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COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Appeal From the District Court
Arapahoe County, Colorado
Honorable John E. Scipione
Case No. 2020CV031115

Plaintiffs/Appellees: REBECCA HOGAN and BETTY MEDINA

v.

Defendant/Appellant: CITY OF ENGLEWOOD d.b.a. BROKEN TEE GOLF COURSE and ANTARES GOLF, LLC, a Virginia limited liability company

▲COURT USE ONLY▲

Case No: 2021CA000172

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief is **8547** words and therefore complies with C.A.R. 28(g). 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.

/s/ David M. Westbrook
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STATEMENT OF THE ISSUES

1. Whether a tree stump on a public Par 3 golf course obscured from view by grass that was allowed to go untrimmed, located approximately 5-6 feet from a forward tee, 5-6 feet off the cart path, of an approximate height of approximately 8 inches, a height that cannot be cleared by the golf cars Defendant rents to its patrons which stump serves no functional purpose, is an unreasonably dangerous condition that exceeds the bounds of reason.[1]

2. The 30-foot rule, the 90-degree rule, providing a cart path, none of these aspects served to communicate to golfers at Broken Tee that operating a golf car in the location of the stump was prohibited.

3. Whether the condition at issue, the stump obscured from view by untrimmed grass, was proximately caused by the negligent act or omission of Defendant Englewood in constructing or maintaining the facility condition rather than the Defendant's design of the facility.

4. The Colorado Supreme Court expressly took into consideration the policy behind the Colorado Governmental Immunity Act that taxpayers should be protected against excessive fiscal burdens which could arise from "unlimited

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[1] Golf Carts are now referred to as Golf Cars by the golf industry, but the terms can be used interchangeably.

liability" that the state could incur under tort lawsuits in *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 19, 418 P.3d 489, 496. Did the trial court commit legal error in taking into account the relative financial burden on of mitigating the risk presented by the condition at issue, the stump obscured from view by untrimmed grass, in reaching its conclusion that the tree stump was an unreasonably dangerous condition that exceeded the bounds of reason?

STATEMENT OF FACTS AND THE PROCEEDINGS BELOW

On June 4, 2018 Plaintiffs were players in a woman's golf league playing nine (9) holes at the Broken Tee Golf Course at approximately 6:00 p.m. Plaintiff Medina rented a golf car from Defendants to transport Plaintiffs while on the course. At approximately 6:20 p.m. the Plaintiffs were crossing between the green of Hole No. 5 and the tee box of Hole No. 6 following the twosome that they were playing with. As they arrived at the forward tee box at Hole No. 6 the golf car that Plaintiff Medina was driving came to an abrupt stop resulting in Plaintiff Medina being ejected from the golf car and Plaintiff Hogan being thrown against the windshield of the golf car face first. Immediately after the crash Plaintiffs, along with the two other ladies in their group who witnessed the incident, discovered that the golf car had struck a tree stump sticking up out of the ground, around which grass had been allowed to grow untrimmed resulting in the tree stump being hidden from Plaintiffs' view. The tree stump was located approximately 5-6 feet from the forward tee at Hole No. 6 approximately 5-6 feet off the cart path. Upon inspecting the tree stump more closely it appeared that the tree stump was rotted with an uneven jagged top sticking up out of the ground high enough to impede the golf cart from proceeding forward (approximately 8 inches high). At the time of the season when the crash occurred the grass was very thick and green and had

grown around and inside the tree stump, making it impossible to see the tree stump. As a result of the golf car striking the tree stump Plaintiff Medina suffered substantial injuries, while, fortunately, Plaintiff Hogan suffered relatively minor physical injuries.

The picture in the record identified as CF, p 61 was taken by Plaintiff Hogan's friend Brian DeHerrera on June 5th, 2018 at 7:30 A.M. the day after the incident. The stakes were placed beside the stump at some time between the date and time of the incident and when this picture was taken. This picture accurately shows the state of the grass at the time of the incident. The picture in the record identified as CF, p 62 was taken by Plaintiff Hogan on June 25th, 2018, 3 weeks after the incident. This picture shows the stump more clearly after the grass around it had been trimmed. The picture from the record identified as CF, p 46 was taken presumably by a representative of Defendant at an unknown date and time. The picture from the record identified as CF, p 41 shows the green at Hole No. 5, the forward tee box at Hole No. 6, location where the stump at issue was located, and the portion of the cart path at issue.

On June 3, 2020 Plaintiff' filed their Complaint and Jury Demand asserting claims against City of Englewood-Broken Tee Golf Course and Antares Golf LLC. CF, pp 3-11. The Complaint asserted, *inter alia*, claims of waiver of sovereign

immunity against Defendant Englewood and claims of Premises Liability-Injury to an Invitee and, in the alternative, Negligence against all defendants. On July 23, 2020 Plaintiffs filed their First Amended Complaint and Jury Demand in an effort to more accurately describe the location of the tree stump where Plaintiffs were injured. CF, pp 18-27.[2]

As to allegations of waiver of sovereign immunity both the First Amended Complaint avers, *inter alia*, that: Defendant is a public entity by virtue of being a municipality; sovereign immunity is waived by a public entity in an action for injuries resulting from a dangerous condition located in any park or recreation area maintained by a public entity; Defendant's primary purpose in constructing and maintaining Broken Tee was recreational in that the area's primary purpose promoted recreation; the stump being hidden from view by tall grass was known to exist or should have been known to exist in the exercise of reasonable care is demonstrated by (i) the length of the grass around the stump and the time it would take the grass to grow; (ii) that the grass had been mowed around the stump; (iii) the apparent age of the stump indicating it had existed on the fairway for an extended period of time; and (iv) alleged statements by a maintenance worker at

[2] The revisions as to location of the stump were a result of a site view between counsel for Plaintiffs and representatives of Broken Tee Golf Course on July 1, 2020 as well as a correction of nomenclature.

the golf course indicating to Plaintiffs that Defendants were aware that the stump was sticking out of the ground and was surrounded by tall grass; Defendant failed to remove the stump, or in the alternative, failed to trim the grass around the stump and place warning signs at or near the hidden stump created an unreasonable risk that golfers approaching area adjacent to the forward tee at Hole no. 6 approximately 5-6 feet from the cart path could collide with the hidden stump by virtue of not being able observe the stump. As a result Defendant waived its sovereign immunity and the trial court has jurisdiction to hear Plaintiffs' claim. CF, pp 3-11, CF, pp 18-27.

On August 26, 2020 Defendant City of Englewood filed its Motion to Dismiss, requesting that the trial court dismiss Plaintiffs' Amended Complaint alleging that the Complaint failed to "articulate a sufficient basis to waive immunity". CF, pp 47-60; CF p 48. As grounds Defendant asserted that, *inter alia*, a tree stump on a golf course does not present an unreasonable risk of harm, the stump did not result from any negligent act or omission of Defendant, and the stump at issue represented an obstacle or difficult terrain, not a defect, and as such was part of the design of the golf course. CF, pp 48-49.

On September 16, 2020 Plaintiffs filed their Response to Motion to Dismiss asserting, *inter alia*, that (i) a stump obscured by view by untrimmed grass that

was too high for a golf car to clear, located in a spot that golf cars (and walking golfers) can reasonably be expected to travel directly caused the crash; (ii) correcting by removal would not have resulted in an unreasonable financial burden on taxpayers, or in the alternative, string trimming around the stump would not have imposed any additional financial burden taxpayers whatsoever. As a result of these facts the stump was an unreasonable risk to the health or safety of the public that exceeded the bounds of reason. CF, pp 93-116. Also that the condition of the stump obscured from view by untrimmed grass, was proximately caused by the negligent act or omission of Defendant in constructing or maintaining the facility by failing to remove the stump or replace the tree, or at a minimum string trim around the stump so that it was visible. And finally, that the stump obscured by untrimmed grass was not part of the inherent design of the golf course. CF, pp 105-113.

Defendant filed its Reply to Plaintiffs' Response to Defendant's Motion to Dismiss on September 20, 2020. CF, pp 158-169. In its Reply, Defendant asserted (i) some risk is acceptable, and only unreasonable risks which exceed the bounds of reason will waive immunity, CF, p 160.; (ii) CGIA does not require public entities to remove conditions which could foreseeably cause harm, rather public entities must only remedy conditions which are unreasonable; CF, p 163.; (iii)

immunity is not waived for million-to-one occurrences like what occurred in this case; CF, p 163.; (iv) having less than ideal conditions next to a path of travel is not unreasonably risky, just because the stump was 5-6 feet away from the path does not mean there is any reason to believe someone would drive their golf cart into it; CF, p 166.; and (v) when a condition exists for a long period of time without causing injury and the condition is not one which obviously presents an unreasonable risk there is no reason to impute knowledge of danger to the public entity; CF, p 168.

On September 25, 2020 Plaintiffs filed Plaintiffs' Motion for Entry of Default against Defendant Antares Golf, LLC ("Antares") due to no answer bring filed and court's deadline for filing for default. On November 3, 2020 counsel for Antares file an Entry of Appearance and an Answer on November 23, 2020 asserting Antares had not duty or obligation and did not manage, operate or control the Broken Tee Golf Course. CF, pp 172-173, pp 179-187. Upon confirmation of Antares' defense, Plaintiffs, Defendant, and Antares filed a joint Stipulation of Voluntary Dismissal of All Claims Asserted Against Antares Golf, LLC Pursuant to C.R.C.P. 41(a)(1)(B) which was granted on December 4, 2020 ending Antares' limited involvement with the case. CF, pp 188-194.

On January 14, 2021 the trail court issued its Order Re: Defendant City of

Englewood's Motion to Dismiss denying the motion and finding that the trial court has subject matter jurisdiction over the case. CF, pp 195-201. The trial court noted that neither party had requested an evidentiary hearing and found, *inter alia*, that based on the evidence before the trial court that there was no relevant factual dispute, only a dispute as to whether Plaintiffs sufficiently pled facts to establish subject matter jurisdiction, then proceeded to decide the issue of subject matter jurisdiction on the pleadings and exhibits filed by the parties. CF, pp 198-199.

The trial court concluded that the undisputed facts demonstrated that the condition of a hidden tree stump in an area of regular golf cart travel created a chance of injury, damage, or loss that exceeded the bounds of reason. CF, p 199. The trial court noted as part of its opinion that the Court in *City & Cty. of Denver v. Dennis*, 2018 CO 37, 418 P.3d 489 had taken great lengths to consider the financial impact and burden on the City and County in concluding the financial burden of removing a tree stump or even warning golfers in some way of its presence is not even closely analogous to the potential costs to the Colorado Department of Transportation ("CDOT") as discussed in *Dennis*. CF, pp 199-200.

On February 3, 2021, Defendant-Appellant City of Englewood filed its Notice of Interlocutory Appeal. CF, 203-210.

SUMMARY OF THE ARGUMENTS

Determining whether Defendant waived CGIA immunity simply requires a common sense fact-specific analysis of whether a tree stump obscured by view by untrimmed grass that was too high for a golf car to clear, located in a spot that golf cars (and walking golfers) can reasonably be expected to travel constituted an unreasonable risk to the health or safety of the public that exceeded the bounds of reason.

Facts and circumstances related to a public highway and the applicable statutory criteria differ significantly from those related to a stump on golf course. Comparing two sets of facts and circumstances verbatim, particularly in light of the different statutory criteria, provides an imperfect framework for analysis, at best. The stump presented a static condition that did not have to further deteriorate to become an unreasonable risk to the public. Therefore the duty to maintain the stump was arguably triggered whenever the tree became a stump; but in any event the duty to maintain the stump was triggered before Plaintiffs' golf car crashed into it.

Defendant's primary purpose in constructing or maintaining Broken Tee Golf Course for the promotion of recreation controls; not the alleged idiosyncratic reasons why Plaintiffs operated the golf car in the location of the stump.

Defendant was operating a business of a public golf course and as such should have removed the stump, or at least string trimmed around it.

The purpose asserted course rules at Broken Tee was protect the grass, not as an absolute prohibition against golf cars being driven off of cart paths. There is no evidence in the record that supports the assertion of an absolute prohibition against operating golf cars where the incident occurred.

Defendant's failure to remove the stump demonstrates Defendant's negligent act or omission in constructing or maintaining rather an intentional design of the condition.

The trail court below correctly interpreted and applied the provisions of Colorado's Governmental Immunity Act ("CGIA") in finding that the undisputed facts demonstrated that the condition of a hidden tree stump in an area of regular golf cart travel created a chance of injury, damage, or loss that exceeded the bounds of reason.

In determining when a condition constitutes an unreasonable risk to the health and safety of the public a court needs to take into consideration the stated policy behind the CGIA of lessening potential financial burdens on taxpayers. Far from mandating a particular formula or requisite financial test for determining the potential financial burdens on taxpayers, determining whether a condition presents

an unreasonable risk requires a fact-specific inquiry and that there is no one-size-fits-all rule.

ARGUMENTS

1. A tree stump obscured by view by untrimmed grass that was too high for a golf car to clear, located in a spot that golf cars (and walking golfers) can reasonably be expected to travel poses a risk of harm that exceeds the bounds of reason.

a. Standard of Review and Preservation of issue for Appeal.

Plaintiffs assert that factual determinations of the district court are upheld unless those determinations are clearly erroneous. *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Once the questions of fact are resolved, questions of governmental immunity are reviewed de novo. *Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Plaintiffs assert that the trial court's determinations of fact should stand unless clearly erroneous, but agrees that questions of governmental immunity are questions of law reviewed de novo. Plaintiffs state no opposition to Defendant's assertion that this issue was properly preserved for appeal.

b. The condition of the tree stump was an unreasonable risk to the health or safety of the public that exceeded the bounds of reason or and was *not* merely a foreseeable risk that did not waive immunity.

Plaintiffs must prove that the condition of the stump created a chance of injury, damage, or loss which exceeded the bounds of reason. *Dennis*, 2018 CO 37, ¶ 23, 418 P.3d 489, 497. This is primary issue to be resolved in this case. The facts as to what occurred are undisputed, however the context of the facts are in dispute. Examples of the context of the facts that are in dispute include: the

relevance, application, and enforcement of the 30-foot rule and the 90-degree rule, had the grass been allowed to grow untrimmed around the stump from its inception as a stump or was the incident the only time that grass had been allowed to grow untrimmed around the stump; had the stump ever been the cause of injury or complaints prior to this incident; was there a conscious decision on the part of Defendant to allow the stump to remain after the tree was supposedly cut down; was there a conscious decision to allow the grass to grow obscuring the stump from view for aesthetic reasons; length of time the stump been there, etc.

Fortunately determining whether Defendant waived CGIA immunity simply requires a common sense analysis of whether a tree stump obscured by view by untrimmed grass that was too high for a golf car to clear, located in a spot that golf cars (and walking golfers) can reasonably be expected to travel constituted an unreasonable risk to the health or safety of the public that exceeded the bounds of reason. In concluding "[p]ut 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" the trial court relied heavily on *Dennis* as Defendants did in their Motion to Dismiss, and as we will here. CF, p 199.

The crux of Defendant's argument is that at the time Plaintiffs crashed into

the stump obscured from view by overgrown grass, Plaintiffs were driving the golf car in an area where driving a golf car was prohibited. As such, Defendant's "decision" to leave an 8 inch stump in that location obscured from view by untrimmed grass may have created some danger, but not a danger rising to the level of an unreasonable risk to the health or safety of the public that exceeded the bounds of reason. Further, that since Defendants provided a cart path and that the stump had allegedly never caused an injury prior to this incident, Defendant's obligation as a public entity to maintain the stump was never triggered because the stump never became unreasonably dangerous.

The CGIA waiver of immunity applies if the alleged injuries occurred as a result of: (1) the physical condition of a public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility. C.R.S. § *24-10-103(1)*. Additionally, the condition must be associated with construction or maintenance, not solely design. C.R.S.§ 24-10-103(1), *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1180-81 (Colo. 2001).

Because governmental immunity is in derogation of Colorado's common

law, the CGIA's immunity provisions are strictly construed, and the CGIA's waiver provisions are construed deferentially in favor of victims injured by the alleged negligence of governmental agents. *Martinez v. Weld Cty. Sch. Dist. RE-1*, 60 P.3d 736, 738 (Colo. App. 2002). While the burden of proof is on Plaintiffs to prove immunity has been waived, this burden is relatively lenient, as the Plaintiffs are afforded the reasonable inferences from their undisputed evidence. *Tidwell ex rel. Tidwell v. City & Cty. of Denver*, 83 P.3d 75, 85-86 (Colo. 2003).

Determining if the stump as it existed at the time of the crash surrounded by untrimmed grass obscuring it from view presented an unreasonable risk is, for the most part, 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*, 2018 CO 37, ¶ 23, 418 P.3d 489, 497.

Dennis dealt with an alleged unreasonably dangerous condition of a public highway designed for public travel. C.R.S. § 24-10-106 states that sovereign immunity is waived by a public entity in an action for injuries resulting from a dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic. The court of appeals found, in a unanimous decision, that because the trial court's factual findings demonstrated that the road conditions physically interfered with the movement of traffic on a

road designed for public travel, and because that finding was not contested on appeal, the road constituted a "dangerous condition" for purposes of waiving immunity under C.R.S. §24-10-106(1)(d)(I) of the CGIA. *Dennis v. City & Cty. of Denver*, 2016 COA 140, ¶ 40, 419 P.3d 997, 1005.

The Colorado Supreme Court disagreed, holding instead that the condition at issue did not physically interfere with the movement of traffic. *Dennis*, 2018 CO 37, ¶ 13, 418 P.3d 489, 494-95. However, the Court first examined the "dangerous condition" prong of C.R.S. § 24-10-106(1)(d)(I), focusing on whether the road constituted an unreasonable risk to the health and safety of the public. The Court determined that the court of appeals' definition of "unreasonable risk" was incorrect for two reasons. First, the court of appeals misread the law. The government's duty to maintain a road is triggered only after the road becomes unreasonably dangerous. *Dennis*, 2018 CO 37, ¶ 18, 418 P.3d 489, 495. Second, the court of appeals' reading of the statute was at odds with the policy behind the CGIA itself. *Id.* at ¶ 19, 496.

At issue in *Dennis* was the alleged necessity of a major repair of a public highway; here the issue is a tree stump on a public golf course. However, one aspect of *Dennis* that definitely applies is applying a fact-specific inquiry to determine whether the condition, the stump at issue, constituted an unreasonable risk to the

health and safety of the public that "*exceeds the bounds of reason or moderation*".

It is difficult to apply the non-analogous facts and circumstances related to a public highway and the different applicable statutory criteria, C.R.S. § 24-10-106(1)(d)(I), to a stump on golf course subject to C.R.S. § 24-10-106(1)(e) referencing a dangerous condition of any public facility located in any park or recreation area maintained by a public entity. The fact patterns, context, conditions at issue, and statutory criteria of the two cases differ significantly.

The CGIA requires more than a foreseeable risk of harm; it requires an unreasonable risk of harm. § 24-10-103(1.3). *Dennis*, 2018 CO 37, ¶ 22, 418 P.3d 489, 497. In *Dennis* the Court reasoned that it may well be that driving on the road carried some risk—some chance of injury, damage or loss—however, the Court was not persuaded that the risk was there was unreasonable. *Id.* The Court reasoned there are situations when there is a chance the road could cause an injury, or it is foreseeable that the road could cause an injury, but that risk is inherent in driving on a *road that has deteriorated from its original condition through use*. [Emphasis added]. *Id.* While there was a foreseeable risk that the road could cause an injury that risk was determined to be reasonable in light of the facts of *Dennis*.

The Court reasoned that while the CGIA and prior case law make clear that the government's duty to maintain the road is triggered only once the road has

degraded to such an extent that it presents an unreasonable risk to the public, here we are not dealing with a public road. *Dennis*, 2018 CO 37, ¶ 18, 418 P.3d 489, 496. The concept of deterioration from its original condition through use like the road in *Dennis*, is not applicable to the condition the stump. The stump presented a static condition that did not have to further deteriorate to become an unreasonable risk to the public. Therefore the duty to maintain the stump was arguably triggered whenever the tree became a stump; but in any event the duty to maintain the stump was triggered before Plaintiffs' golf car crashed into it.

It is difficult to find guidance other than *Dennis* as to how interpret the standard of *exceeding the bounds of reason.* The concept is mostly found in terms of references to the acts of ALJ's in the workers compensation context, which is not directly analogous. An abuse of discretion occurs when the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law. *Heinicke v. Indus. Claim Appeals*, 197 P.3d 220, 222 (Colo. App. 2008). Using this approach as guidance, Plaintiffs assert that the stump created a chance of injury, damage, or loss which exceeded the bounds of reason both supported by the evidence in the record and by Colorado law.

Plaintiffs assert that Defendant's second argument under this heading is part and parcel of the first, and choose to address both as together as follows:

c. Plaintiff's clearly established by a preponderance of the evidence as pled in their Complaint and Response to the Motion to Dismiss that the Stump constituted an unreasonable risk to the health or safety of the public that exceeded the bounds of reason.

Defendant asserts that even *if* the stump were as "hidden" as Plaintiffs claim, and even *if* golfers routinely ignore course rules and take the shortcut Plaintiffs took, the stump is still not a condition which presents a risk that exceeds the bounds of reason. And, that is there no evidence that the stump was "of such a nature" that its dangerous character should have been discovered. These assertions defy common sense reasoning, as well run contra to Colorado law.

The twosome that Plaintiffs followed from the green at Hole No. 5 to the forward tee box at Hole No. 6 were Janice McNally and Mary Dunn. Both Ms. McNally and Ms. Dunn provided affidavits relating what they witnessed. CF, p 66; CF, p 67. Ms. McNally in her affidavit states that the group proceeded from Hole 5 to Hole 6 "using a direct straight line which is used by the women golfers because it is a direct route to the next hole". CF, p 66. She also states that "the cart path does not allow for two carts to be moving on the same path at the same time, one coming and one going". CF, p 66. Ms. Dunn in her affidavit states that the group was "using the route which is direct from the 5th hole we had just completed, to the tee for Hole 6, a route all women in our league use to go from Hole 5 to the tee of Hole 6". CF, p 67. Both ladies state that it was the usual and customary

practice of participants in the ladies golf league at Broken Tee to take the direct route from Hole 5 to the forward tee at Hole 6 with their golf cars. This wasn't the Hells Angels Golf League or a group of miscreants; it was the ladies golf league at Broken Tee Golf Course. As such, the ladies golf league at Broken Tee Golf Course were not a bunch of out of control scofflaws or crazed rule breakers. There was nothing idiosyncratic about the route they took in traversing the course from Hole 5 to the forward tee at Hole 6; it was customary for participants in the ladies golf league to take this route. During ladies golf league play Broken Tee requires that each set of golfers tee off at approximately 14 minute intervals. There is only one cart path between the 5th green and tee for the 6th hole. Due to oncoming golf cars and the fact that the cart path isn't wide enough to accommodate 2 golf cars simultaneously, participants in the ladies golf league would routinely travel directly across the course from the green at Hole 5 to the forward tee at the 6th Hole. CF, p 41. This was in part so they wouldn't run into the path of oncoming golf cars being driven to Hole 5 by golfers behind them, and because they were playing golf in intervals as part of the Broken Tee ladies golf league requirements and participants had to keep moving from hole to hole so as not to hold up the other participants. As a result, Defendant's staff at Broken Tee should have been aware that traversing the course along this route was a common occurrence.

As to the area where the stump was located and area where Plaintiffs crossed the course, both could be traversed and golfers could still be operating within the parameters of the 90-degree rule. Essentially, the 90-degree rule means riding in golf cars is allowed and golf cars can be driven onto the fairway, but golf cars must remain on cart parts as much as possible, turning off the path only at right angles (90 degrees) to reach the players' golf balls. The purpose is to help protect the grass, not as an absolute prohibition against golf cars being driven off of cart paths. In reality, golfers generally drive their golf cars all over the course at Broken Tee as the rules are not enforced and it is a very relaxed Par 3 public course. As a result, the stump created a chance of injury, damage, or loss of the golfing public at Broken Tee which exceeded the bounds of reason. And this clearly should have been known to Defendant's staff at Broken Tee.

Defendant asserts that "the City most certainly did not intend for golf carts to be operated where the accident occurred". The inference is that the City mandated golf carts to *only* be operated on cart paths and prohibited golf cars to be operated anywhere but the cart paths; this is not only incorrect, but also implausible and unsupported by the custom and practices at Broken Tee. Golf cars are operated all over the course at Broken Tee with no signage prohibiting carts accessing this or other areas of the course, with minimal to no dissemination of the

rules to patrons and no enforcement whatsoever. While reference to the 30-foot rule is included on the course-provided scorecard, the 90-foot rule can only be found on the Broken Tee website. CF, p 41; CF, p 43. Defendant should be aware that a stump obscured from view by overgrown grass presented an unreasonable danger to golfers, both in carts and walking. The stump was not only an unreasonable danger to golfers operating a course-provided golf car, but also a trip hazard. The dangerous condition presented by the condition of the stump was not only foreseeable, but also clearly presented an unreasonable risk to the health or safety of the public that exceeded the bounds of reason.

2. Defendant's Course Rules are not determinative in assessing whether the stump the posed a risk of harm that exceeded the bounds of reason.

a. Standard of Review and Preservation of issue for Appeal.

Plaintiffs assert that factual determinations of the district court are upheld unless those determinations are clearly erroneous. *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Once the questions of fact are resolved, questions of governmental immunity are reviewed de novo. *Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Plaintiffs assert that the trial court's determinations of fact should stand unless clearly erroneous, but agrees that questions of governmental immunity are questions of law reviewed de novo. Plaintiffs state no opposition to Defendant's assertion that this issue was properly preserved for appeal.

b. The Trial Court was not "Required" to Consider Defendant's Rule that Carts Remain 30 Feet From Tee Boxes as the Rule was not Determinative.

There is no evidence in the record that the trial court "ignored" assessing the course rules in reaching its concluding that "[p]ut 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". Defendant asserts that undisputed evidence shows that Defendant specifically stated that golf carts should *not* be driven in the area where the stump was located. This issue is not undisputed. There is no evidence in the record that supports this assertion of an absolute prohibition against operating golf cars where the incident occurred.

Important to Court's determination in *Dennis* was the City's expert Kennedy's unrebutted testimony. *Dennis, 2018 CO 37, ¶ 25, 418 P.3d 489, 497.* The record here includes no affidavits or expert opinions submitted on behalf of Defendant. As in *Dennis*, there is no evidence in the record directly rebutting the affidavits provided by Plaintiffs and Ms. McNally and Ms. Dunn or the report of Plaintiffs' expert. CF, pp 63-67; CF, pp 79-92. As such, Plaintiffs are afforded the reasonable inferences from their undisputed evidence.

The 30-foot rule was never enforced and impossible to adhere to because of

the overall area of the course was too small to accommodate golf cars always remaining 30 feet away from tees and greens. In many areas the cart path itself is within 30 feet of greens and tees. Like the 90-degree rule, the 30-foot rule is to help protect the grass, not as an absolute prohibition against golf cars being driven off of cart paths. And while stopping at a green or tee, golfers often would need to pull off the path to allow other golf cars pass.

The 30-foot rule, the 90-degree rule, providing a cart path, none of these aspects serve to communicate to golfers at Broken Tee that operating a golf car in the location of the stump was prohibited. Providing a cart path is not an indicator, implied or otherwise, that golf cars are prohibited from operating in the location of the stump. The 90-degree rule just states that golf cars should drive onto the fairways at a 90 degree angle to the golfer's ball; it neither states nor implies any indications of prohibited locations. The 30-foot rule is not an absolute prohibition, is not enforced, has a purpose of protecting greens and tees. Therefore it is a "bridge too far" to assert the 30-foot rule serves to support the defense that that due to the 30-foot rule the stump did not present a danger to golfers driving golf cars. Whether or not the trial court considered the 30-foot rule, assuming arguendo that the rule was not considered, would not have altered the trial court's conclusion as gleaned from its order, and therefore any alleged error is harmless. With regard to

harmless error review, the jurisprudence of both the Colorado Supreme Court and the United States Supreme Court distinguishing trial from structural error and defining "substantial rights" has evolved to the point of sanctioning reversal for trial error only when that remedy is dictated by an appropriate outcome-specific analysis. *People v. Novotny*, 2014 CO 18, ¶ 17, 320 P.3d 1194, 1200.

In support of the alleged requirement that the trial court consider the 30-foot rule, Defendants rely, in part, on the analysis in *Daniel v. City of Colo. Springs*, 2014 CO 34, 327 P.3d 891. Defendant posits that in assessing whether golfers were allowed, prohibited, or should not have been expected to operate a golf car in the area of the stump, the risks should be assessed in light of the reasonable expectations and intentions of the public entity who builds or operates the facility. Defendant asserts determinations of waivers of immunity under CGIA do not account for the conduct or actions of the public and therefore whether immunity has been waived is determined based on what the public entity intended and expected, and not on the subjective actions of any individual. Plaintiffs do not agree with Defendant's application of *Daniel*.

Sovereign immunity is waived by a public entity in an action for injuries resulting from a dangerous condition located in any park or recreation area maintained by a public entity, as was the stump in at issue here. C.R.S. 24-10-

106(1)(e). In determining whether a particular *piece of property* is "located in" a "recreation area," the Court in *Daniel* began by employing a three-step analysis by determining: (i) what property is relevant to the analysis (i.e., what property constitutes the "putative recreation area"); (ii) if the recreation area includes both recreational and non-recreational purposes, then what is the public entity's "primary purpose" in constructing or maintaining the area the promotion of recreation; (iii) if primary purpose was the promotion of recreation, then determining whether the area at issue is "located in" the boundaries of the recreation area. *Daniel v. City of Colo. Springs*, 2014 CO 34, ¶ 23, 327 P.3d 891, 897.

An injured individual's purpose in visiting the recreation area where he or she was injured is irrelevant. The examination of the public entity's primary purpose-rather than the injured individual's purpose-reflects the thrust of determination of CGIA immunity the waivers, which focus exclusively on the public entity's duties to maintain its premises in a safe manner and to discover and correct dangerous conditions that could cause injuries. Waivers of immunity under the CGIA do not focus on the injured individual's duties, or on the injured individual's right to compensation. A public entity owes the same duty to an individual injured by a dangerous condition "located in" a "recreation area"

regardless of the idiosyncratic reasons why that individual might have visited the recreation area. *Daniel v. City of Colo. Springs*, 2014 CO 34, ¶ 27, 327 P.3d 891, 898-99.

The analysis described in *Daniel* is intended to be applied to situations involving mixed use, recreation and non-recreation, to determine whether the entity's primary purpose in constructing or maintaining the area is the promotion of recreation, and if so, whether the public facility at issue is located within the boundaries of the intended recreation area. Here, there is no question that Broken Tee Golf Course was constructed and maintained for recreation and that the stump was located in the recreation area. The main thrust of *Daniel* is not whether the individual utilized the area for recreation, but rather whether the entity's intended purpose was for the area to be used for recreation.

Applying *Daniel* to assert that the 30-foot rule established the Defendant's purpose that the area where the stump was located should not be used for the operation of golf cars is without merit. The area where the stump was located was not cordoned off, or separate from the golf course, or restricted from use by golfers or where one would never expect a golfer to travel with a golf car. Under *Daniel*, the waiver of immunity at issue here should focus exclusively on Defendant's duties to maintain its premises in a safe manner and to discover and correct

dangerous conditions that could cause injuries.

In relying on *Daniel*, Defendant asserts that a golf course is not maintained with the expectation that golfers will ignore course rules and that Defendant clearly expressed its intent that golf carts not be driven where Plaintiffs took their golf cart, concluding that the fact that Plaintiffs ignored the rules and chose to act in their own self-interest does not change this analysis. This assertion is a bit over-the-top in light of the facts of this case. The ladies in the ladies golf league were taking a route from the 5th Hole to the forward tee at the 6th Hole that was commonplace at Broken Tee. The fact that the staff at Broken Tee allegedly did not know of the regular and customary conduct of its patrons, or chose to remain willfully ignorant of their patrons conduct, and solely rely on 2 non-enforced rules in determining whether the stump was a dangerous condition *does* change the analysis. A public entity owes the same duty to an individual injured by a dangerous condition "located in" a "recreation area" regardless of the idiosyncratic reasons why that individual might have visited the recreation area. *Daniel*, 2014 CO 34, ¶ 27, 327 P.3d 891, 898-99. As such, it is Defendant's primary purpose in constructing or maintaining the area for the promotion of recreation that controls, not the alleged idiosyncratic reasons why Plaintiffs operated the golf car in the area where the stump was located. Defendant was operating a business of a public golf

course and as such should have removed the stump, or at least string trimmed around it.

3. <u>The Stump Was Not A Design Choice, It Was a Maintenance Failure.</u>

a. Standard of Review and Preservation of issue for Appeal.

Plaintiffs assert that factual determinations of the district court are upheld unless those determinations are clearly erroneous. *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Once the questions of fact are resolved, questions of governmental immunity are reviewed de novo. *Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Plaintiffs assert that the trial court's determinations of fact should stand unless clearly erroneous, but agrees that questions of governmental immunity are questions of law reviewed de novo. Plaintiffs state no opposition to Defendant's assertion that this issue was properly preserved for appeal.

b. The condition, the stump obscured from view by untrimmed grass, was proximately caused by the negligent act or omission of Defendant in constructing or maintaining the facility.

The condition, the stump obscured from view by untrimmed grass, was proximately caused by the negligent act or omission of Defendant in constructing or maintaining the facility and as such, the statute's waiver of immunity applies. *Springer v. City & Cty. of Denver*, 13 P.3d 794, 800 (Colo. 2000).

To recover under this provision of the CGIA, Plaintiffs must show as a

threshold jurisdictional matter that the condition upon which they base their tort claim existed because of the government's act or omission in maintaining or constructing the condition rather than the government's design of the condition. *Swieckowski by Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997). Broadly construing the immunity waiver provisions, as the court must, meanings of "maintain" include "to keep in a state of repair, efficiency, or validity: preserve from failure or decline. "Maintenance" includes "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: CARE, UPKEEP." *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1182 n.4 (Colo. 2001).

Defendant asserts that the trial court below did not identify any physical decline or failing of the golf course. First, Plaintiffs assert that the condition, the stump obscured from view by untrimmed grass, as demonstrated in the pictures in the record, clearly and simply demonstrates a condition caused by the negligent act or omission of Defendant in constructing or maintaining the facility. CF, p 61, 62, 46. Second, Defendant by allowing the grass to grow untrimmed, or failing to trim the grass around and inside of the stump, negligently created the dangerous condition of a stump obscured from view. The reality is the area of untrimmed grass concealed an approximately 8" high stump that a golf car with a clearance of 4.1"-4.3" rented to Plaintiff Medina by Defendant could not clear. CF, p 68, 69.

At a minimum, Defendant neglected to trim the grass around the stump resulting in the stump being obscured from view thereby proximately causing the condition. However, Defendant's failure to remove the stump in its entirety demonstrates Defendant's negligent act or omission in constructing or maintaining rather their design of the condition.

c. The stump obscured from view by untrimmed grass served no design or functional purpose whatsoever.

A dangerous condition shall not exist solely because the design of any facility is inadequate. C.R.S. § 24-10-103(1.3). Defendant asserts that the stump was a part of the design of the golf course. This assertion is unsupported by the record, Colorado law, and arguably by a common sense analysis of the condition of the stump.

An injury results from inadequate design when it is caused by a condition of that *inheres in the design* and persists to the time of the injury. [emphasis added] *Medina v. State*, 35 P.3d 443, 448 (Colo. 2001). The critical distinction between maintenance and design is temporal. *Estate of Grant v. State*, 181 P.3d 1202, 1205 (Colo. App. 2008). The respective analyses have focused on whether the particular injury-causing condition developed during the facility's design phase or after the design was completed. *Id.* at 1206. Attributing the condition of the stump to design would require ascertaining the original condition of the golf course in order

to determine the general state of being and repair of the golf course as initially constructed *Medina v. State*, 35 P.3d 443, 448-49 (Colo. 2001). Only after making this determination could a court ascertain whether a developed through a lack of maintenance subsequent to the initial design and construction of the course, and thus whether immunity has been waived. *Id.* at 448-49. However, rather than embarking on the process of determining whether the original design included the stump, or even the original tree, substituting a common sense analysis of the condition of the stump clearly indicates that the stump was not part of the design of the golf course. It was not aesthetic; it served no functional purpose and was a condition that created a chance of injury, damage, or loss which exceeded the bounds of reason. The stump resulted from a tree that either fell down or was cut down and then the grass was allowed to go untrimmed around it; not a design choice.

4. The Trial Court properly Analyzed Waiver of Immunity in Considering the Policy behind the CGIA.

a. Standard of Review and Preservation of issue for Appeal.

Plaintiffs assert that factual determinations of the district court are upheld unless those determinations are clearly erroneous. *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 12, 418 P.3d 489, 494. Once the questions of fact are resolved, questions of governmental immunity are reviewed de novo. *Dennis*, 2018 CO 37, ¶

12, 418 P.3d 489, 494. Plaintiffs assert that the trial court's determinations of fact should stand unless clearly erroneous, but agrees that questions of governmental immunity are questions of law reviewed de novo. Plaintiffs state no opposition to Defendant's assertion that this issue was properly preserved for appeal.

b. The Trial Court Did Commit Error in Considering the Relative Cost to Maintain or Remove the Stump.

C.R.S. § 24-10-102 states the general assembly recognizes that the taxpayers would ultimately bear the fiscal burdens of unlimited liability and that limitations on the liability of public entities and public employees are necessary in order to protect the taxpayers against excessive fiscal burdens.

In *Dennis*, the Court held that the court of appeals' definition of "unreasonable risk" was incorrect for two reasons, the second of which was that the court of appeals' failed to consider the policy behind the CGIA itself, i.e. C.R.S. § 24-10-102. *Dennis*, 2018 CO 37, ¶ 18, 418 P.3d 489, 495.

The Court reasoned that the intent behind the CGIA is to lessen potential burdens on taxpayers and that because the court of appeals ignored this policy declaration and expanded the potential burdens on taxpayers, the court of appeals erred. *Dennis*, 2018 CO 37, ¶ 19, 418 P.3d 489, 496. It is reasonable to conclude that the Court's intent was, at a minimum, to strongly encourage consideration of

the policy behind the CGIA to lessen potential burdens on taxpayers. Further, in analyzing the issue of whether "unreasonable risk" under the CGIA, any court that ignores or fails to take into consideration the policy behind the CGIA does so at its own peril. As such, the trial court was correct in taking into account policy behind the CGIA and considering the relative costs and potential financial burden on taxpayers of removing a tree stump or even warning golfers *in some way* of its presence would in no way violate the intent behind the CGIA. CF, pp 195-201.

c. There is no established test indicating what costs should be considered, aggregate or otherwise, when taking into account the policy behind the CGIA.

The Court in *Dennis* provided no indications as to what costs should be considered or what formula should be utilized, aggregate or otherwise, when taking into account the policy behind the CGIA. However the Court did hold that in determining whether a condition presents an unreasonable risk requires a fact-specific inquiry and that 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*, 2018 CO 37, ¶ 23, 418 P.3d 489, 497.

The implication of the *Dennis* holding is that in determining when a condition will constitute an unreasonable risk to the health and safety of the public a court needs to take into consideration the stated policy behind the CGIA; to

lessen potential financial burdens on taxpayers. Far from mandating a particular formula or requisite financial test for determining the potential financial burdens on taxpayers, the Court stated that determining whether a condition presents an unreasonable risk will necessarily be a fact-specific inquiry and that there is no one-size-fits-all rule. The necessary implication is that each situation presents its own unique set of circumstances that courts in conducting a fact-specific inquiry will need to take into consideration the stated policy behind the CGIA, to lessen potential financial burdens on taxpayers, but the Court did not specify how that should be accomplished. As such, the trial court did not err in its methodology of considering the relative cost to remove or maintain the stump.

Conclusion

A tree stump on a public Par 3 golf course obscured from view by grass that was allowed to go untrimmed, located approximately 5-6 feet from a forward tee, 5-6 feet off the cart path, of an approximate height of approximately 8 inches, a height that cannot be cleared by the golf cars Defendant rents to its patrons which stump serves no functional purpose, is an unreasonably dangerous condition that exceeds the bounds of reason. While the burden of proof is on Plaintiffs to prove immunity has been waived, this burden is relatively lenient, as the Plaintiffs are afforded the reasonable inferences from their undisputed evidence. A waiver of

immunity by Defendant is both supported by the evidence in the record and by Colorado law. The trial court correctly interpreted and applied the law, performed the proper analysis, properly considered and applied the intent behind the CGIA which is to lessen potential burdens on taxpayers and in no way expanded Defendant's potential liability beyond what the General Assembly intended, or exposed the taxpayers to excessive fiscal burdens.

WHEREFORE, Plaintiffs respectfully requests that relief sought by Defendant's be denied and that the Court of Appeals affirm the trial courts judgment in all respects.

Respectfully submitted this 8th day of June, 2021.

WESTBROOK LAW OFFICES, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **ANSWER 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 June 6, 2021, copies addressed to:

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