then one speculatory remark by Ms. Panza, there was no evidence, documents or testimony that the choice of re-topping material and the color of that material was "conceived or planned out" as opposed to the

implementation of its maintenance and repair project. To expand "design" to the level suggested by the County would eliminate any distinction between the two (2), since every maintenance project or repair must (by necessity) include at least some planning and similar choices. For these reasons, the Court of Appeals holding should be affirmed.

ARGUMENT

I. SUMMARY OF THE LEGAL PRINCIPLES; THE STANDARD OF REVIEW AND THE CGIA

The question of immunity under the CGIA is treated as a motion to dismiss pursuant to C.R.C.P. 12(b)(1). *Corsentino v. Cordoza,* 4 P.3d 1082 (Colo. 2000). While the Plaintiff bears the burden of proof, *Trinity, supra,* that burden is relatively lenient. *Dennis, supra.* For example, under C.R.C.P. 12(b)(1), the Plaintiff is entitled to all reasonable inferences that can be drawn from the evidence. *Swieckowski,* 934 P.2d at 1384; *Trinity, supra; Tidwell,* 83 p.3d at 85. In other words, the Plaintiff is not required, at this early stage, to prove her case by a preponderance of the evidence. Rather, the Court must simply be satisfied that it can hear the case because it falls within one (1) of the CGIA's waiver provisions. *Swieckowski, supra.*

In Colorado, the standard of review on appeal for issues of governmental immunity pursuant to Rule 12 depends on whether the Court's ruling was on a question of law or a question of fact. If the Court of Appeal's ruling involves a question of law, such as the meaning of the words in the statute, the standard of review on appeal is *de novo*, and this Court will review the issue independently. *Swieckowski,* 934 P.2d at 1282; *Douglas v. City & County of Denver,* 203 P.3d 615, 618 (Colo. App. 2008). However, the Court must remain cognizant of the purpose of the CGIA, which "is to allow the common law of negligence to operate against governmental entities except to the extent it has barred suit against them." *Walton*, 968 P.2d at 643. The CGIA's waiver provisions must therefore be strictly and narrowly construed. *Corsentino,* 4 P.3d at 1086. Giving effect to the intent of the legislature is the lynchpin of the analysis. *Springer*, 13 P.3d at 799.

Questions of fact, on the other hand, are for the District Court to resolve. *Swieckowski, supra.* If the Court's ruling was on a question of fact, the standard of review on appeal is more deferential, and this Court will only reverse the lower court's ruling if it is clearly erroneous. *Dennis, supra.* Under this clearly erroneous standard of review, the District Court's factual findings can only be overturned if

there is no support for it in the record. *Continental Western Ins. Co. v. Jim's Hardwood Floor Co.,* 12 P.3d 824, 828 (Colo. App. 2000).

II. THE JEFFERSON COUNTY ADMINISTRATION BUILDING'S TWO (2) STORY PARKING STRUCTURE IS A "BUILDING" WITHIN THE MEANING OF THE CGIA, BASED ON THE ORDINARY MEANING OF THE WORD AS DEFINED BY THIS COURT SIXTY (60) YEARS AGO, MULTIPLE DICTIONARIES AND PERSUASIVE AUTHORITY FROM OTHER APPELLATE COURTS

A. STANDARD OF REVIEW

Pursuant to C.R.S. §24-10-106 (1)(c), governmental immunity has been waived for a dangerous condition caused by the negligence of a public entity in constructing or maintaining any "public building." The CGIA does not, however, define "public building." The interpretation of the term building in the CGIA is a question of law that is reviewed *de novo*. *Corsentino, supra*. The Jefferson County District Court's factual findings, which must then be applied to that definition (summarized above) to determine if the parking structure falls within that definition are reviewed under a clearly erroneous standard. *Continental Western, supra.* Ms. Stickle agrees that the County preserved this issue for review.

B. THIS COURT SHOULD APPLY ITS OWN PRECEDENT, THE LEGAL ANALYSIS OF THE OTHER COURTS THAT HAVE EXAMINED THE QUESTION, AND COMMON AND ORDINARY DICTIONARY DEFINITIONS, AND AGAIN HOLD THAT A "BULDING" IS ANY EPRMANENT, STATIONARY, ENCLOSED STRUCTURE USED FOR SHELTERING PROPERTY

The Colorado Court of Appeals holding that the area where Ms. Stickle fell is a "building" is correct, for several reasons, including because it is the only reasonable interpretation of the plain language of the CGIA.

Courts must interpret statutes based on the ordinary meaning of the words used. *Fogg v. Macaluso,* 892 P.2d 271 (Colo. 1995); *Powell v. City of Colorado Springs,* 25 P.3d 1266 (Colo. App. 2000). The Court should not add or subtract from the language of the statute, nor read into the statute something that is not there. Strained interpretations must be avoided, *Colonial Penn. Ins, Co. v. Colorado Ins. Guar. Assoc.*, 799 P.2d 448, 451 (Colo. App. 1990), and common definitions should not be ignored in favor of hyper-technical or legalistic interpretations. *Stephens v. City & County of Denver,* 659 P.2d 666 (Colo. 1983). The reason for this is well settled; the role of the Court is to ascertain and effectuate the will of the legislature, not to legislate itself. *Denmark v. State of Colorado*, 954 P.2d 624, 625 (Colo. 1998); *Medina,* 35 P.3d at 445; *Smokebrush v.*

City of Colorado Springs, 410 P.3d 1236 (Colo. 2018). "The Court will not judicially legislate by reading a statute to accomplish something that the plain language does not suggest, warrant or mandate." *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994).

If the legislation is clear, straightforward and unambiguous, and the phrases have a commonly understood meaning, the analysis should end there by applying the language as written. *Padilla,* 25 P.3d at 1180; *Vaughan v. McMinn,* 945 P.2d 404, 408 (Colo. 1997); *City of Westminster v. Dogan Constr. Co.,* 930 P.2d 585, 590 (Colo. 1997); *Town of Superior v. Midcities Co*., 933 P.2d 596, 600 (Colo. 1997).

While the analysis must focus on (and in this case should end with) the ordinary meaning of the words used, this Court has provided additional guidance. First, absent a definition included in the statute itself, this Court must presume the legislature knew the meaning of the words it used and intended to use their ordinary meaning. *R.E.N. v. City of Colo. Springs*, 823 P.2d 1359 (Colo. 1992). Second, this Court must assume that the legislature was aware of this Court's prior interpretation of a word in other statutes dealing with the same or similar subject

matters. See, by way of example, *State v. Nieto*, 993 P.2d 493 (Colo. 2000) and *People v. Washburn*, 593 P.2d 962 (Colo. 1979), noting that legislative "silence" to the Court's interpretation is evidence of agreement. Third, and perhaps most importantly, the Court should look to dictionaries and similar reference materials to ascertain the ordinary meaning of words. Dictionaries are a strong, if not the best, indication of the ordinary meaning of a word. *People v. Deadmond,* 683 P.2d 763, 766 (Colo. 1984); *Voth,* 312 P.3d at 149 (Colo. 2013); *Dennis,* 418 P.2d at 491; *Walton, supra*. Taken together, these guidelines promote predictability and consistency in the interpretation of statutes.

Although the Court of Appeals characterized this issue as "novel", Ms. Stickle respectfully disagrees. This Court recognized the common and ordinary definition of the word "building" decades ago in *Sanchez, supra.* The case involved a man who had been charged with breaking and entering a "building" in violation of Colorado's burglary law. Mr. Sanchez was charged with breaking into and stealing a coin box from a telephone booth, located twenty-five feet from a gas station. The trial court determined a phone booth was a "building" based on the

common understanding of the word, and the jury convicted Mr. Sanchez. Mr. Sanchez appealed.

In rejecting his argument, this Court explained "it seems obvious that the legislature…sought to have one overall generic term, i.e., 'building' encompasses not only the variety of structures it had listed before, but also to cover all types of structures known but not then included and possibly other types which might be invented in the future." 349 P.2d at 561-2. The Court held: "***We believe it was the legislator's intent*** that a building is 'a structure which has a capacity to contain and is designed for habitation…***or the sheltering of property***." *Sanchez,* 349 P.2d at 562. [Emphasis added.] This Court went on, emphasizing the definition is very broad:

> A ***building is generally considered to be an edifice, erected by art, and fixed upon or over soil…thus all stationary structures within Colorado…are within the term building, so long as they are designed for use in the position in which they are affixed***." [Emphasis added.]

Thus, the basic features of a "building" under Colorado law is that it is constructed on land to be permanent and is built for the purpose of sheltering people or property.

As the Court of Appeals observed, *Sanchez* did not define building for use in the criminal code, or for any statute, or because of some technical aspect of that case. This Court stated it was using the common and ordinary meaning of the word building, as reflected in the dictionary. CAO at 12-13, "[T]he *Sanchez* Court did not interpret a statutory definition of 'building' unique to the criminal code. Instead, the Court considered the ordinary meaning of the term, with the aid of a dictionary and cases for other states."

The Colorado General Assembly has used a similar and broad definition, stating "building" includes any structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind. (C.R.S. § 18-4-19, defining "building" as a "structure which has the capacity to contain, and is designed for the shelter of…property…"); C.R.S. §18-4-101 ("Building means a structure which has the capacity to contain, and is designed for the shelter of…property…"). This reinforces, once again, what building usually means.

Indeed, even the County uses a similar definition. As the Court of Appeals summarized, the County's definition of building, as reflected in its various building codes, is broad and specifically includes parking garages. CAO at 13-14.

The Federal government also defines building broadly, and "***in terms of common experience and understanding***," as:

> The gist of the definition is a structure in question is a building if it encloses a space within walls, is covered by a roof, and has a purpose such as the furnishing of shelter of housing, or other working office, parking, display or sales space. [Emphasis added].

Robert E. Catron v. Comm. of the Internal Revenue Service., 50 T.C. 306 (1968).

Even if this Court had not resolved this question 60 years ago, and even if the definition of building was not contained in Colorado's other statutes, Federal law and the County's own codes, it would not change the outcome. Dictionary definitions are the best and preferred indicator of a word's common usage. See, for example, *Walton, supra*; *Dennis,* 418 P.2d at 491; *Deadmond,* 683 P.2d at 766; *Dennis,* 418 P.2d at 491; *Vorth,* 312 P.3d at 149. Notably, this Court relied heavily on a dictionary definition of building in the *Sanchez* case to define this exact word. Virtually every dictionary definition supports the position that the parking structure in this case is a "building." The Cambridge Dictionary defines building as "A structure with walls and a roof, such as a house or factory, to give protection to people, animals or things." Webster's Dictionary defines it as a "thing built: a constructed edifice designed to stand more or less permanently… enclosed by

walls and serving as a…storehouse…shelter…or other useful structure…" Merriam-Webster defines it as "a usually roofed and walled structure built for permanent use (as for a dwelling)." Webster's Third New International Dictionary states "it is a constructed edifice designed to stand more or less permanently … covered by a roof and more or less completely enclosed by walls, and serving as dwelling, [or] storehouse …" The Oxford English Dictionary defines a building as "a structure with walls and a roof, such as a house, school, store, or factory."

Legal and other dictionaries use a similar definition.[4] Ballentine's Law Dictionary defines a building as "any structure with walls and a roof," or as "a structure designed and suitable for sheltering or storing property…," citing several legal treatises, including 29 AMJRev.ed., Ins. §293, and 13 AMJ2d Bldgs., §§1

4 See also, www.dictionary.com ("A relatively permanent enclosed construction over a plot of land, having a roof and usually windows and often more than one level"); www.businessdictionary.com ("a permanent or temporary structure enclosed within exterior ("a permanent or temporary structure enclosed with exterior walls and a roof…"); www.definitions.uslegal.com ("any walls and a roof…"); www.definitions.uslegal.com ("any structure that has [a] roof and walls, especially a permanent structure. It can be any structure that is designed or intended for…enclosure, shelter or protection…of property having a permanent roof that is supported by columns or walls.").

and 6. Black's Law Dictionary, cited by the Court of Appeals, recognizes that a garage is a specific type of "accessory building."

Case law from other states support this as well, although most often in zoning and criminal cases. In *Chicago Title and Trust Co. v. Village of Lombard*, 166 N.E. 2d 41 (Ill. 1960), for example, the court held that a parking garage is a building under the Illinois Building Code. See also, *Moore v. Wilmington Housing Authority,* 619 A.2d 1166, 1174 (Del. 1993); and *People v. Miller,* 213 P.3d 534 (Ca. App. 1940), cited with approval by this Court in *Sanchez, supra.* However, the Jefferson County District Court and Court of Appeals looked to one case in particular because it analyzed whether a parking structure was a "building" under that state's governmental immunity statute. Since it addressed an almost identical issue, the Courts found the analysis in *Pierce v. City of Lansing,* 694 NW 2d 65 (Mich. App. 2005) instructive.

This is correct. First, Michigan's governmental immunity statute is virtually identical to the CGIA, and immunity is waived under Michigan law for a dangerous condition of a public building. Like the CGIA, the Michigan statute does not define public buildings. Like here, Michigan Courts looks to the

dictionary to determine the ordinary meaning of words. *Pierce*, 694 NW 2d at 68, citing *Ali v. Detroit*, 554 NW 2d 384 (Mich. App. 1996). Relying on the dictionary, the Court rejected the City's argument, the same argument made by the County in this case; basically, that a parking garage is nothing more than two (2) parking lots "stacked on top of each other." Rather, the *Pierce* Court explained:

> "Building" is defined as a "reasonably permanent, essentially box like construction having a roof and used for any wide variety of activities, such as living, entertaining, or manufacturing." The Random House College Dictionary…and a "structure designed for habilitation, shelter, storage, trade…and the like." A structure or edifice enclosing a space within its walls, and usually but not necessarily covered with a roof." Black Law Dictionary (5th ed.). *Id.*

Although not controlling, the decision in the *Pierce* case is persuasive and reinforces yet again the ordinary definition of building.

The primary purpose of a parking garage or parking structure is to provide a covered, enclosed and safe space for vehicles to park. This function is like that of other types of buildings, such as warehouses and storage facilities, and to a degree even office buildings, and shopping centers. They are constructed in much the same way as these other types of buildings, in that they have walls and a roof and at least in this case have electrical power and other safety devices like a sprinkler

system. As to the latter, they must (like all other types of buildings) comply with the County's building codes.

Based on the definitions in Colorado law, including the definition used by this Court in *Sanchez*, *supra*, as well as the definitions recognized by other states and virtually every dictionary, a two (2) story parking structure like that at the Jefferson County Administration Center is a "building." Since the CGIA does not adopt a different definition, it is presumed that the legislature intended to use this common definition, and this Court should affirm the holding of the Court of Appeals.

III. REPAVING A PARKING AREA IS "MAINTENANCE" WITHIN THE MEANING OF THE CGIA, BASED ON THE ORDINARY MEANING OF THE WORD AND THE ACT'S DEFINITION

A. STANDARD OF REVIEW

The factual findings of the Court below are reviewed under the clearly erroneous standard. *Dennis, supra.* This includes the Court's findings of fact regarding the nature and purpose of the MMRRP. The application of those facts to the language of the statute is a question of law. *Douglas, supra.* The County did not specifically argue that it was immune from liability because the MMRRP work

was "design" or "improvements" of the property in the District Court. It did however argue generally that the building was not in a dangerous condition.

B. THIS COURT SHOULD HOLD THAT REPAIRING THE SURFACE/ROOF OF A BUILDING IS MAINTENANCE BECAUSE IT IS INTENDED TO KEEP THE BUILDING IN GOOD CONDITION, APPEARANCE AND OPERATION

Under the CGIA, immunity is waived if the public entity is negligent in the construction of,[5] or its maintenance activities for, a public building, and if that negligence results in an unreasonably dangerous condition. Since the parking structure is clearly a building, the next question is whether re-topping, which was responsible for the optical illusion that caused Ms. Stickle and others to fall, was part of its "maintenance" or its "design" (as now argued by the County). This presents a related question. If re-topping the landing and parking surface implicates the building's design (despite the lack of any evidence to support it), was the design the sole cause of the dangerous condition? *Medina*, 35 P.3d at 459. The distinction between design and maintenance was considered in *Medina, supra*.

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5 'Construction' under the CGIA means the original work to form, make or create, and 'any permanent or temporary alterations to the facility made during its ensuing lifetime in service to the public.'" *Padilla, supra.*

"Design" means "to conceive or plan out in the mind." *Medina*, *supra*, citing *Swieckowski*, 934 P.2d at 1386. "Maintenance," on the other hand, means any act undertaken to keep property in the same general state of repair as initially constructed, but does not include a duty to modernize or improve. C.R.S. 24-10-103(2.5) therefore defines maintenance as "the act or omission of a public entity as public employee in keeping a facility in the same general state of repair or efficiency as mutually constructed or in preserving a facility from decline or failure."). "Logically then the critical distinction is temporal: an injury results from [maintenance] when it is caused by a condition that develops subsequent to … the initial design. An injury results from inadequate design, in contrast, when it is caused by a condition … that inheres in the design and persists to the time of injury." *Medina*, 35 P.3d at 445-6.

The temporal analysis clearly supports Ms. Stickle's position. In 2017, fifteen (15) years after the building was constructed, the County replaced the topping with a new, darker and therefore different material.

The rationale for the maintenance exception to immunity also supports Ms. Stickle. Immunity for maintenance is waived because "a public entity is in a

position to avoid injury to the public when it engages in a public work project." *Lopez v. City of Grand Junction,* 488 P.3d 364 (Colo. App. 2018) citing *Springer*, 13 P.3d at 801-2.

In interpreting the maintenance waiver, this Court has done so broadly. For example, in *Walton, supra*, a student was injured when a ladder providing access to a loft slipped on a newly waxed floor, causing him to fall while trying to move a desk. There was no evidence that the wax was applied incorrectly, or that the ladder was dangerous or defective. Other than the fact that it was difficult to access, the loft did not have any unreasonably dangerous characteristics. But, because of the combination of those factors, ***and because the injury occurred during a maintenance project,*** this Court found immunity was waived. *Id.*

Here, there is no evidence in the record related to the building's design, let alone that the topping material the County used in 2017 (fifteen (15) years after the Administration Building opened) was part of the design process, or that it was "conceived." The evidence does however establish that re-topping the landing and parking area is maintenance as the word is ordinarily used. "Maintenance," is ordinarily defined as activities necessary or appropriate to keep a facility in good

condition, operation, and appearance. For example, the Merriam Webster Dictionary defines "maintenance" as "the upkeep of property or equipment." It is also commonly defined as "the work needed to keep a road, building, etc., in good condition," (Cambridge Dictionary), or as "activities required to keep something in good condition, such as property." (www.thelaw.com). The legal dictionary www.lawinsider.com includes resurfacing and patching as examples of "maintenance."

Repaving (re-topping) is clearly an activity that is necessary to maintain the surface of a roadway or parking lot in good condition and proper operation. It is a routine maintenance activity that is commonly performed on roadways and parking lots. It is like other routine maintenance activities such as painting, patching, and sealcoating. www.epa.gov/npdes/construction-general-permit-cgp-frequent-questions.

As the Court of Appeals explained, the "undisputed facts establish that this topping material was added as part of the maintenance plan [MMRRP]… to prevent water, mag chloride and salt from infiltrating into the concrete because those substances will degrade the rebar and concrete itself." CAO at 22-23. This is

maintenance. Throughout the evidentiary hearing in front of the Jefferson District Court, even the County recognized this commonsense conclusion, often referring to the repaving as "maintenance." While certainly not dispositive, it is an indication of the simple fact that, as the word is typically used and understood, repaving or re-topping are types of maintenance.

The holding in *Lopez, supra,* provides further guidance. The *Lopez* case involved injuries from a natural gas leak after a gas line ruptured during work on a traffic light. Although the primary legal issue was whether the government was liable for the acts of an independent contractor, the analysis is instructive. The Court of Appeals looked to the analytical framework established by this Court in *Springer,* 13 P.3d at 794. The Court of Appeals noted "that a public entity lacks immunity because it is responsible for its acts (in creating), as well as its omissions (failing to reasonably discover and correct), an unsafe condition in a public building." *Lopez, supra*, citing *Springer,* 13 P.3d at 801 ("A public entity, while operating or performing maintenance…is liable because it is in a position to avoid creating ('act') or failing to prevent ('omission') a circumstance resulting in injury."). Although it did not cite this specific language, or cite to the case in its

analysis, that is precisely what both the Jefferson County District Court and the Court of Appeals found. Indeed, the County did both. It created the danger (as evidenced by the increased number of falls) and failed to act by not recognizing the danger of the layout while doing work to maintain it). The evidence in this regard was undisputed (and overwhelming), and the Court of Appeals decision should therefore be affirmed.

CONCLUSION

Because the CGIA is in derogation of the common law, it must be strictly construed against the government and in favor of the people injured by governmental negligence. *Walton,* 968 P.2d at 643 ("the [CGIA's] waiver provisions are entitled to deferential construction in favor of the victims injured by the negligence of governmental agents, while the immunity provisions are subject to strict construction."). This means that any ambiguities in the CGIA must be resolved in favor of allowing injured people like Ms. Stickle to pursue their claims. *Id.*; *Daniel, supra.*

While this well settled principle supports Ms. Stickle's position, and the holding of the Court of Appeals, it is not the lynchpin of the analysis. The plain

and ordinary use of the words used, and long-standing precedent from this Court, control the analysis and dictate the result. There is no definition of building that would exclude the Administration Building's parking structure. Even if there was, which there is not, this Court has already defined the term in the exact same way that the Court of Appeals did.

Similarly, the evidence established that the re-topping which caused Ms. Stickle to fall was done to preserve and maintain the building and was therefore a maintenance activity for which immunity is waived. It cannot, under any reasonable definition, be characterized as a design flaw given the years which had passed, and given the intervening event of the MMRRP.

Respectfully, both the Jefferson County District Court and the Court of Appeals resolved the issues in this case correctly and consistently with Colorado law. The County's appeal should again be denied, and this matter remanded to the trial court so that Ms. Stickle's claim can proceed on the merits.

Respectfully submitted this 4th day of May, 2023.

SILVERN & BULGER, P.C.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of May, 2023, a true and correct copy of the above and foregoing ANSWER BRIEF was served, via Colorado Courts Efiling, on the following:

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