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CASE NUMBER: 2020CV31115

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac St. Centennial, CO 80112	
Plaintiffs: REBECCA HOGAN and BETTY MEDINA, v. **Defendants:** CITY OF ENGLEWOOD d.b.a. BROKEN TEE GOLF COURSE	**▲ COURT USE ONLY ▲** **Case Number:** 2020 CV 31115 **Division: 204**

ORDER RE: DEFENDANT CITY OF ENGLEWOOD'S MOTION TO DISMISS

THIS MATTER is before the court on Defendant City of Englewood's ("Defendant") Motion to Dismiss ("Motion") for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1). Having reviewed the Motion, Response and Reply, and being fully advised in the matter herein, the Court hereby finds, and orders as follows:

BACKGROUND AND PROCEDURAL HISTORY

On June 4, 2018, Plaintiffs, Rebecca Hogan and Betty Medina ("Plaintiffs"), were players in a women's golf league playing nine holes at the Premises of Broken Tee Golf Course ("Premises") in Englewood, Colorado. Ms. Medina rented a golf cart from Defendant to transport her and Ms. Hogan while playing a round of golf at the Premises as part of the women's golf league play. When Plaintiffs and another twosome playing the golf course with Plaintiffs that day had completed golfing on Hole No. 5, Plaintiffs followed the golf cart containing the

other twosome in their golf cart across the fairway to Hole No. 6. At approximately 6:20 p.m. while crossing the fairway, Plaintiffs' golf cart hit an obstruction which caused the golf cart to abruptly stop. As a result, Ms. Medina was ejected from the golf cart and Ms. Hogan was thrown against the windshield of the golf cart face first.

Immediately after the crash, Plaintiffs discovered that the golf cart had struck a tree stump sticking out of the ground. The tree stump was surrounded by untrimmed grass. As such, the tree trump was hidden from Plaintiffs' view. According to Plaintiffs, Defendant was responsible for maintaining the grounds at the Premises as the owner and operator of the Broken Tee golf course. As the owner and operator of the golf course, Defendant failed to ensure that the fairway area was safe and unobstructed for its customers as the stump on the golf course between Hole. No. 5 and Hole No. 6 posed an unreasonably dangerous risk to those playing the golf course. Defendant owed Plaintiffs the duty to maintain the Premises in a safe condition including maintaining the grounds in such a condition that all obstructions were either removed or could readily be observed by golfers in carts. Due to Defendant's negligence, Plaintiffs allege that they suffered injuries and damages.

Plaintiffs filed their Complaint on June 3, 2020, asserting claims under premises liability as invitees and negligence. Plaintiffs also assert that sovereign immunity for Defendant City of Englewood is waived under the Colorado Governmental Immunity Act ("CGIA"). Defendant filed a motion to dismiss for lack of subject matter jurisdiction and a request for attorney's fees on August 26, 2020. Defendant argues that Plaintiffs' claims are barred by the CGIA and should be dismissed under C.R.C.P. Rule 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs objected to Defendant's Motion and filed a Response on September 16, 2020. On September 30, 2020, Defendant filed a Reply.

LEGAL AUTHORITY

When a governmental entity or employee raises the defense of immunity under the CGIA, the district court must make factual findings to ensure that the court has jurisdiction to hear the case. *City and County of Denver v. Dennis*, 2018 CO 37. When a plaintiff sues a governmental entity or employee and that entity or employee moves to dismiss for lack of jurisdiction, the burden of proof is on the plaintiff to prove the government has waived its immunity. *Id*. at ¶ 11. However, "this burden is relatively lenient, as the plaintiff is afforded the reasonable inferences from her undisputed evidence." *Id.* citing *Tidwell ex rel. Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 85-86 (Colo. 2003).

The CGIA waives a governmental entity's immunity when injuries occur resulting from "a dangerous condition of any . . .public facility located in any park or recreation area maintained by a public entity…" § 24-10-106(1)(e). As such, in order to overcome Defendant Englewood's Motion to Dismiss, Plaintiffs have the burden of proving that the tree stump itself on the golf course was "a dangerous condition" for which Defendant was responsible to maintain. The CGIA defines "dangerous condition" as: a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility. § 24-10-103(1.3).

Here, Plaintiffs must prove (1) the presence of the tree stump on the golf course surrounded by untrimmed grass, (2) constituted an unreasonable risk to the health or safety of the public, (3) Defendant knew or should have known of the risk, and (4) Plaintiffs' injuries were proximately caused by Defendant's negligent omission in maintaining the golf course by the removal of the tree stump. See *St. Vrain Valley Sch. Dist. RE-1J v. Loveland*, 2017 CO 54, ¶ 16, 395 P.3d at 755

(enumerating the four factors that a plaintiff must generally prove to show a dangerous condition).

Defendant argues that Plaintiffs' complaint fails to demonstrate the second element of section 24-10-106(1)(e) which requires the Court to find that the tree stump constituted an unreasonable risk to the health or safety of the public. Per the Defendant, the operative language for the Court's consideration comes from the very definition of "unreasonable risk." In *Dennis*, the Court interpreted this very language from C.R.S. 24-10-103(1.3) as "[u]nreasonable in this context means exceeding the bounds of reason or moderation." *Dennis*, ¶ 23. "A risk is the chance of injury, damage, or loss." *Id*. Since "unreasonable" precedes "risk" in the statute, the presumption is that "unreasonable" modifies the term "risk." *Id*. In summary, the Colorado Supreme Court concluded that to prove the existence of a "dangerous condition" for CGIA purposes, a plaintiff must prove that the allegedly dangerous condition "created a chance of injury, damage, or loss which *exceeded the bounds of reason*." *Id*. (emphasis added)

ANALYSIS

1. Evidentiary Hearing

When alleged jurisdictional facts are in dispute, the trial court should hold an evidentiary hearing; when there is no evidentiary dispute, the trial court may rule without a hearing. *Tidwell ex rel. Tidwell v. City and County of Denver*, 83 P.3d 75, 85 (Colo. 2003); *Lyons v. City of Aurora*, 987 P.2d 900, 902 (Colo. App. 1999) (may hold hearing on fact if existence of subject matter jurisdiction may turn on that fact).

In this case, neither party has requested an evidentiary hearing before a ruling on Defendant's Motion to Dismiss. Based on the evidence before the Court, the Court finds that there is no relevant factual dispute, only a dispute as to whether Plaintiff sufficiently pled facts to establish subject matter jurisdiction. Therefore, the Court declines to hold an evidentiary hearing

and decides the issue of subject matter jurisdiction on the pleadings and exhibits filed by the parties.

2. Subject Matter Jurisdiction

Governmental immunity can be waived as set forth in C.R.S. § 24-10-106(1). The question of subject matter jurisdiction in this case turns on a very fact specific determination – did the presence of the tree stump surrounded by untrimmed grass constitute an *unreasonable risk* to the golfers like Plaintiffs riding in golf carts on the Premises golf course? Defendant's Motion to Dismiss relies almost exclusively on the Colorado Supreme Court's analysis in *Dennis.*

The facts in *Dennis* are distinguishable from Plaintiffs' case. While the Supreme Court found that there is inherent risk in driving on a road that has deteriorated from its original condition through use, the same inherent risk does not exist in driving a golf cart on a golf course that presumably has been reasonably maintained (i.e. it is unreasonable to assume that golfers should expect to encounter hidden hazards like a tree stump that is shrouded by untrimmed grass in an area of the golf course where golf carts can reasonably be expected to travel). "Determining if the road presents an unreasonable risk will necessarily be a fact-specific inquiry; there is no one-size-fits-all rule that encapsulates when a condition will constitute an unreasonable risk to the health and safety of the public." *Dennis* at ¶ 23. Put simply, the undisputed facts in this case demonstrate that the condition of the hidden tree stump in an area of regular golf cart travel created a chance of injury, damage, or loss which exceeded the bounds of reason.

Further, the *Dennis* Court took great lengths to consider the financial impact and burden on the City and County of Denver when opining that the roadway did not constitute an unreasonably dangerous condition. "The court of appeals' reading of the statute would require state and local governments to keep roads like new at all times or face potential liability in a tort lawsuit because the road constitutes an unreasonable risk to the health and safety of the public. Statewide, the

Colorado Department of Transportation ("CDOT") estimates that maintaining mainline roads at this level **would cost one billion dollars per year**." *Id*. at ¶ 19 (emphasis added). The financial burden of removing a tree stump or even warning golfers *in some way* of its presence is not even closely analogous.

In this case the facts are undisputed related to the cause of the accident. However, in *Dennis*, there were several disputed facts and conflicting testimony which called into question whether the road condition was a cause of the motorcycle accident. "The road, while cracked and rutted, did not contain potholes or sinkholes. The road did not contain features which would force a driver to make an emergency maneuver, or any other road characteristics such as a raised pavement lip that could damage a vehicle and lead to an accident." *Id*. at ¶ 26. Here, the golf course *did* contain a feature (the hidden tree stump) which would force a golf cart operator to make an emergency maneuver (if seen), and result in damage to the golf cart and injuries to its occupants.

For all the reasons stated herein, the Court finds that the undisputed facts support a waiver of sovereign immunity of Defendant City of Englewood pursuant to C.R.S. § 24-10-106 (1)(e). As such, the Court has subject matter jurisdiction over this case and Defendant's Motion to Dismiss is **DENIED**.

3. Request for Attorney's Fees

Based on the failure of Defendant's Motion to Dismiss, Defendant's Motion for Attorney's Fees pursuant to C.R.S. § 13-17-201 is **DENIED**.

CONCLUSION

Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1) is **DENIED**.

SO ORDERED this 14th day of January 2021.

BY THE COURT:

John E. Scipione
District Court Judge