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<tr><td>On Writ of Certiorari from the Colorado Court of Appeals
The Honorable Judge Navarro, Judges Lipinsky and Kuhns, JJ., concurring
Court of Appeals Case Number 2021CA439</td></tr>
<tr><td>Appeal from the District Court for the First Judicial District, Jefferson County, Colorado
The Honorable Judge Klein
District Court Case Number 2020CV30105</td></tr>
<tr><td>Petitioner/Appellant:
COUNTY OF JEFFERSON,

v.

Respondent/Appellee:
BEVERLY STICKLE.</td><td rowspan="2">Supreme Court Case Number 2022SC632</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

This brief complies with C.A.R. 28(g)(1), as it contains 3,175 words.

This brief complies with C.A.R. 28(c) in that it complies with C.A.R. 28(a)(1)-(3).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and 32.

JEFFERSON COUNTY ATTORNEY'S OFFICE

By: */s/ Rebecca P. Klymkowsky*
Kimberly S. Sorrells
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I. The Court Should Reject Ms. Stickle's Definition of "Building" Derived from Colorado's Criminal Code and Instead Find That the North Parking Lot Is Not a Building for Purposes of the CGIA.

Ms. Stickle urges this Court to find that a building, for purposes of the CGIA, is anything "constructed on land to be permanent and . . . built for the purpose of sheltering people or property." (Ans. Br. at 35 (referencing *Sanchez v. People*, 349 P.2d 561, 561-62 (Colo. 1960) (finding a telephone booth was a building for purposes of Colorado's then-existing crime of burglary).)[1] However, even if the Court is inclined to adopt the *Sanchez* Court's holding that "a building is 'a structure which has the capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property," 349 P.2d at 562 (quotation omitted) for purposes of the CGIA, that definition has two parts: first, that the structure has the ability to contain something, and second that its intended purpose or design is for habitation or for sheltering property. *Id.*

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[1] The County references the district court file by citation to "CF," the March 9, 2021 *Trinity* hearing transcript and exhibits by citation to "Tr." and "Ex.," respectively, the Colorado Court of Appeals' Opinion by "Op.," and the County's Opening Brief and Ms. Stickle's Answer Brief before this Court as "Op. Br." and "Ans. Br.," respectively.

Under the framework for which Ms. Stickle advocates, the North Parking Lot is not a building for two reasons. First, it only "contains" property (by dint of a knee wall with large openings) when a user parks on the lower level. CF, p. 195, *and see* Ex. D (photographs of North Parking Lot). Second, there is no evidence in the record that it was "designed" to "shelter[] property"; rather, it was designed to provide parking in roughly equal measures on the upper, exposed level and the lower, partially covered one, CF, pp. 195-96.

To add further confusion, Ms. Stickle relies on *Pierce v. City of Lansing*, 694 N.W.2d 65 (Mich. App. 2005), as instructive. (Ans. Br. at 39-40.) But *Pierce* suggests that a building need not even have a roof, offering the following definition: "[a] structure or edifice enclosing a space within its walls and usually, *but not necessarily* covered with a roof." (Ans. Br. at 40 (quoting *Pierce*, 694 N.W.2d at 68) (emphasis added)); *contra People v. Moyer*, 635 P.2d 553, 556 (Colo. 1981) (*en banc*) (finding fenced enclosure that provided "no effective protection against inclement weather and extreme temperatures" for chickens enclosed in it and "miniscule . . . sheltering effect" for dogs was not a building for purposes of COLO. REV. STAT. § 18-4-101). Under that definition, is a walled courtyard or garden without a roof a building? The Answer Brief would have this Court rule that it is. (Ans. Br. at 40.)

While it disputes that the North Parking Lot meets Ms. Stickle's proposed definition of building for CGIA purposes, the County's request is ultimately for clarity as to what characteristics a building must possess that an improvement, structure, or facility need not for purposes of waiving immunity under COLO. REV. STAT. § 24-10-106(1)(c). As germane here, does a ground-level parking lot, surrounded by a minimal knee wall and pillars to support an upper parking lot, lacking windows, HVAC, internal stairs or stairwells, offices, elevators, or direct entry into the Courts and Administrative Building, where even the lower parking lot is exposed to the elements in some areas, and where roughly half of the parking area is completely unenclosed, unroofed, exposed to the elements, and not designed to shelter anything, a building for purposes of the CGIA? CF, 195-196 (district court's description of North Parking Lot) Ex. D (photographs of North Parking Lot). The County again submits to this Court that it is not.

II. The County's Choice of Materials to Improve the North Parking Lot's Surfaces is Quintessentially a Design Choice for Which the County Enjoys Immunity.[2]

The County also urges this Court to reject Ms. Stickle's narrow reading of the Court's dangerous condition decisions, and instead find that Ms. Stickle's injuries are solely the result of a design defect for which the County is immune.

It is axiomatic that the County only waives its immunity under the dangerous condition of a public building exception if there is evidence that negligent construction or maintenance of the North Parking Lot caused Ms. Stickle's injuries. If there is only evidence of a design defect, the County maintains immunity.

In 2003, the General Assembly amended the CGIA, adding a separate definition of maintenance as:

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[2] As a preliminary matter, the Court should reject any suggestion by Ms. Stickle that the County did not preserve the issue of whether the alleged dangerous condition was the result of design versus maintenance. (Ans. Br. at 41-42; *contra* CF, pp. 18-28 (County's motion to dismiss), Op. Br. at 17-18 (reciting preservation history).) Likewise, contrary to Ms. Stickle's assertion that the County objected to providing any design documents (Ans. Br. at 21, n.3), the County objected to production of "site maps, architectural plans, and/or other documents *identified in your response to Plaintiff's interrogatories*" (emphasis added) both because the County did not identify any such documents in its discovery responses and on grounds of vagueness, overbreadth, burden, in addition to relevance. CF, pp 165-66 (County's responses to requests for production).

> 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 initially constructed or in preserving a facility from decline or failure. "Maintenance" does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility.

COLO. REV. STAT. § 24-10-103(2.5). (*See* Op. Br. at 20, n.4.) This definition must not only be read in harmony with the other provisions of the CGIA but must be internally harmonious as well – that is, the Court must give effect to the definition as a whole and cannot simply read out the language exempting from maintenance those acts that "upgrade, modernize, modify, or improve." *See, e.g., Poudre Sch. Dist. R-1 v. Stanczyk*, 489 P.3d 743, 747 (Colo. 2021) ("Our primary goal when interpreting a statute is to effectuate the legislature's intent. To accomplish this, we look to the entire statutory scheme in order to give consistent harmonious, and sensible effect to all its parts, and we apply words and phrases in accordance with their plain and ordinary meanings.") (internal citations, quotations omitted).

Notwithstanding this precept of statutory interpretation, Ms. Stickle argues that this Court should read its decision in *Medina* such that any action a public entity takes after the initial design of an improvement would always constitute maintenance because it is separated in time from the improvement's original design and construction. (Ans. Br. at 44.) *Contra Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1182 (Colo. 2001) (*en banc*) (construction "includes the

facility as original constructed *but also encompasses permanent or temporary alterations to the facility made during its ensuing lifetime in service to the public*") (emphasis added). But this misconstrues the County's argument, which is that the 2017 project involved a new ***design*** to which Ms. Stickle's injuries were wholly attributable. CF, pp 18-28. (*See also* Op. Br. at 20-25.)

The record contains no evidence that Ms. Stickle's fall was caused by defective construction. Similarly, the district court expressly found that:

> [T]he evidence and the allegations do not suggest a failure of maintenance, and the testimony by Mr. Danner was unrefuted that he and his team, upon learning of issues, work to try to determine the source of the problem and how to remedy the problem. Instead, the evidence demonstrates that the negligent act or omission stems from the decision to finish both the walkway and the drive surface with the same color – particularly after the 2017 incident and complaint regarding the illusion. This decision was a proximate cause of Ms. Stickle's fall and injuries.

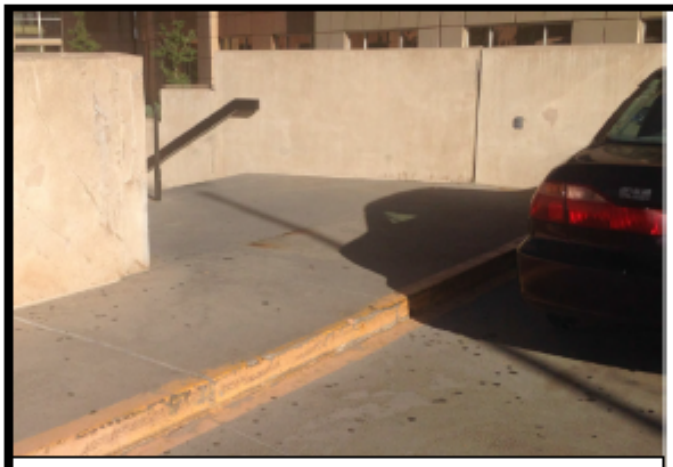
CF, pp 211-12. The district court's factual findings that the evidence and allegations do not suggest a failure to maintain are "binding on an appellate court unless they are so clearly erroneous as not to find support in the record." *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994) (*en banc*) (citing *Briano v. Rubio*, 347 P.2d 497 (Colo. 1959)).

Even assuming, *arguendo*, that this Court determines that the district court's finding that "the evidence and allegations do not suggest a failure of maintenance,"

is a legal conclusion subject to *de novo* review, it must nevertheless find that Ms. Stickle's injury was ***solely*** the result of a design defect for which the County is immune. The district court's analysis is devoid of any mention of design defect. In fact, when quoting the definition of "dangerous condition," the district court omitted the definition's limiting language that a "dangerous condition shall not exist solely because the design of any facility is inadequate." COLO. REV. STAT. § 24-10-103(1.3). This is where the district court erred. It found that the curb illusion created an unreasonable risk and concluded that the curb illusion was a dangerous condition without tying the dangerous condition to evidence in the record that it was caused by faulty construction or maintenance. The fact something creates an unreasonable risk does mean it qualifies as a dangerous condition unless it also meets all other elements of the definition. The dangerous condition must stem from the County's negligence in the construction or maintenance of the structure at issue. That the addition of the new topping material was completed as part of a maintenance project does not necessarily and inevitably mean that the County was negligent in its duty to maintain the parking structure.

The July 2017 fall upon which Ms. Stickle relies to demonstrate the County had notice of the curb illusion issue highlights this point. That incident occurred ***before*** the County's 2017 addition of the new topping material. CF, pp 151

(photograph), 125 (email about July 2017 fall); Tr. 74-77 (prior fall at undisclosed location occurred in July 2017, before addition of new topping), 81-82. While the record is silent as to the location of the July 2017 fall, even if it occurred at the same location as Ms. Stickle's February 2018 accident, the record evidence shows that the County modified, upgraded, and improved the area between July 2017 and Ms. Stickle's accident. This is evident in a comparison of the "before" and "after" photographs of the area in which Ms. Stickle fell, which demonstrates that the 2017 project was more than simple maintenance:



The North Parking Lot at the location of Ms. Stickle's fall as it appeared in August 2017. CF, pp 151 (photograph), 125 (email about July 2017 fall); Tr. 74-77 (prior fall at undisclosed location occurred in July 2017, before addition of new topping), 81-82.

The North Parking Lot at the location of Ms. Stickle's February 2018 fall following the addition of the new topping material, the repainting of the yellow hazard stripe, and the addition of white diagonal striping after the step-down.

As demonstrated above, rather than keeping the walking and parking/driving surfaces of the North Parking Lot in the same general state of repair as they had

been in previously, the County's 2017 project undertook to add the new topping material and new white striping in those areas; in doing so, it upgraded, modified, and improved what had been there previously. CF, pp 194-212 (trial court's factual finding was that curb illusion created by finishing walking and parking/driving surfacing the same color caused Ms. Stickle's injury); *and see* Op. at 19 (finding that the new topping material "was different from what had existed before"). The CGIA categorically exempts such acts from the definition of maintenance. *See* COLO. REV. STAT. § 24-10-103(2.5).

Once again, Ms. Stickle's entire theory of her case is that the County's decision to make the color of the walkway and the color of the parking surface the same created an optical illusion that caused her fall. Tr. at 25 (Ms. Stickle testified that "Well, I missed – I didn't see where there was any change in level and I missed the step and I fell face down trying to stop myself with my hands."); 36-38 (Ms. Stickle did not perceive the change in levels between the walking and driving surfaces, although she did see the yellow line demarcating the curb). Nor does Ms. Stickle allege or the evidence show that the new material had degraded since its 2017 application in a manner that constituted a hazard. CF, pp 197-98 (condition at completion of project was the same as at the time of Ms. Stickle's fall, as demonstrated by picture of area); 201, 211-12 (trial court expressly found that

there was no evidence of a lack of maintenance). Ms. Stickle does not contend that the new topping material was poorly applied and resulted in a lumpy or wavy surface that created a tripping hazard. If so, that would be indicative of negligence in the construction or maintenance that would support a waiver of immunity. Here, it is the specific design choice that created the illusion, nothing more.

A review of this Court's prior decisions regarding the "dangerous condition" analysis supports the conclusion that Ms. Stickle's injury was caused solely by a design defect for which the County enjoys immunity. As the County outlined in its Opening Brief, the dangerous condition analysis requires that a court first determine "the general state of being, repair, or efficiency [of the improvement] as initially constructed." *Medina v. State*, 35 P.3d 443, 448-49 (Colo. 2001) (*en banc*).

On this point, *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1383 (Colo. 1997), is instructive. That case involved the widening of an existing road rather than new construction. This Court held that the work "maintain" as used in the CGIA means "to repair or restore a roadway to the same condition as originally constructed." *Id.* at 1382. "While the government has no duty to improve a roadway, it does have a duty to repair a roadway where the roadway has changed from its initial construction ***and this change poses a danger.***" *Id.* at 1385

(emphasis added). When analyzing whether the plaintiff's injuries were due to a design defect or failure of a duty to maintain, this Court looked at the widened roadway as constructed, not as compared to the original roadway. In that case, the parties agreed that the widened road had been constructed according to the design. There, "the widened portion's abrupt beginning at the road's intersection with the ditch" was "part of the design of the improvement." *Id.* at 1386. The design of the improvement, not the original roadway, was the focus of the inquiry.

As applied to this case, the initial construction inquiry relates not to the genesis of the North Parking Lot as a whole, but rather to the 2017 addition of the new surface material. CF, pp 197-98. *Accord Medina*, 35 P.3d at 456 (remanding to trial court for findings related to the "general state of being, repair, or efficiency" of the subject road, and noting that a public entity's "duty to maintain can arise only after the road has been designed and constructed"). There is zero evidence in the record that the new topping and marking of the area was not constructed as contemplated by the County's 2017 project plans. There is likewise zero evidence in the record that the area in question on the day of Ms. Stickle's fall had changed in any way from its condition at the time the County completed the topping and striping project in 2017. Since there was no evidence of degradation of the surface materials applied in 2017, there is no evidence of a failure to maintain,

as the duty to maintain would require the County to return the walkway/parking surface to the same condition it was in upon completion of the 2017 addition of the new topping material.

Had the County not added a new material to the North Parking Lot's walking and parking/driving surfaces – that is, had those surfaces existed exactly as they had following the original construction of the North Parking Lot as reflected in the first picture on page 8 above, and had Ms. Stickle claimed that the original material created the curb illusion, the claim would have been a design defect claim. *Accord Medina*, 35 P.2d at 1386 (citing *Szmanski v. Dep't of Highways*, 776 P.2d 1124, 1125 (Colo. App. 1989), finding "intersection's 'blind spot,' improper sightlines, unduly high speed limit, and lack of warning signs regarding the dangerousness of the intersection . . . were all design flaws, despite the plaintiff's attempts to label them otherwise, and . . . that the government was immune"); *Willer v. City of Thornton*, 817 P.2d 514, 517 (Colo. 1991) (city immune from liability for claims brought driver injured when car struck dip in pavement at an intersection because driver did not allege that intersection construction or maintenance deviated from design). The result is the same if the County replaced the walking and parking/driving surfaces using the same material in the same areas contemplated by the improvement's original design as shown in

the first photograph above, and had that material caused an optical illusion. And such is also the case here, where Ms. Stickle's claim is that the decision to add a new material to both the walking and parking/driving surfaces caused her injury *because of the optical illusion it created*. (Op. at 22-23; *accord* CF, pp. 211-12 ("[T]he evidence demonstrates that the negligent act or omission stems from *the decision to finish both the walkway and the drive surface with the same color* – particularly after the 2017 incident and complaint regarding the illusion. *This decision* was a proximate cause of Ms. Stickle's fall and injuries.") (emphasis added); CF, p 125.) The fact this decision was made as part of the 2017 project, and not in original construction, does not transform this from a design issue to a maintenance issue.

Ms. Stickle's sole contention is that the County's decision to add a new topping to the North Parking Lot, and to have that topping cover both the walking surfaces and the parking/driving surfaces, created an "optical illusion" that caused her to perceive the walking and parking/driving surfaces as continuous rather than separated by a step-down. CF, p. 197. As a result, the dangerous condition with which Ms. Stickle takes issue was inherent in and solely attributable to the County's conception or plan (i.e., design) for the improvements. *Id.* As a result, the County enjoys immunity under this Court's jurisprudence.

CONCLUSION

For the reasons stated here and in its Opening Brief, the County respectfully requests that the Court reverse the Court of Appeals on both issues related to the CGIA's waiver of immunity for dangerous conditions of a public building. First, the County respectfully requests that the Court find that the North Parking Lot is not a building because it does not provide shelter from the elements for the individuals or vehicles that use it and was not intended to shelter individuals or property. Second, the County respectfully requests that the Court reject the contention that Ms. Stickle's fall was the result of a dangerous condition as defined in COLO. REV. STAT. § 24-10-103(1.3). Because the "optical illusion" that led to Ms. Stickle's injuries was created by a design defect, the County is entitled to immunity under the CGIA.

Respectfully submitted this 8th day of June, 2023.

JEFFERSON COUNTY ATTORNEY'S OFFICE

By: */s/ Rebecca P. Klymkowsky*
Kimberly S. Sorrells
Rebecca P. Klymkowsky
Eric T. Butler

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2023, I filed the foregoing APPELLANT'S REPLY BRIEF via CCE, which will send a true and correct copy to the following:

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Silvern & Bulger, P.C.
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/s/ Heather A. Hayward
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