COLORADO COURT OF APPEALS

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Appeal from El Paso County District Court
The Honorable Michael P. McHenry
Case No. 2021-CV-030904

▲COURT USE ONLY ▲

JOHN H. BRUCE, JR.

Plaintiff-Appellee

v.

JONATHAN WEBB, FALCON FIRE PROTECTION DISTRICT and WILLIAM YODER

Defendant-Appellants.

Case No.: 2022CA2034

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APPELLANTS REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this Reply 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, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

X It contains 5,293 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

> **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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

By: s/ *Sean J. Lane*
Sean J. Lane, No. 32000

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I. SUMMARY OF THE ARGUMENT

Appellant contends that the trial court committed reversible error in this matter. In essence, the trial court's determination can be understood to create a *per se* imposition of liability *if* an emergency responder proceeds past a stop sign below the speed limit and an accident occurs. The trial court's decision would chill emergency personnel when responding to emergency situations and renders the protections of the Colorado Governmental Immunity Act ('CGIA") superfluous.

Appellee does not sufficiently address the fact that the trial court determined that "due regard" was not given, instead Appellee presents the argument that what the trial court really meant by stating "due regard" is that "failed to slow down as may be necessary." The transcripts speak for themselves, where the trial court based the determination on the fact that "due regard" was not given. The fact that the written order, prepared by Appellee over objection by Appellants, states a different legal basis, is a red hearing. This Court has determined that similar orders should be critically scrutinized if they are prepared by a party to the proceedings. *Koontz v. Rosener,* 787 P.2d 192, 195 (Colo. App. 1989). Appellee's prepared order that changes "due regard" to "failed to slow down as may be necessary"

should be viewed with the upmost scrutiny as Appellee's were counsel of record when *Bilderback v. McNabb*, 474 P.3d 247 (Colo. App. 2020) was decided that reaffirmed the position that "due regard" had no applicability under the statute as determined in *Fogg v. Macaluso,* 892 P.2d 271 (Colo. 1995). Ultimately, it is unclear what basis was used by the trial court for its findings.

The District does not assert that it was surprised by the witnesses called at the hearing, what is surprising is that nearly every witness called by Appellee was proffered as an expert witness during the hearing, without advance notice of each experts opinions and no opportunity to rebut those opinions. The problem in the instant case is that this Court is presented with multiple experts that were proffered at the hearing rendered undisclosed and inaccurate legal opinions. *See* Opening.Br. at p. 32. It is undisputed that in the present case, three non-disclosed experts took the stand and testified that the standard of care required under the applicable statute is "due regard." Ultimately, the trial court reiterated in the findings that "due regard" was not given, thus waiving immunity. TR (Oct. 21, 2022), p. 211:14-23. To put it another way, the expert witnesses testified that it walked like a duck, quacked like a duck, then in their determination

it was a duck. *Lake v. Neal,* 585 F.3d 1059 (7th Cir. 2009)[1]. The trial court incorrectly stated that due regard was required, even though it was not.

The Trial Court in this case ultimately made an erroneous determination that even though Chief Webb slowed down to a speed below the speed limit, as he approached the intersection with his lights and sirens activated, that itself was unreasonable, though the testimony supported that his behavior was appropriate. There is but one piece of evidence that the trial court weighed, and that is the evidence of the speed at which Chief Webb was traveling. CF, 29. That evidence supports the fact that Chief Webb's speed was reasonable. However, that piece of evidence alone cannot be outweighed by all other factors that the trial court should consider. The law provides that Chief Webb, during times of emergencies, can ignore stop signs, stop lights and exceed the posted speed limit. *See* COLO.REV.STAT. § 42-4-108. The overall intent of the statute is to allow first responders to respond quickly to emergencies and shield them from liability *if* an accident were to occur. Here, Appellee's only argument is that Chief Webb, who did slow significantly, didn't slow down *enough*, even though he was

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[1] This is otherwise known as the *Duck Test* which apparently has wide judicial acceptance. *See Walczak v. Labor Works-Ft. Wayne LLC.,* 983 N.E. 2d 1146, nt.1 (Indiana. 2013).

below the speed limit and was, in fact, struck by Mr. Yoder's vehicle when all other vehicles in the area were pulled over. Apl. Br. at p. 17.

What Appellee does not address is the fact that every other vehicle, except for Mr. Yoder's, yielded and stopped for Chief Webb's approaching emergency vehicle that was easily seen from a long distance in an unobstructed area. Accidents do happen, that is a risk that everyone on the road takes when they operate an automobile. However, the statute is not intended to have a *per se* rule of liability imposed, rather the intent of the statute is to shield entities and individuals such as Chief Webb in situations exactly like the instant case.

II. ARGUMENT AND AUTHORITIES

A. *The driving conduct of Chief Webb was reasonable, safe and appropriate under the circumstances, with the only evidence in opposition to that being the fact that there was an accident, thus immunity has not been waived.*

1. Discussion

The facts of this case are relatively undisputed. *See* Apl.Br. at p. 16. Chief Webb was responding to a local brush fire that was endangering homesteads. CF, 252. Not only was Chief Webb operating his emergency vehicle with lights and sirens, but he was also being followed by a secondary emergency vehicle also operating lights and sirens. *See* (Tr. Oct.

21, 2022), p. 171: 11 Testimony of James Oakley. While in response to the emergency, it was established that at most Chief Webb was travelling 53 miles per hour in a 45 mile per hour zone but decelerated before entering the intersection. CF, 29. Thus, by operating both his emergency lights and sirens, Chief Webb was fully compliant with COLO.REV.STAT. § 42-4-108.

It is further undisputed that as Chief Webb approached the intersection of where the accident occurred, he slowed his vehicle to 38 miles per hour, 7 miles per hour below the posted speed limit. CF, 29. This evidence is corroborated by independent black box data captured from the vehicle itself, in addition to eyewitness testimony that mentions Chief Webb braking his vehicle and significantly slowing down. TR (Oct. 21, 2022), p. 178:17-25. In addition to the rapid deceleration of both Chief Webb's vehicle and the other emergency vehicle, Appellee's only properly designated expert testified that there was at least 10 seconds of clear line of sight at the intersection. TR (Oct. 21, 2022), p. 153:22-25. According to one witness's account, upon approaching the intersection there was not any traffic. TR (Oct. 21, 2022), p. 180:6-9. The only constituting cross traffic was Mr. Yoder's vehicle, who did not appear to be slowing down and yielding to the approaching emergency vehicles. TR (Oct. 21, 2022), p.

120:10-25. As Chief Webb proceeded through the intersection in accordance with the statutes, his vehicle was struck by Mr. Yoder's, who had failed to yield or slow to the emergency vehicle in accordance with COLO.REV.STAT. § 42-4-705(1). CF, 62. In this chain of events, only Mr. Yoder's conduct was unreasonable. Even though an accident ultimately occurred, that fact in itself cannot create a determination that the conduct of Chief Webb is *per se* unreasonable.

While the other issues brought forth in this appeal are equally as important, the errors discussed *supra* culminate with the trial court determination that immunity has been waived. It has long been understood that there are two competing policies found under the CGIA. The first being able to seek redress from governmental entities and the second being to grant immunity to emergency vehicle operators. *See Corsentino v. Cordova,* 4 P.3d 1082, 1088 (2000) citing *State v. Moldovan,* 842 P.3d 220 (Colo. 1992) and *Fogg*, 892 P.2d at 271. In this matter, the policy of providing *deference* to vehicle operators' decisions to avoid the chilling effect on the public's interest to quick responses to emergency situations is the glaring issue. The driving force behind this policy was Sen. Theibaut when he sought to clarify the statute. *Corsentino*, 4 P.3d at 1092

("we want emergency vehicles to *continue* acting according to [section 42-4-108(2)] and that when they act according to the statute, they have immunity to so act."). As stated *supra* the trial court has stated two different legal conclusions. The first being that the District did not exercise "due regard" when operating an emergency motor vehicle. TR (Oct. 21, 2022) p. 211: 14-19. The second being, that the District failed to slow down "as may be necessary" for safe operation. CF, p. 252. Assuming *arguendo* that Appellee is correct in their belief that even though the trial court stated the District failed to exercise due regard, what the trial court actually meant was that the District failed to slow down as may be necessary, the facts of this case would render COLO.REV.STAT. § 24-10-106 and § 24-4-108 superfluous.

As discussed in the District's Opening Brief, the net effect of the statutes discussing the interplay between granting and waiving immunity is that the rule of thumb is a "governmental entity is generally immune from tort liability in connection with the operation of an emergency vehicle so long as the vehicle is operating with emergency lights and sirens activated." *Giron v. Hice,* 519 P.3d 1083, 1089 (Colo. App. 2022), *cert. granted,* No. 22SC671, 2023 WL 2159655 (Colo. 2023). Taking out of

consideration that an accident occurred, Appellee does not present any arguments as to how exactly the conduct leading up to the accident was unreasonable or out of the ordinary under the circumstances. Rather, Appellee argues that since the black box established the rate of travel per hour, this conclusively proves that the trial court did not err. *See* Ap. Br. at p. 17. While the speed of travel is one of many factors the trial court should look at, this factor cannot be the sole and determinative factor as it was in this case. *See Bilderback*, 474 P.3d at 251. What Appellee does not address are the other factors in this accident, which are equally as important and weigh in favor of immunity for the District and its employees, as discussed in both *Giron* and *Corsentino. See Giron,* 519 P.3d at 1089 citing *Corsentino v. Cordova,* 4 P.3d 1082. Further, the data collected from Chief Webb's vehicle establishes that Chief Webb slowed to a *per se* reasonable speed, less than the posted speed limit, before entering the intersection.

On April 8, 2020,[2] Chief Webb, was responding to a brush fire that was jeopardizing the safety of the pubic and local homesteads. CF 140; CF,

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[2] We ask this Court to take Judicial notice under COLO.R.EVID. 201(f) that on March 25, 2020, Governor Jared Polis issued Executive Order D 2020 017, ordering Coloradans to stay at home after Governor Polis declared a

252. Chief Webb was responding in his Fire Protection vehicle, operating lights and sounds in accordance with COLO.REV.STAT. § 42-4-213. *Id.* While traveling down a country road highway to respond to the emergency, Chief Webb was in an area that had unobstructed sight lines in all directions and had a posted speed limit of 45 miles per hour. All testifying witnesses were able to see and hear Chief Webb's emergency vehicle approaching from a great distance. TR (Oct. 21, 2022), p. 153:22-25. All vehicles, except for Mr. Yoder's, appropriately yielded to Chief Webb.

The weather was clear and there were no visible obstructions to drivers' line sight. CF, 139. Appellee's expert testified that there was at least ten seconds of a clear line of sight for Chief Webb and the vehicle driven by Mr. Yoder prior to the intersection. TR (Oct. 21, 2022) p. 153:22-25. The Witnesses testified that all but one vehicle, Mr. Yoder's, had yielded and stopped as Chief Webb's vehicle approached the intersection.

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disaster emergency in response to COVID-19. *See Prestige Homes, Inc. v. Legouffe,* 658 P.2d 850, 853 (Colo. 1983); *Highlands Broadway OPCO, LLC, v. Barre Boss LLC,* ---P.3d---, 2023 WL 308999, 2023 COA 5, ¶ 6. By all appearances, life seemed to halt, except mother nature. Only essential businesses remained open, other business were forced to shut their doors. Rush hour traffic seemed to be a thing of the past. The entire country was forced to abandon what they once knew, so that they could face the unknown of an emergency pandemic.

TR (Oct. 21, 2022), p. 109:10-138:8. This is because pursuant to COLO.REV.STAT. § 42-4-705(1), when an emergency vehicle is approaching utilizing audio or visual signals, the driver of every other vehicle *shall* yield the right of way. The only vehicle that appeared to ignore the mandatory duty to yield to approaching emergency vehicles was Mr. Yoder's. TR (Oct. 21, 2022), p. 122:1-9. Mr. Yoder's failure to yield was, *per se*, unreasonable.

As Chief Webb's vehicle got closer to the intersection, the speed of his vehicle decreased from 53 miles per hour to 38 miles per hour. CF, 29. Thus, Chief Webb's vehicle was 7 miles per hour slower than the posted speed limit. *Id.* Once Chief Webb realized that Mr. Yoder was not yielding, he attempted to accelerate to avoid an accident. CF, p. 29. Unfortunately, Chief Webb was unable to avoid an accident as Mr. Yoder's vehicle hit the right rear quarter panel of his vehicle. CF, p. 156. This subsequently caused Chief Webb's vehicle to spin and hit Appellee who had properly yielded to the oncoming emergency vehicle. No witness testified that Mr. Yoder attempted to slow down or yield to the approaching emergency vehicle. TR (Oct. 21, 2022), p. 125. *See also Smith v. Janda,* 126 S.W. 3d 543, 546 (Tex. App. San Antonio, 2003) (Discussing the applicability of a similar sovereign immunity statute and emergency vehicle waivers);

Robinson v. City of Detroit, 613 N.W.2d 307, 311 (Mich. 2000) (holding that as a matter of law the governmental car was not the proximate cause of the accident after discussing the policies between conflicting duties).

While there is no case directly on point in Colorado, a similar statute to COLO.REV.STAT. 42-4-108 can be found in Louisiana. *See Muhleisen v. Bienvenu,* 325 So.3d 6078, 611 (La. App. 5th Cir. 2021). In *Muhleisen*, the Louisiana Court of Appels discussed the duty of care their governmental immunity statute LA.R.S. 32:24. More specifically, the Court was looking at the two duty of care standards found under LA.R.S. 32:24(d). The statute at issue in *Muhleisen* is as follows:

> The foregoing provisions shall not relieve the driver of an authorized vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

LA.R.S. 32:24(d)

The court in *Muhleisen* subsequently determined that the case law and statute provides that if the emergency vehicle meets the criteria of proceeding past a stop sign, but only after slowing down as may be necessary for safe operation, while making use of audible or visual signals to warn motorists of their approach, then the emergency vehicle driver may

only be held liable for actions which constitute a reckless disregard for the safety of others. *Id.* at 612 citing *Lenard v. Dilley,* 805 S.2d 175, 180 (La. 2002).

COLO.REV.STAT. § 42-4-108(4) has nearly the same language as the statue referred to in *Muhleeisen*. Colorado statute provides:

> The provisions of this section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of such driver's reckless disregard for the safety of others.

COLO.REV.STAT. § 42-4-108(4).

By all appearances, there seem to be two different duties owed to safety of the public within the Colorado statute. The first duty is "due regard" to the safety of all persons, which we know has no applicability under the present situation. *Fogg,* 892 P.2d at 277. However, the second duty of care is related to consequences[3], which means that it is only triggered *if* something were to happen. Meaning, liability would be imposed *if* it is established that the emergency vehicles driver conduct constituted a "reckless disregard" to the safety of others. *See Cisneros v. Elder,* 490 P.3d 985, 989 (Colo. App. 2020)

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[3] Consequences: A result that follows as an effect of something that came before. Black's Law Dictionary (11th ed. 2019).

(discussing the how reckless disregard applies to the CGIA) citing *White v. Hansen,* 837 P.2d 1229, 1233 (Colo. 1992) "The common thread that separates [willful and wanton misconduct, willful and wanton negligence, gross negligence, reckless conduct, and reckless negligence] from ordinary negligence's is that all defendant's conduct is so aggravated as to be all but intentional.").

There is no evidence that Chief Webb's conduct was aggravated or constituted a reckless disregard to the community. CF, 29. In fact, under the circumstances present in this case, Chief Webb's conduct was reasonable under the conditions. Chief Web entered the intersection at 38 MPH, 7 miles per hour less than what the Colorado Department of Transportation has deemed "reasonable" in this area. It is undisputed that Chief Webb was operating his emergency vehicle with lights and sirens. CF, 252. Multiple witnesses testified that they saw Chief Webb approaching the intersection with lights and sirens and that all vehicles, other than Mr. Yoder, were acting pursuant to the law and yielding to Chief Webb. TR (Oct. 21, 2022), p. 117: 4-23; *See also Muhleisen,* 325 So.3d at 612 (discussing the duty imposed on other drivers when an emergency vehicle is approaching which is similar to COLO.REV.STAT. § 42-4-705(1)).

Moreover, there were no obstructions and Chief Webb's vehicle was seen approaching the intersection for at least 10 seconds. TR (Oct. 21, 2022), p. 146:22-24; SUPP.EX Trinity Hearing, 10(a), (b) and (c). The only unreasonable behavior in the instant case was that of Mr. Yoder, who illegally failed to yield.

All of the actions taken by Chief Webb can be summed up as follows: he approached the intersection below the speed limit while operating lights and sirens. Yes, an accident occurred, but that does not mean that the actions taken by Chief Webb were aggravated or unreasonable, thus eliminating liability. *See Giron v. Hice,* 519 P.3d at 1087 (Officer Hice was traveling in excess of 100 miles per hour without his lights and sirens activated); *Corsetino v. Cordova,* 4 P.3d 1082 (Colo. 2000) (Deputy Cortese was speeding 50-60 miles per hour in a 35 mile per hour zone and failed to slow down when entering the intersection); *Tidwell v. City and County of Denver,* 83 P.3d 75, 85 (Colo. 2003)(Officer McAleer was driving 40-45 miles per hour in a 30 mile per hour zone without lights and sirens activated); *Bilderback*, 474 P.3d at 251 (Colo. App. 2020) (view was obstructed when entering an intersection). The mere fact that Chief Webb did not actually stop is not applicable in the analysis. All of Chief Webb's

conduct appears to be reasonable and there is no evidence of any aggravating factors. The *only* evidence of unreasonable behavior is the fact that there was an accident. However, that is the single factor that cannot be considered by this Court, or the trial court. *Quintana v. City of Westminster,* 56 P.3d 1193, 1197 (Colo. App. 2002).

B. *The trial court clearly stated that the District did not retain immunity because Chief Webb failed to give 'due regard' to the safety of the community.*

1. Response to Preservation of the Issue and Standard of Review

Contrary to Appellee's position, the District properly preserved the issue that the court's written decision does not comport with the findings made on the bench. *See* Apl. Br. at 25. In accordance with the order from the trial court, Appellee was instructed to draft a proposed order and submit it to the court. TR (Oct. 21, 2022), p. 215: 3-4. When the only draft was tendered to the District, an objection was raised, which became part of the record when Appellee filed the submission of the proposed order. CF, pg. 237. Due to the conflicting conclusions of law by the court, no deference should be afforded to the written order drafted by Appellee, rather this should be reviewed *de novo*. *People v. Kyler,* 991 P.2d 810, 818 (Colo. 1999).

2. Discussion

The District will concede that *In re Marriage of West,* 94 P.3d 1248 (Colo. App. 2004) appears to stand for the proposition that the court has the authority to supplement or modify any remarks made at the close of the hearing up until a written order or judgment enters. However, when looking closely at *In re Marriage of West* the heart of the issue is what constituted a final order for appeal. *Id.* at 1250 ("the court had authority to modify its earlier findings at any time before issuing an order…when it did so, the written order may serve the basis for the appeal."). The issue raised by the District is not what order is appealable, rather the issue is the conclusions of law that differ from what the trial court espoused at the time of the hearing and what was written by the Appellee.

Instead of relying on *In re Marriage of West,* this court should look towards *Koontz*, 787 P.2d 192. Similar to this case, in *Koontz* an argument was presented to this Court that the trial court erred by adopting the "written findings, conclusions, and judgement prepared by" opposing counsel. *Id.* at 195. This Court disagreed that the trial court committed an error. *Id.* However, in *Koontz*, this Court reaffirmed that "[A]ppellate courts will critically scrutinize findings prepared by a party to proceedings

that are adopted by the court." *Id.* If the findings are supported by the evidence, they will nevertheless be sustained. *Id.* citing *Ficor, Inc. v. McHugh,* 639 P.2d 385 (Colo. 1982). What is being asked by the District in this case is for this Court to critically scrutinize the findings prepared by Appellee, which were subsequently adopted by the Court after the Court made different findings at the conclusion of the *Trinity* hearing. *Compare* TR (October 21, 2022) p. 211:14-23 *to* CF 252.

However, the trial court *did not* clarify that "the written order accurately embodies the court's oral comments and overall conclusions at the *Trinity* hearing. Appl. Br. at pg. 26. This is a complete misstatement of the record. Rather, the trial court stated, "[t]he court reviewed the emails and understands the concerns but this proposed order accurately embodies the courts ruling." CF, p. 246. Nowhere in the trial court's order adopting the proposed order submitted by Appellee does the trial court mention or clarify the court's oral comments and conclusions. *Id.*

The overall problem with the oral findings and conclusions of law, which are not reflected in the adopted written order prepared by the Appellee, is that there are two conflicting legal concepts. The first being that the trial court found the statute required the District to exercise due

regard, thus vesting the court jurisdiction to hear the matter. TR (October 21, 2022) p. 211:14-23. However, the written order claims that the District "failed to slow down as may be necessary." CF, p. 244.

Though Appellee believes that this is a trivial issue, the difference of legal conclusions is highly impactful to the present case. The standard of *due regard* has been determined not to be applicable to COLO.REV.STAT. § 42-4-106(2) and (3). *See Fogg v. Macaluso,* 892 P.2d at 277. Moreover, counsel for Appellee is more than aware of the *due regard* standard is inapplicable in the statutory analysis. [4] Thus, it is incumbent on this Court to not only critically scrutinize Appellee's written order, but also look at the legal ramifications to the District by the party who wrote it.

C. *The untimely disclosed experts proffered an incorrect legal conclusion which influenced the Judge as evidenced in the oral findings.*

1. Discussion

Nearly four pages of the Answer Brief concentrate on the testimony from Officer Rodgers, Captain Hophan and Sergeant Wolf. Apl. Br. at p.

[4] Counsel for the Appellee was counsel of record on *Bilderback v. McNabb* where the exact issue of "due regard" was litigated at the Court of Appeals. *Bilderback*, 474 P.3d at 252. Thus, it could be inferred that there was a purpose behind the change of "due regard" with the courts wording versus the written order tendered by Appellee.

19-23. Appellee argues that the designation of these witnesses as experts during the hearing, did not affect or harm the District as it was no surprise that these witnesses would be testifying. *See* Apl. Br. p. 23 ("District always knew that Webb's colleagues would proffer testimony."). The District concedes that it was not a surprise that these witnesses would be testifying. However, it was unanticipated that they all would be designated as experts, without an opportunity to have prior knowledge of their opinions and seek rebuttal, and even more so a surprise that their erroneous expert opinion ultimately substantially influenced the outcome of the case. *See Smith v. Ford Motor Co.,* 626 F.2d 784, 798 (10th Cir. 1980) (Determining that prejudice occurred when the surprise excerpt testimony was presented *during* the trial).[5]

The "harmless error doctrine" has gone through variations over the course of the years. *See Laura A. Newman, LLC. v. Roberts,* 365 P.3d 972, 977 (Colo. 2016) (recognizing a modern harmless error analysis). Blending both the criminal and civil concepts of this doctrine, the Colorado Supreme Court has recognized the tenet of a harmless error, that ultimately

[5] Appellee's did designate a single expert prior to the hearing and provided reports, including his opinions. CF, 108.

becomes a reversible error is the point at which the error substantially influences the outcome of the case. *See Banek v. Thomas,* 733 P.2d 1171, 1178 (Colo. 1986). The District has already conceded that a late disclosed expert may be a minor error, not subject to reversal, however the culmination of multiple late disclosed experts and the erroneous expert opinions create the grounds for reversible error. *See* Opening. Br. at p. 32.

Appellee does not dispute, nor address, that the following *expert* opinions were rendered in this case:

Appellee's Expert Officer Rodgers when asked to provide a conclusion.

> Q: So your training and experience in running code is what ultimately influenced your conclusions in this case, and so what was your conclusion or your determination?
> A: That he did not take the ***due regard*** for other as he was driving through the intersection.

TR (Oct. 21, 2022) p. 35: 15-19 (emphasis added)

Appellee's Expert Captain Hopan when asked to provided testimony states:

> Q: So would you just tell us what's your understanding about what rules you have to follow when you're running code, specifically when you're going to go through a stop sign or a stop light?

> A: So the law requires that you drive with ***due regard*** even if you're operating an emergency vehicle…

TR (Oct. 21, 2022) p. 71:2-10 (emphasis added)

And finally, when Appellee's expert Sergeant Wolf was asked about his interpretation on the law:

> Q: And so what is your understanding for the standard under the state statute then?
> A: If you're responding to an emergency situation, you would have lights and siren on. You can violate the rules of the road such as red lights, stop signs, lane changes, with ***due regard*** to the safety of the community around.

TR (Oct. 21, 2022) p. 113:17-22 (emphasis added)

Despite Appellee's statement that there were "occasional references to 'due regard' at the hearing", these statements were in fact the substance of the legal opinions rendered by the non-disclosed experts. *See* Apl. Br. at p. 23. While the Appellee does not believe that these opinions were critical to the trial court, the opposite is true as the trial court stated:

> "[T]he Court is finding that Plaintiff has met their burden of proof in demonstrating that sovereign immunity has been waived and this is because the Defendant did not meet the requirements of ***C.R.S. § 42-4-108(2) that requires that due regard be given to the safety of the community*** in the intersection at the time that a stop sign, or a red light is run."

TR (Oct. 21, 2022) p. 211: 14-19. (emphasis added)

As discussed in the Opening Brief, the law has been clear since 1995 when the Colorado Supreme Court announced that "due regard" is not imposed under COLO.REV.STAT. § 42-4-106(2) and (3) on emergency vehicle drivers who are responding to an emergency. *Fogg*, P.2d at 278. Here in this case, the trial court heard from three expert witnesses that Appellant did not use *due regard* when operating the emergency vehicle. The erroneous interpretation of the law by the experts substantially influenced the trial court's findings as it was reiterated that the District did not provide *due regard* to the safety of the community. Therefore, while it is true that the failure to timely disclose an expert may constitute a minor error, the culmination of multiple undisclosed experts rendering incorrect legal opinions, substantially influenced the findings by the trial court making this more than a harmless error. *Banek v. Thomas,* 733 P.2d at 1178.

III. CONCLUSION

This Court is tasked with deciding when an accident is, not an accident. When the statute was amended in 1996, it was the intent of the legislature to shield first responders as much as possible during their

response to emergency situations. The intent could not be much clearer as Senator Theibault stated that "we want emergency vehicles to continue acting according to [section 42-4-108(2)] and that when they act according to the statute, they have immunity to so act." *Corsentino,* 4 P.3d at 1092. The facts and circumstances in this case are not egregious nor aggravated, rather the actions taken by Chief Webb were reasonable. If this case is determined to be nothing more than an unfortunate accident, which it was, then the intent of the statute granting immunity to first responders who are responding to emergency situations prevails, which it should.

The trial court's erroneous interpretation indicates that Chief Webb, and all similarly situated first responders, would in reality have to come to a full stop at any stop sign, anything else would be unreasonable. This interpretation would render provisions of the statute superfluous, such as the ability to exceed the posted speed limit, or the ability to run a red light. There is no other way to rectify the trial court's decision, and that was even though Chief Webb was below the posted speed limit, he did not slow down enough. The problem with the trial court's analysis and legal conclusions is that it does not properly address the question of how much a first responder must slow down. If 7 miles per hour under the posted speed

limit, with unobstructed sight lines and all other vehicles having yielded, is *per se* unreasonable, then would 15 miles per hour below the speed limit be sufficient? Perhaps 25 miles per hour below the speed limit? There are no facts or evidence that Chief Webb was operating the emergency vehicle in an unsafe manner prior to the collision. Chief Webb was not weaving in and out of traffic. Chief Webb was not speeding without lights and sirens. There is no evidence that Chief Webb was playing "Frogger" with traffic. *See State v. Schwarz,* 2012 WL 1861381 (Az. App. 2012) (discussing a bicyclist playing the game of "Frogger" with oncoming traffic as he was traveling southbound in northbound traffic). The only actor who acted unreasonably in this accident was Mr. Yoder.

In sum, this Court should reverse the trial court's decision based upon the culmination of errors committed and upon *de novo* review hold that the Appellant retains immunity in the instant case.

Respectfully submitted this May 26, 2023.

Duly Signed Original Available at the offices of:

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CERTIFICATE OF SERVICE

I hereby certify that on this May 26, 2023, a true and correct copy of the above and foregoing **REPLY BRIEF** was, unless otherwise indicated, filed with the Court who provides notice to the following:

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