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<tr><td>COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203</td><td rowspan="2">DATE FILED: May 4, 2021 7:10 PM
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<tr><td>Appeal from the District Court
Arapahoe, Colorado
Honorable John E. Scipione
Case No. 2020CV031115</td></tr>
<tr><td>Plaintiffs/Appellees: REBECCA HOGAN and BETTY MEDINA

v.

Defendant/Appellant: CITY OF ENGLEWOOD d/b/a BROKEN TEE GOLF COURSE</td><td rowspan="2">Case No.: 2021CA000172</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, the undersigned certifies that the brief is **6986** words and therefore complies with C.A.R. 28(g).

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STATEMENT OF THE ISSUES

1. For claims under Colorado's Governmental Immunity Act, immunity is only waived when an allegedly dangerous condition "created a chance of injury, damage, or loss which exceeded the bounds of reason." *City and County of Denver v. Dennis*, 418 P.3d 489, 497 (Colo. 2018). The tree stump in this case had never caused injury before and was not likely to cause injury to reasonably careful golfers operating golf carts in permitted areas. Did the tree stump present a chance of injury which exceeded the bounds of reason?

2. The degree of risk posed by any condition must be assessed in light of the intended and expected uses of the surrounding area. The undisputed facts establish that the tree stump in this case was in an area that Defendant specifically requested golf carts not be driven. Was Defendant required to make all areas of the golf course, including areas where golf carts should not be driven, free of all potential risks to golf carts?

3. In traditional tort claims, a defendant's duty is largely a function of assessing the foreseeability of harm in comparison to the magnitude of the burden to remove the risk. The trial court here based its decision, in part, on its assessment that mitigating the risk of the tree stump would not place an exorbitant burden on Defendant. Did the trial court commit legal error in finding an immunity waiver

based on the cost to mitigate the risk as opposed to the degree of risk presented by the tree stump?

STATEMENT OF FACTS AND THE PROCEEDINGS BELOW

The facts and procedural history of this interlocutory appeal are uncomplicated. As set forth in the Amended Complaint, Plaintiffs were participants in a golf league and were playing a round of golf at Broken Tee Golf Course on June 4, 2018 at approximately 6:00 pm. CF, p 32. During the round, Plaintiffs were utilizing a golf cart, rented and driven by Plaintiff Medina. CF, p 33. Broken Tee provides a paved cart path and asks that users stay on the cart path and employ the "90-degree rule" when carts must leave the paved path. CF, pp 41-43. The 90-degree rule provides that golf carts must remain on the paved path unless making a 90-degree turn off the paved cart path toward their ball located in play. CF, p 45. Otherwise, carts should stay on the paved path whenever possible. CF, p 45.

It is also a near-universal truth on golf courses that carts must remain a certain distance from tee boxes and greens. CF, pp 46-45. Broken Tee is no different and has a written rule specifying that golf carts must not be driven on the grass within 30 feet of greens and tee boxes. CF, p 42. Nobody disputes that Defendant had this rule and that, like many rules of golf, course rules are communicated to golfers and it is expected that golfers comply with the rules.

Colloquially, the enforcement mechanism might be referred to as the "honor system."

After completing the 5th hole, Medina sought to take a shortcut to the tee box for the 6th hole and took her cart off the provided cart path and ran into a tree stump. CF, p 33. The stump was adjacent to the tee box for the 6th hole, within the 30 feet where carts are not supposed to travel. CF, p 33; CF, p 41, 46. Plaintiffs allege that Medina did not see the stump because there was too much grass surrounding it. CF, p 33.

Defendant filed its Motion to Dismiss on August 26, 2020. Defendant's motion presented three reasons why immunity could not be waived for Plaintiffs' injuries. First, a tree stump on a golf course does not present an *unreasonable* risk of harm as required by precedent from the Colorado Supreme Court. Second, the stump was not the result of a negligent act or omission of Defendant. Third, natural elements on a golf course, even in a modified state, are the result of design choices for the course's aesthetic, layout, and obstacles. CF, pp 47-59.

Plaintiffs responded on September 16, 2020, with three primary arguments. First, Plaintiffs argued that the cart paths at Broken Tee are not wide enough to have two carts travel side-by-side and it was reasonable to therefore avoid using the cart paths. CF, pp 100-101. Second, Plaintiffs argued that the language the

Colorado Supreme Court used in *City and County of Denver v. Dennis* does not apply to all cases involving a "dangerous condition" but only cases involving dangerous conditions on roadways. CF, pp 102-05. Finally, Plaintiffs asserted that Defendant was negligent in not making the grass in the area short enough and that the stump served no design or functional purpose. CF, pp 108-13.

The trial court issued its order denying the motion to dismiss on January 14, 2021. CF, pp 195-201. In the order, the trial court found that because the financial burden of removing the tree stump was not significant, it should have been removed and immunity was waived. CF, pp 199-200. The trial court did not address any issues regarding the degree of danger posed by the stump, golf course design, or the undisputed fact that the stump was in an area where Defendant requested golf carts not be driven.

SUMMARY OF THE ARGUMENTS

The trial court below committed reversible error in finding that a tree stump on a golf course presented an unreasonable risk of harm that waived the immunity protections afforded to Defendant under Colorado's Governmental Immunity Act ("CGIA"). The trial court made three fundamental errors in reaching its determination. Each of the identified errors is sufficient, standing alone, to require reversal.

First, under binding precedent from the Colorado Supreme Court, a public entity only waives immunity for dangerous conditions which present a risk of injury, damage, or loss that exceeds the bounds of reason. The assessment properly focuses on the degree of the risk presented by a condition as opposed to answering the question of whether the condition poses any foreseeable risk of harm.

Second, whether an object presents an unreasonable risk of harm requires an assessment of the anticipated users of the area. The trial court erred in relying on the fact that users of the golf course *could* operate golf carts in the area of the tree stump when the undisputed evidence showed that Defendant had rules in place directing golfers to *not* drive golf carts next to tee boxes, and to stay on the paved cart path unless traveling directly to their ball. The area with the stump was not

maintained for use by golf carts, but instead was maintained for use by pedestrians, and the risks must be assessed as such.

Third, the trial court relied on its assessment that the burden to remove the tree stump was not particularly great and that because the stump posed any risk of harm, Defendant should have taken action to make the area safer. The trial court's assessment applied traditional tort concepts governing duty, foreseeability of risk, and financial burden of eliminating or mitigating risk. The trial court's assessment contradicts authority from the Colorado Supreme Court which provides that a merely foreseeable risk of harm is insufficient to waive immunity. Instead, the likelihood of harm must exceed the bounds of reason.

The judgment of the trial court should be reversed, and this case should be remanded with instructions to dismiss.

ARGUMENTS

1. A Tree Stump Adjacent to a Tee Box on a Golf Course Does Not Pose a Risk of Harm That Exceeds the Bounds of Reason

a. Standard of Review and Preservation of Issue for Appeal

Whether the trial court has jurisdiction to hear a tort claim against a governmental entity is a matter of statutory construction, and a reviewing court is not bound by a trial court's determinations. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000). This case involves the interpretation and application of a statute, and statutory interpretation is subject to *de novo* review. *Moran v. Standard Ins. Co.*, 187 P.3d 1162, 1164 (Colo. App. 2008). Whether immunity is waived in this case is an issue of law and should be reviewed *de novo*.

Defendant has preserved the issue for appeal by raising it with the trial court in its motion to dismiss and the reply. CF, pp 47-59; CF, pp 158-69. The issue was included in the Notice of Interlocutory Appeal. CF, p 203-10.

b. A Merely Foreseeable Risk Does Not Waive Immunity

The CGIA defines "dangerous condition" as a condition that constitutes an "unreasonable risk to the health or safety of the public. C.R.S § 24-10-103(1.3). "'Unreasonable' in this context means exceeding the bounds of reason or moderation." *City and County of Denver v. Dennis*, 418 P.3d 489, 497 (Colo. 2018) (internal citation omitted). "A risk is the chance of injury, damage, or loss."

Id. "The term 'unreasonable' modifies the term 'risk.'" *Id*. There, in order to prove a particular condition was a dangerous condition as contemplated by the CGIA, a plaintiff must prove the condition "created a chance of injury, damage, or loss *which exceeded the bounds of reason*." *Id*. (emphasis added).

The trial court here erred by concluding a tree stump on a golf course presented a possibility of injury that exceeded the bounds of reason. CF, p 199. While it is arguable whether a tree stump adjacent to a tee box poses some possibility of harm, the likelihood of harm is not significant and cannot be said to exceed the bounds of reason. The facts of the *Dennis* case highlight that immunity cannot be waived simply because some risk is identifiable.

In *Dennis*, the Colorado Supreme Court was charged with defining "unreasonable risk" as that term is utilized in C.R.S § 24-10-103(1.3). The circumstances of *Dennis* required assessing the condition of a road, but the analytical framework applies to any scenario where a potential immunity waiver requires proving the existence of a "dangerous condition." As explained in this brief, immunity is not waived simply because a condition *could* cause injury. Immunity is only waived for conditions where the potential for harm exceeds the bounds of reason.

The crux of the plaintiff's claim in *Dennis* was that the condition of the road was such that the driver of the motorcycle the injured party was riding on was unable to come to a safe stop, but would have been able to if the road were in better repair. *Dennis*, 418 P.3d at 499 (Gabriel, J., dissenting). The Colorado Supreme Court ultimately found that the road in question could cause harm, and may even be dangerous, but was not sufficiently dangerous to waive immunity because the road was not unreasonably risky. *Id*. at 498. In finding that the roadway before them did not constitute a dangerous condition, the *Dennis* court looked to the testimony of Denver's pavement engineer, William Kennedy. *Dennis*, 418 P.3d at 493. Mr. Kennedy testified that the road at the intersection in questions was "very poor" and "cracked, worn, and somewhat rutted." *Id*. Mr. Kennedy even testified "that the intersection was 'dangerous,' but not 'dangerous enough' to warrant immediate repairs." *Id*. Not only did Mr. Kennedy state that the intersection was dangerous, but he reached that conclusion after inspecting the intersection eight days prior to the accident in response to a complaint from a concerned citizen. *Id*. The *Dennis* court found that the road presented a *foreseeable* risk of harm, but not an *unreasonable* risk of harm. *Id*. at 497.

Quite the opposite set of facts exist in this case. The stump in question was a few inches high and located in the grass, not on the paved path Defendant provided

for golf carts. CF, p 46. Golf carts are supposed to stay on the paved path, only leaving the cart path when traveling directly to a played ball. CF, p 45; CF, p 43. Additionally, the stump had never before caused any issue, had never caused any injury, and there is no evidence that Defendant had ever received a complaint about this tree stump, or any other tree stump, or ever had reason to believe that the tree stump was a danger. There is simply no evidence that the stump posed the degree of risk necessary to properly be described as "unreasonably risky." *Dennis*, 418 P.3d at 497. At most, Plaintiffs can opine that the stump was risky to them at the particular moment in time they attempted to drive over it, but there is no evidence in the record that the stump posed an unreasonable risk of injury to the public at large.

The evidence in the record shows nothing more than that the stump may have posed some level of foreseeable risk, but "[t]he CGIA requires more than a foreseeable risk of harm; it requires an unreasonable risk of harm." *Dennis*, 418 P.3d at 497. Roads may have potholes, sidewalks may have cracks and settling, and golf courses may have tree stumps, sprinkler heads, and other low-risk hazards. While any of these conditions *might* cause an injury, and indeed some of those conditions potentially have caused injury in other circumstances, immunity is only waived when the likelihood of injury exceeds the bounds of reason. Was it

foreseeable that a golfer could drive a cart into the stump? Certainly, just as it is foreseeable that someone drives their cart sideways on a hill and the cart tips over. But was it expected, likely, or certain to happen? Absolutely not. It is foreseeable that someone drives their golf cart into one of the lakes and ponds on the course as well, but that does not require removal of all lakes or ponds. *See DeAnzona v. City and County of Denver*, 222 F.3d 1229, 1237 (10th Cir. 2000) (concluding that lake in city park, even if it presents some risk, is not an unreasonable risk). Immunity is only waived for unreasonably risky conditions, not for million-to-one occurrences like what happened in this case.

c. Plaintiffs Were Required to Prove the Stump Posed a Risk to the General Public by a Preponderance of the Evidence

The evidence presented to the trial court showed a small stump with surround grass, 5-6 feet away from a tee box, which had never caused any injury or incident before Plaintiffs' accident. Even if the trial court disregarded all of Defendant's evidence that golf carts should not be driven where the stump is, the evidence presented by Plaintiffs is insufficient to show that the tree stump posed a risk to the public that exceeded the bounds of reason.

The trial court appeared to base its ruling, in part, on the claim that a golf cart would have to make an emergency maneuver to avoid hitting the stump. CF, p 200. The trial court did not make any finding that the stump was, in fact, hidden.

Instead, the trial court merely repeated the allegation of Plaintiffs which lacked evidentiary support. In fact, the photographs in the record show a stump with surrounding grass, but it could clearly be seen. CF, p 46.

But even *if* the stump were as "hidden" as Plaintiffs claim, and even *if* golfers routinely ignore course rules and take the shortcut Plaintiffs did, the stump is still not a condition which presents a risk that exceeds the bounds of reason. The record is entirely devoid of any previous issues associated with the stump. And given that Plaintiffs were playing in a league and had played the course a number of times before, they had clearly played through the area where the stump was located without incident and without concern since they never reported any potential hazard. CF, p 4, ¶ 19. Further, once Defendant was notified of the potential issue, the stump was marked off and subsequently removed. The evidence shows if there had ever been an issue with the stump before, it would have been addressed. But there is no evidence that Defendant knew the stump was unreasonably risky. Nor is there evidence that the stump was "of such a nature" that its "dangerous character should have been discovered. C.R.S § 24-10-103(1.3). Without that evidence, Plaintiffs have not met their burden of proving an immunity waiver by a preponderance of the evidence. *Cash Adv. and Preferred Cash Loans v. State*, 242 P.3d 1099, 1113 (Colo. 2010) (holding that a plaintiff "bears the

burden of proving, by a preponderance of the evidence," that the defendant has waived immunity.)

2. The Trial Court Ignored Defendant's Course Rules In Assessing The Risk Posed By The Stump

a. Standard of Review and Preservation of Issue for Appeal

Whether the trial court has jurisdiction to hear a tort claim against a governmental entity is a matter of statutory construction, and a reviewing court is not bound by a trial court's determinations. *Conners*, 993 P.2d at 1171. This case involves the interpretation and application of a statute, and statutory interpretation is subject to *de novo* review. *Moran*, 187 P.3d at 1164. Whether immunity is waived in this case is an issue of law and should be reviewed *de novo*.

Defendant has preserved the issue for appeal by raising it with the trial court in its motion to dismiss and the reply. CF, pp 47-59; CF, pp 158-69. The issue was included in the Notice of Interlocutory Appeal. CF, p 203-10.

b. The Trial Court was Required to Consider Defendant's Rule that Carts Remain 30 Feet From Tee Boxes

Risk is not the same for all users of a given facility or amenity. For instance, a slight height difference at the junction of two sidewalk slabs may pose little-to-no risk for someone walking but may pose a much greater risk for someone riding a skateboard. A minor pothole in a road may pose no risk to a car, but may present a

challenge for a thin-wheeled bicycle—such as a racing bike—which opted to forego an available bicycle lane. No public entity can account for all the subjective uses individuals may engage in, but public entities may set forth the rules of use in hopes that users will comply. And this is why immunity waivers cannot focus on risk from the standpoint of a single user who acts as they wish, but must instead consider the intentions of the public entity with respect to how a public entity expects a facility be utilized.

Viewing risks in light of the reasonable expectations and intentions of the public entity who builds or operates a facility is consistent with Colorado law. In *Daniel v. City of Colorado Springs*, the Supreme Court recognized that all immunity waivers set forth in the CGIA look to what the public entity is required to do, but the waivers do not account for the conduct or actions of the public. 327 P.3d 891, 898 (Colo. 2014). As such, whether immunity has been waived is determined based on the public entity intended and expected, and not on the subjective actions of any individual. At issue in *Daniel* was whether a parking lot was a part of a recreation area. Since a parking lot is merely a place to park cars, it has no inherent recreational purpose. And, depending on the area in question, a single parking lot could serve as a vehicle repository for individuals intending to recreate, go see a movie, go to a restaurant, or even all of the above. Given the vast

potential of uses for a parking lot, the *Daniel* court determined that the inquiry must focus on what the public entity's primary purpose in constructing and maintaining the parking lot was. *Daniel*, 327 P.3d at 898. In reaching that conclusion, the *Daniel* court specifically rejected the argument that the inquiry should consider the subjective uses of the parking lot by individuals. *Id*. at 899.

Here, the undisputed evidence showed that Defendant specifically stated that golf carts should *not* be driven in the area where the stump was located. The record shows that the stump was adjacent to, and mere feet away from, tee box for the 6th hole. CF, p 33, ¶ 14. It is undisputed that Defendant provided scorecards with golf carts that stated in simple language that golfers must not operate the carts on the grass within 30 feet of tee boxes. CF, p 42.[1] It is further undisputed that there was a safe and available cart path available for travel by cart from the area of the 5th green to the area of the tee box for the 6th hole. CF, p 41. Defendant clearly intended for golf carts to use the cart path, otherwise it would not have installed and maintained the cart path. A cart path not only provides a safe path for use by motorized golf carts, but it also assists in keeping the grass healthy and undamaged. Immunity should not be waived simply because individual users may

[1] A digital version of the scorecard can be found at https://www.englewoodco.gov/parks-recreation-library-golf/broken-tee-golf-course/visit/courses (last visited May 3, 2021).

flout course rules and ignore the availability of the cart path so they can shave a few seconds off the trip from the putting green for the 5th hole to the tee box for the 6th hole.

The proximity of the stump to the cart path further highlights to error in finding the stump posed an unreasonable risk of harm in this case. There is no reasonable argument that Plaintiffs would have been injured if they utilized the cart path as Defendant requested, expected, and intended. If the entire area needs to be maintained for use by golf carts, then there is no point in installing and maintaining a path dedicated for use by golf carts. But there *was* a cart path which Defendant requested and expected golfers to utilize both for safety purposes and for course maintenance purposes. Whatever reasons an individual may have for taking their cart off the cart path does not alter the fact that the cart path is provided for use by golf carts. It is similar in some respects to an earthen median on a divided highway. Any vehicle that missed their exit *could* drive through the median to make a U-turn. This is a true even if there are laws against such action and signs which remind drivers that U-turns through the median are not permitted. It is impossible to have law enforcement in all areas at all times, and surely some scofflaws have utilized a median for their own convenience instead of driving to the next exit and making two left turns to get back on the highway going the opposite direction.

And, certainly, medians receive some level of maintenance to prevent overgrowth of grass or shrubs, so the area likely appears drivable to the adventurous sort. But public entities do not maintain medians with the expectation or desire that vehicles drive through them. If a time-crunched driver attempted a U-turn through a median and damaged their vehicle or got hurt, it would be absurd to find an immunity waiver since cars should not be driving through medians, both as a matter of law and common sense.

The same is true with areas on a golf course. A golf course is not maintained with the expectation that golfers will ignore course rules, and different areas on the course receive different types of attention. By asking that golf carts stay on the cart path and that golfers keep carts at least 30 feet away from tee boxes, Defendant clearly expressed its intent that golf carts not be driven where Plaintiffs took their golf cart. The fact that Plaintiffs ignored the rules and chose to act in their own self-interest does not change this analysis. *Daniel*, 327 P.3d at 899 (holding that a public entity's obligation to maintain an area does not consider the "idiosyncratic" conduct of any individual who visits the area) (emphasis added). The anticipated traffic on the grass within 30 feet of a tee box, including the tee box in this case, would be foot traffic. The stump presented no practical risk to pedestrians and does not waive immunity for Plaintiffs' accident.

3. The Stump Was A Design Choice, Not a Maintenance Failure

a. Standard of Review and Preservation of Issue

Whether the trial court has jurisdiction to hear a tort claim against a governmental entity is a matter of statutory construction, and a reviewing court is not bound by a trial court's determinations. *Conners*, 993 P.2d at 1171. This case involves the interpretation and application of a statute, and statutory interpretation is subject to *de novo* review. *Moran*, 187 P.3d at 1164. Whether immunity is waived in this case is an issue of law and should be reviewed *de novo*.

Defendant has preserved the issue for appeal by raising it with the trial court in its motion to dismiss and the reply. CF, pp 47-59; CF, pp 158-69. The issue was included in the Notice of Interlocutory Appeal. CF, p 203-10.

b. An Immunity Waiver for a "Dangerous Condition" Requires a Negligent Act or Omission of the Public Entity

The mere identification of a condition which poses a risk of injury is not enough to waive a public entity's immunity under the CGIA. Instead, a person seeking to establish an immunity waiver must show the public entity knew of the unreasonable risk of harm and that the condition was proximately caused by a negligent act or omission of the public entity. In this case, there is no evidence of any negligence by Defendant in the construction or maintenance of the golf course.

Pursuant to statute, "'Maintenance' means 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." C.R.S. § 24-10-103(2.5). "'Maintenance' does not include any duty to upgrade, modernize, modify, or improve the design or construction of a facility." *Id*. As interpreted by the Colorado Supreme Court, a public entity's maintenance obligation is only triggered *after* a condition becomes unreasonably dangerous. *Dennis*, 418 P.3d at 495.

The trial court below did not identify any physical decline or failing of the golf course. Nor did the trial court say the golf course was not in the same *general* state of repair or efficiency. That is because the golf course was in the same general state of repair and efficiency. Certainly, grass in some areas is higher than in other areas, but that is fairly typical on golf courses. Golf courses are known to have areas of grass or other foliage of varying lengths, densities, and colors. Golf courses even have features called "hazards" which are interspersed through the course. These hazards include man made hazards, such as sand traps or ponds, and natural hazards, such as tall or thick grass, trees, rocks, or bushes.

The record shows that the stump and surrounding grass was, at most, a few inches in height. CF, pp 46, 61-61. The photographs do not depict a facility in

disrepair or a facility which has received no maintenance. If there had been no maintenance of any kind in the area, then the grass would surely have been taller than a few inches. This is notable because a public entity does not have to keep a facility, or part of a facility, in the *exact* same state at all time to retain immunity, only in the same *general* state of repair or efficiency. C.R.S. § 24-10-103(2.5). The photographs show that the area was in the same general state of efficiency. CF, pp 46, 61-61.

c. The Decision to Leave the Stump was a Design Choice for Which Immunity is not Waived

Dangers resulting from design choices do not meet the statutory definition of dangerous condition. C.R.S. § 24-10-103(1.3). "Design means to conceive or plan out in the mind, and conditions attributable solely to inadequate, or risky, design that are intrinsic to the general state of the [facility] as initially constructed may not be considered a dangerous condition and do not waive immunity." *Est. of Grant v. State*, 181 P.3d 1202, 1205 (Colo. App. 2008) (internal quotations and citations omitted). Hazards, obstacles, and impediments on a golf course are elements of the course's design. Plaintiffs have suggested that the stump served no purpose, though that argument could be applied to nearly any element on a golf course, particularly with aesthetic elements and areas left in their natural state. Many a golfer has likely complained that an area of particularly tall natural grass "serves no purpose," but

this is properly written off as sour grapes from someone who lost one too many balls in tall grass.

In this case, the tree stump was not the result of physical decline of the golf course. The stump was not the byproduct of physical degradation of the course, in fact it is quite the opposite. A tree existed, the tree was cut down, the stump remained. Given the location of the stump next to tee boxes, a design choice was made to cut down the tree that existed so that golfers using the rear tees would not have to hit a tee shot through a tree. CF, p 41. A choice was then made to leave the tree stump as it existed instead of wholly removing it from the ground. This was a design choice because once the decision was made to cut the tree to make tee shots easier for golfers playing from the rear tees, the choice was also made to leave the stump as part of the course and it became an inherent part of the design of the course. *Est. of Grant*, 181 P.3d at 1207. ("If the state undertakes an upgrade and follows a certain design, any inadequacies that may result from that design do not waive immunity simply because there previously may have been a safer design available."). Thus, the stump as it existed at the time of Plaintiffs' accident, was a part of the design of the golf course. *Id*. ("[T]he choice to adhere to a later design is still part of the design or planning process and, hence, gives rise to the same immunity.")

4. The Trial Court Improperly Analyzed Immunity Through The Lens Of A Duty Owed In Tort

a. Standard of Review and Preservation of Issue

Whether the trial court has jurisdiction to hear a tort claim against a governmental entity is a matter of statutory construction, and a reviewing court is not bound by a trial court's determinations. *Conners*, 993 P.2d at 1171. This case involves the interpretation and application of a statute, and statutory interpretation is subject to *de novo* review. *Moran*, 187 P.3d at 1164. Whether immunity is waived in this case is an issue of law and should be reviewed *de novo*.

Defendant has preserved the issue for appeal by raising it with the trial court in its motion to dismiss and the reply. CF, pp 47-59; CF, pp 158-69. The issue was included in the Notice of Interlocutory Appeal. CF, p 203-10.

b. The Trial Court Erred in Focusing on Cost to Remove the Stump

In its order denying Defendant's Motion to Dismiss, the trial court juxtaposed the cost of repairing all roads in Colorado to the cost of removing the tree stump in this case, ostensibly to show that removing a stump is not analogous to repairing all roads throughout the State of Colorado. In doing so, the trial court committed two significant errors that require reversal.

First, there is no evidence in the records regarding the costs to remove the tree stump. No party made argument regarding the cost of removing the stump, and

Defendant did not argue the cost to remove a single stump was prohibitive as the basis for not removing the stump. The trial court simply inserted the issue which lacked any evidence in the record, and then incorporated it into the final analysis. CF, pp 199-200. Even under a clearly erroneous standard of review, it was error to reach a conclusion when "there is nothing in the record to support it." *Loveland Essential Group, LLC v. Grommon Farms, Inc.*, 251 P.3d 1109, 1117 (Colo. App. 2010).

Second, and more importantly, the trial court utilized the speculative cost to remove the stump as a basis for finding an immunity waiver because the cost to remove a stump is not analogous to the cost to repair all roads in Colorado. CF, pp 199-200. What the trial court did was conflate the cost or burden to remove the stump with whether Defendant was *required* to remove the stump to retain immunity. But the trial court skipped an important step – a public entity only has to remove or remedy conditions *after* they become unreasonably dangerous. *Dennis*, 418 P.3d at 495 ("The government's duty to maintain a road is triggered only after the road becomes unreasonably dangerous.") (emphasis in original). The trial court's assessment inverted the analysis and focused on the burden to remove without first finding that the stump presented a risk which exceeded the bounds of reason. Before saying Defendant should have removed the stump in order to retain

immunity, the trial court was first required to find that the stump presented a risk of harm that exceeded the bounds of reason. That never happened in this case.

In effect, the trial court evaluated the issue much as a court would in determining whether a defendant owed an injured party a duty in tort. *See, e.g.*, *Collard v. Vista Paving Corp.*, 292 P.3d 1232, 1239 (Colo. App. 2012) (listing factors including foreseeability and likelihood of injury from the hazard, magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden of a duty on the defendant.) While the trial court's assessment might be appropriate in a tort case against a private entity, it was inappropriate to perform a duty analysis to find an immunity waiver because the *Dennis* court made clear that immunity issues should not be analyzed in the same manner as tort issues.

In *Dennis*, the plaintiff argued that a court should assess "unreasonable risk" the same way a court would determine whether a party owes another party a duty in tort. *Dennis*, 418 P.3d at 496. Specifically, the plaintiff argued that a complaint against a public entity should not be dismissed unless "the foreseeability of the risk is so remote in comparison to the magnitude of the burden in guarding against the risk ... that the defendant had no duty to guard against it as a matter of law." *Id*. This position was squarely rejected by the *Dennis* court who explained the suits

against the government were not intended to be viewed the same as negligence suits. *Id*. Instead, "the court must decide the sovereign immunity question separate and apart from the duty of care question." *Id*. at 497.

Certainly, the *Dennis* court did discuss evidence and arguments presented by the various *amicus curiae* which referenced costs associated with statewide maintenance of roads and highways. But the discussion was in the context of legislative intent and furthering the intent of the CGIA, not in the context of duty. *Dennis*, 418 P.3d at 495-96. Further, the discussion was not the basis for why immunity was or was not waived in the *Dennis* case. On the contrary, there was no evidence presented regarding what it would cost the City and County of Denver to repair the intersection in question. All evidence of costs was from the Colorado Department of Transportation and discussed statewide costs, not costs to the defendant in the case. *Id*. at 496 ("Statewide, the Colorado Department of Transportation ("CDOT") estimates that maintaining mainline roads at this level would cost one billion dollars per year.") The discussion of costs to repair all roads was not about the case before the *Dennis* court, but was instead about the CGIA's stated policy of lessening, not expanding, the fiscal burden on taxpayers who end up footing the bills for suits against public entities. *Dennis*, 418 P.3d at 496 ("The CGIA intends to lessen potential burdens on taxpayers; because the court of

appeals ignored this policy declaration and expanded the potential burdens on taxpayers, the court of appeals erred.") The *Dennis* court found that a potential risk of harm could not waive immunity, a reading which furthers the express intent of the General Assembly in reducing the burden on taxpayers. *Dennis*, 418 P.3d at 497 ("The CGIA requires more than a foreseeable risk of harm; it requires an unreasonable risk of harm.") The *Dennis* court recognized that if they ruled that the specific intersection before them waived immunity, the impact would be felt by public entities statewide who suddenly had to repair any road or intersection which presented *any* foreseeable risk of harm. Such a decision would have a profound and far-reaching implications, particular with respect to public finances. *Id*. at 496 ("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.") (internal citation omitted).

c. To the Extent Repair Costs are Considered, it is the Aggregate Costs which Must be Considered

In this case, the trial court erred by considering the costs to remove the stump. Whether immunity is waived in this case is not dependent on the cost to remove the stump, but instead depends on whether the stump presented a risk of harm which exceeded the bounds of reason. *Dennis*, 418 P.3d at 497. To the extent

that costs are relevant at all to the analysis, the trial court would have had to consider the costs associated with removing all potential hazards throughout the City of Englewood. As the *Dennis* court explained, requiring public entities to repair all *potentially* hazardous conditions would place a significant financial burden on public entities and the taxpayers, and the aggregate financial burden on taxpayers must be considered if costs are to be considered at all. *Dennis*, 418 P.3d at 496 ("Statewide, the Colorado Department of Transportation ("CDOT") estimates that maintaining mainline roads at this level would cost one billion dollars per year…[and] restoring Colorado's bridges to 'as constructed' condition would cost an additional seven billion, with $360 million yearly for maintenance.") (internal citations and quotations omitted). The cost to repair or replace a single component or item, standing alone, is unlikely to be cost prohibitive, but the financial impact of having to repair all conditions as soon as they pose *any* possibility of risk, or to remedy issues *before* they even begin to pose a risk, would be significant.

If courts are permitted to find immunity waivers based on the perceived costs to repair a single component, then it fundamentally defeats the CGIA's stated purpose of reducing financial burdens. Taking the example of roads, as was the situation in *Dennis*, reveals the flaw in focusing on the costs to repair a single item

as justifying an immunity waiver. Filling in a single pothole or repaving a single intersection is unlikely to bankrupt any city, but repairing every pothole, rut, crack, or physical imperfection on all roads would pose a significant financial burden.[2] But if an accident happens and an immunity waiver is found because the cost to repair the single pothole involved was not excessive, the public entity would then need to immediately repair all other potholes or face similar liability, and other public entities would need to do the same since judicial decisions do not exist in a vacuum. Of course, a public entity "could not simultaneously fix every road; some roads would be prioritized and renovated before others." *Dennis*, 418 P.3d at 496. "And when a motorist was injured on one of the non-prioritized roads that were awaiting renovation, the government would be potentially liable for not fixing the road." *Id.* The same concern exists here. The trial court's analysis would require the removal of any condition that could foreseeably cause any injury, no matter how remote, so long as the cost to remove the condition is not equivalent to the cost to repair all roads in Colorado.

The trial court's analysis improperly relied on the costs of a single repair, without any evidence, and in isolation. The costs associated with a single item are not representative of the larger financial burden that accompanies removing or

[2] This does not even factor in the costs to inspect all areas and determine if there is any potential for harm.

preventing all risk in public spaces. The trial court's analysis erroneously expands the burden on public entities and, necessarily, the taxpaying public. *Dennis*, 418 P.3d at 496 (finding reversible error where court ignored the CGIA's intent of lessening burden on taxpayers.)

5. Request for Attorney Fees

C.R.S. § 13-17-201 provides for the award of reasonable attorney fees to a defendant in a tort action dismissed pursuant to a C.R.C.P. 12(b) motion. Governmental entities are entitled to an award of fees when actions are dismissed pursuant to the CGIA. *Henderson v. City and County of Denver*, 300 P.3d 977, 984 (Colo. App. 2012). This includes an award of appellate fees if the matter should have been dismissed by the trial court. *Id*. Defendant respectfully requests that this Court direct the trial court on remand to award Defendant its reasonable attorney fees and costs incurred in the defense of this action, including this appeal.

CONCLUSION

The trial court misinterpreted the controlling law, did not perform the appropriate analysis, and found an immunity waiver unsupported by the record or the law, thereby expanding Defendant's potential liability well beyond what the General Assembly intended. The Court should reverse the trial court's judgment

and remand with instruction to dismiss Plaintiffs' claims and award Defendant its reasonable attorney fees incurred throughout the defense of this action.

DATED: May 4, 2021

Respectfully submitted,
The duly signed original held in the file located at Tucker Holmes, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **OPENING BRIEF** was Filed and Served Electronically via Colorado Courts E-Filing, the duly signed original held in the file located at Tucker Holmes, P.C., on May 4, 2021, copies addressed to:

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