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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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<tr><td colspan="2" align="center">REPLY BRIEF</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 **5,349** 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/ Winslow R. Taylor, III
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TABLE OF CONTENTS

Contents

CERTIFICATE OF COMPLIANCE.. ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REPLY STATEMENT vii

ARGUMENTS 1

1. The Stump was Not Unreasonably Dangerous 1

a. Plaintiffs Misunderstand the Rule Announced in *Dennis* 1

b. "Exceeds the Bounds of Reason" is Not Synonymous with, or Related to, "Abuse of Discretion" 2

c. Plaintiffs Have Not Proven All Required Elements 3

2. Course Rules Must be Considered in Assessing the Danger Presented 6

a. The Rules Apply Even if Plaintiffs are Not Aware of Prior Enforcement Actions.. 6

b. Plaintiffs' Assertion That Golfers Frequently Take a Shortcut from the 5th Hole to the 6th Hole is Irrelevant 8

c. The Width of the Cart Path is a *Post Hoc* Justification which Should be Ignored.................... 9

d. Defendant's Knowledge of Rules Violations by Other Golfers Does Not Waive Immunity 11

3. Plaintiffs Fail to Dispute the Stump was a Design Choice 15

CONCLUSION 21

CERTIFICATE OF SERVICE....................22

TABLE OF AUTHORITIES

Cases

Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017)..................11

Burnett v. State Dept. of Nat. Resources, 346 P.3d 1005 (Colo. 2015) 3

City and County of Denver v. Dennis, 418 P.3d 489 (Colo. 2018).......................2, 4

DeAnzona v. City and County of Denver, 222 F.3d 1229 (10th Cir. 2000) 19

Fine v. Tumpkin, 330 F. Supp. 3d 1246 (D. Colo. 2018) 7

Harrington v. Richter, 562 U.S. 86 (2011)..11

Karr v. City & Cty. of Denver, 677 P.2d 1384 (Colo. App. 1984) 15

Medina v. State, 35 P.3d 443 (Colo. 2001)...13, 15

St. Vrain Valley Sch. Dist. RE-1J v. Loveland, 395 P.3d 751 (Colo. 2017)...........19

Swieckowski by Swieckowski v. City of Ft. Collins, 934 P.2d 1380 (Colo. 1997)...18

Szymanski v. Dept. of Highways of State of Colo., 776 P.2d 1124 (Colo. App. 1989)...19

Timm v. Reitz, 39 P.3d 1252 (Colo. App. 2001) 11

Williams v. Dep't of Public Safety, 369 P.3d 760 (Colo. App. 2015).....................11

Statutes

C.R.S. § 24-10-103(1.3)...2, 3, 5

C.R.S. § 24-10-103(2.5)..15

C.R.S. § 24-10-106.5(1) 7

C.R.S. § 42-4-1010(1) 14

REPLY STATEMENT

In seeking to uphold the trial court's order, Plaintiffs' Answer Brief presents three primary arguments. None of the arguments support a waiver of immunity in this case.

First, Plaintiffs argue that the stump posed a risk of harm that exceeded the bounds of reasons because it was in an area that golf carts *could* go. But this argument relies on a logically flawed premise: because golfers may try to operate their carts in all areas, Defendant must either physically prevent access to certain areas on the course or, alternatively, make every area on the golf course perfectly safe for golf carts. Of course, even a superficial inquiry into this theory reveals its absurdity as this would require the elimination of ponds, lakes, or other water hazards because someone *could* drive their cart into the water. The argument does not withstand scrutiny.

Plaintiffs' second primary argument focuses on the course rules and vacillates between arguing that Defendant's course rules are not really "rules" that anyone has to follow, and arguing that even if the rules should be followed, the lack of consistent enforcement means the rules do not apply to them. Plaintiffs' argument in this regard necessarily requires them to admit an important fact: they knew the course rules expressly prohibited golf carts on the grass within 30 feet of

tee boxes. It is only *after* admitting that the rule exists can Plaintiffs then argue that the rules should not apply. Much of Plaintiffs' argument follows a well-known and flawed line of reasoning: everyone else does it. Such reasoning has never been sufficient to excuse behavior, and that holds true here. Quite simply, Defendant asked that carts not be driven where Plaintiffs operated their cart and expected golfers to comply. Plaintiffs' argument might hold up if there was no safe and available cart path and Plaintiffs had to forge their own path throughout the course. But there was readily available cart, and Plaintiffs' argument can rightfully be disregarded.

Finally, Plaintiffs summarily argue that the stump was not a design flaw because, even though the stump had existed in the state they found it "for an extended period of time," Defendant never should have allowed the stump to exist. Plaintiffs go on to argue that the stump did not serve an aesthetic or functional purpose and, therefore, it could not be a design choice. But Plaintiffs' aesthetic preferences do not prevent something from being a design choice. Quite the opposite, the Colorado Supreme Court does not require that an element fit a certain aesthetic or serve a useful function to be part of a design. All that is required is that the element exist due to a choice of the public entity. The stump here existed by design, and it does not waive immunity.

ARGUMENTS

1. <u>The Stump was Not Unreasonably Dangerous</u>

Plaintiffs try to avoid reversal by arguing that the stump was an unreasonable risk to the health or safety of the public because (1) golfers using golf carts frequently take a shortcut from the 5th hole to the 6th hole, (2) the cart path is not wide enough for two golf carts to occupy the path at the same time, and (3) Defendant should have known that golfers do not feel obligated to remain on the cart path. (Answer Brief, pp 1-11.) These arguments cannot prevail.

a. Plaintiffs Misunderstand the Rule Announced in *Dennis*

Primarily relying on their own affidavits asserting the tree stump was an unreasonably dangerous condition, Plaintiffs assert they are entitled to all reasonable inferences and that the Court must conclude the stump was unreasonably dangerous. Plaintiffs fail to appreciate the difference between a fact and the characterization of a fact. It is a fact that the stump existed. Calling the stump unreasonably dangerous is a characterization of the stump; it is simply an opinion about a fact. Plaintiffs' affidavits calling the stump dangerous add nothing to the analysis. Instead of focusing on the subjective and self-serving opinions of Plaintiffs, the inquiry is properly focused on whether a tree stump in an area not designed for golf carts to operate poses an objectively unreasonable risk of harm

which waives Defendant's immunity. Because the stump is not a condition which "exceeds the bounds of reason," immunity cannot be waived. *City and County of Denver v. Dennis*, 418 P.3d 489, 497 (Colo. 2018).

Even though *Dennis* interpreted the phrase "unreasonable risk" as used in section 24-10-103(1.3), Plaintiffs also question whether the analysis in *Dennis* applies to this case on the basis that the facts in *Dennis* differ from the facts here. Plaintiffs are right that the facts of this case share little similarity with the facts of *Dennis* – the evidence in *Dennis* showed a roadway with cracks and ruts which posed some risk while the stump here posed no risk to golf carts that followed course rules. But the specific facts of *Dennis* are immaterial. The significance of *Dennis* is the analysis of the phrase "unreasonable risk." If Plaintiffs are going to prove the existence of a dangerous condition, they must prove the condition posed an unreasonable risk of harm—that is, a risk of harm which exceeded the bounds of reason—and the analysis of *Dennis* controls.

b. "Exceeds the Bounds of Reason" is Not Synonymous with, or Related to, "Abuse of Discretion"

Plaintiffs take the position that the "exceeds the bounds of reason" standard is difficult to interpret and requires additional guidance. Straying far afield of any relevant case law or legal principles, Plaintiffs turn to appeals of decisions made by administrative law judges in workers' compensation matters involving the

Industrial Claim Appeals Office, concluding that "exceeding the bounds of reason" actually means "abuse of discretion." (Answer Brief, p 7.) Plaintiffs assert that the Court must affirm the decision of the trial court if there is evidence supporting the trial court's conclusion. (Answer Brief, p 7.) This simply cannot be. The standard of review in this matter is *de novo*, which means trial court's conclusion is afforded no deference. *Burnett v. State Dept. of Nat. Resources*, 346 P.3d 1005, 1008 (Colo. 2015) ("Where the facts are undisputed, as they are here, appellate review is de novo.")

c. Plaintiffs Have Not Proven All Required Elements

The CGIA's definition of "dangerous condition" requires claimants to prove two essential elements. Pertinent here, the CGIA provides that "dangerous condition" means:

> either a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility. For the purposes of this subsection (1.3), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered.

C.R.S. § 24-10-103(1.3)

The establish the first element—that the stump constituted an unreasonable risk to the safety of the public—Plaintiffs must have proven that a tree stump in an area where golf carts should not be driven "created a chance of injury, damage, or loss which exceeded the bounds of reason." *Dennis*, 418 P.3d at 497. If Plaintiffs have proven that the stump posed a risk of harm that exceeded the bounds of reason, then they must then prove the second element—that Defendant had knowledge of a risk which exceeded the bounds of reason—which can be accomplished by proving either (1) that the risk was "known to exist" by Defendant, or (2) that the danger "was of such a nature that" it should have been discovered. C.R.S. § 24-10-103(1.3). Plaintiffs fail on all elements.

As to the first element, the stump was not so dangerous that its presence exceeded the bounds of reason. The stump in question was several inches high and located in the grass, not on the paved path golf carts should be on when near tee boxes. CF, p 46. If the stump were in the middle of the cart path, the assessment might be different. But the stump was not in the middle of the cart path, and whatever risk it posed to golf carts was reasonable in light of the fact the cart path was intended for use by golf carts.

As to the second element, the record contains no evidence that Defendant knew that the stump posed any risk at all. There were no prior accidents reported,

no complaints, and no known issues with the stump. The stump existed for years and the record lacks evidence of any prior issues. And since it is Plaintiffs' burden to prove jurisdiction, it was not incumbent on Defendant to disprove anything by providing affidavits attesting to the lack of incidents. Plaintiffs were obligated to prove all elements, including knowledge, and they failed to provide the required evidence.

Having failed to prove actual knowledge, Plaintiffs must prove Defendant "should have known" about the unreasonable risk. Yet, there is no evidence in the record that the stump was "of such a nature" that any "dangerous character" should have been discovered. C.R.S. § 24-10-103(1.3). It was a stump, in the grass, which received no complaints. And since Defendant had course rules which requested golfers not drive golf carts in the grass within 30 feet of tee boxes, there was no reason to believe that anyone would opt for a shortcut that made them drive right through the tee box area and directly into the stump.

Plaintiffs have failed to prove any of the required elements. The trial court erred in finding that Defendant waived immunity and the Court should reverse and remand with instructions to dismiss.

2. Course Rules Must be Considered in Assessing the Danger Presented

It is undisputed that Plaintiffs received the scorecard with the course rules expressly stating that golf carts must stay on the cart path for all par 3 holes and that golf carts must be kept 30 feet from greens and tees. CF, p 42. Even though Plaintiffs received these rules, and knew about the rules, Plaintiffs take the position that the course rules are immaterial because the rules were not meant to protect people from harm. As Plaintiffs' argument goes, the course rules regarding keeping golf carts more than 30 feet away from greens and tee boxes protect the grass on greens and tee boxes. (Answer Brief, p 13.) But Plaintiffs' argument misses the mark. The course rules directly reflect how the course should be used and what equipment should not be utilized in certain areas. As such, they directly relate to reasonable expectations and whether, based on an objective assessment, the tree stump presented a risk of harm that exceeded the bounds of reason.

a. The Rules Apply Even if Plaintiffs are Not Aware of Prior Enforcement Actions

Defendant has shown that it provided a paved cart path that went from the putting green for the 6th hole all the way to the tee boxes for the 5th hole. CF, p 41. Defendant has shown that it provides scorecards which contain course rules and Plaintiffs had a copy of the scorecard. CF, p 42. The rules provide that carts must remain on the cart path for all par 3 holes and, for all holes, carts must be

kept 30 feet from putting greens and tee boxes. CF, p 42. Plaintiffs do not challenge any of these established facts, but instead assert that because golfers frequently ignore the rules, and Defendant does not frequently punish rule breakers, then the rules themselves are immaterial. There is no legal or logical basis for this assertion.

At the outset, Colorado law expressly precludes Plaintiffs from arguing that the failure to enforce course rules or policies somehow supports a waiver of immunity. Pursuant to C.R.S. § 24-10-106.5(1), "a public entity or public employee shall not be deemed to have assumed a duty of care where none otherwise existed by the performance of a service or an act of assistance for the benefit of any person." Further, "[t]he adoption of a policy or a regulation to protect any person's health or safety shall not give rise to a duty of care on the part of a public entity or public employee where none otherwise existed." *Id*. Finally, "the enforcement of or failure to enforce any such policy or regulation…shall not give rise to a duty of care where none otherwise existed[.]" *Id*.; *see also Fine v. Tumpkin*, 330 F. Supp. 3d 1246, 1252 (D. Colo. 2018) ("Under the plain language of the statute, University policy does not establish a legally cognizable duty of care, and thus an alleged violation thereof does not constitute a breach of a legal duty.") Plaintiffs' argument runs directly contrary to Colorado law regarding

enactment and enforcement of rules, regulations, and policies. On this basis alone, Plaintiffs' argument can be rejected.

b. Plaintiffs' Assertion That Golfers Frequently Take a Shortcut from the 5th Hole to the 6th Hole is Irrelevant

Beyond the legal prohibition against arguing that the failure to punish golfers who ignore course rules somehow supports a finding that Defendant has waived immunity, Plaintiffs' position that they can ignore course rules because others do as well is unsupportable. The subjective whims and actions of users are not a basis for finding an immunity waiver. The CGIA establishes rules for when a public entity waives immunity based on its actions or the actions of public employees; the CGIA does not provide for immunity waivers based on the actions of individuals which the public entity does not employ and does not control.

Plaintiffs do not deny that they knew of the course rules. Instead of claiming ignorance of the rules, Plaintiffs seek to excuse their failure to abide by the rules by pointing to others who have also ignored the rules. But the explanation only seeks to justify why Plaintiffs believed breaking the rules was acceptable. It means nothing with respect to whether the stump was an unreasonably dangerous condition which waives Defendant's immunity. And the fact of the matter is that the stump could not have been unreasonably dangerous under the circumstances precisely because there was a safe and available path. Any danger posed by the

stump was within the bounds of reason because the stump was not on the path Defendant provided for travel by golf carts. Instead, the stump was in an area where Defendant asked that golf carts *not* be driven and Defendant reasonably did not believe the stump would pose a risk to golf carts. This is precisely and entirely within the bounds of reason.

Defendant provided a safe cart path and asked golfers to keep their golf carts on the path. It was not Defendant's burden to police the course and punish every golfer who broke any course rule. Golf is famously a self-policing sport where players are expected to know, and follow, the rules.[1] The cart path was available Defendant asked golfers to use it, and Plaintiffs' accident never would have happened had they followed the course rules.

Just as one can lead a horse to water but cannot make it drink, in this matter Defendant provided the proverbial water but Plaintiffs chose not to drink.

c. The Width of the Cart Path is a *Post Hoc* Justification which Should be Ignored

In attempting to justify why they took their golf cart off the cart path to take the shortcut, Plaintiffs offer statements that the cart path was not wide enough to

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[1] *See* USGA "Rules of Golf" Rule 1, stating "You are responsible for applying your own penalties if you breach a Rule[.]" (copy of "Rules of Golf" Rule 1 available at https://www.usga.org/content/usga/home-page/rules/rules-2019/rules-of-golf/rules-and-interpretations.html#!ruletype=pe§ion=rule&rulenum=1) (last visited June 29, 2021.)

accommodate two carts passing each other. (Answer Brief, p 9.) This position is nothing but a *post hoc* justification which adds nothing to the analysis.

With respect to the evidentiary record, there is nothing in the record which even potentially indicates that Plaintiffs had to leave the cart path because another golf cart was coming at them head-on. There was no evidence that there were even other carts or players in the immediate area. There was similarly no evidence of the exact specifications of the cart path, primarily because it was never brought up as an issue. In fact, the only evidence offered is that their playing partners took the shortcut and that is why Plaintiffs did. CF, p 63. Even if Plaintiffs had raised this issue, that the cart path should have been built wider, it would be rightfully rejected as an argument that the cart path was inadequately designed, which precludes an immunity waiver. C.R.S. § 24-10-103(1.3) ("A dangerous condition shall not exist solely because the design of any facility is inadequate.")

Beyond the lack of evidence is the legitimate concern with a party attempting to justify their actions with explanations that, without a doubt, did not impact their decision-making in the moment. In a variety of other legal contexts, where courts must evaluate a party's conduct, the party is precluded from offering *post hoc* justifications like those offered here by Plaintiffs. *See, e.g., Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 798-99 (2017) (gerrymandering

inquiry looks to "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not"); *Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("courts may not indulge '*post hoc* rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions"); *Williams v. Dep't of Public Safety*, 369 P.3d 760, 772 (Colo. App. 2015) (in employment discrimination cases, evidence of "*post-hoc* justifications" that were not employer's actual reasons "can be evidence of pretext"); *Timm v. Reitz*, 39 P.3d 1252, 1256 (Colo. App. 2001) (in Fourth Amendment case challenging drug testing program, court must consider "the actual, programmatic purpose" and "not merely look for any governmental interest that could be classified as a special need").

Plaintiffs did not depart the cart path because they were forced to make a sudden evasive maneuver to avoid an oncoming cart on the cart. The truth is much simpler – Plaintiffs took the shortcut because it was convenient for them.

d. Defendant's Knowledge of Rules Violations by Other Golfers Does Not Waive Immunity

Plaintiffs take the position that the stump was unreasonably dangerous, in part, because Defendant knew that golfers frequently departed from the cart path. This argument does not rebut the assertion that the cart path provide a safe path of

travel for use by golf carts and makes little logical sense as it would allow for users of a facility to, essentially, make their own rules.

To begin, in its Opening Brief, Defendant established that the cart path provided a safe path of travel for use by golf carts which reached all areas of the course. (Opening Brief, p 9.) Plaintiffs do not dispute this fact and do not challenge that Defendant intended for golf *carts* to utilize the *cart* path. Instead, Plaintiffs appear to argue that Defendant could not have intended that golf carts *only* be used on the cart path. (Answer Brief, p 10.) But this has never been Defendant's position. Defendant's position is, and always has been, that golf carts should not be taken off the cart path on par 3 holes and within 30 feet of putting greens and tee boxes. CF, p 42. Because carts should not be operated off the cart path within 30 feet of putting greens and tee boxes, these areas are not maintained to accommodate golf carts.

Certainly, golfers may, and sometimes do, ignore the course rules and act in their own interest. And Plaintiffs seem to argue that Defendant's knowledge of this reality means Defendant should have done something to prevent the very actions Plaintiffs' took here in departing the cart path for a shortcut. Plaintiffs' argument is, essentially, that Defendant knew people would break the rules and had a duty to prevent people from breaking the rules by, for example, placing more signs around

the course telling golfers not to drive their carts across greens and tee boxes or placing barriers around the green and tee boxes. But that would be placing a duty on Defendant which does not exist under the CGIA – either a duty to warn or a duty to upgrade a facility with new features. *Medina v. State*, 35 P.3d 443, 462 (Colo. 2001) (rejecting claim that public entity waived immunity for failing to warn about dangerous condition of highway, stating that "[o]ur precedent makes clear that the CGIA has not waived the state's immunity for such a claim.") Moreover, Defendant would need to know that there was a dangerous condition to warn anyone about the existence of a dangerous condition. Yet, the record provides no indication that the stump had ever caused any other problems, and Defendant had no reason to suspect the stump would suddenly pose any risk of harm.

As for Plaintiffs' contention that Defendant has waived immunity because golfers frequently take the same shortcut that they did, this position finds no support in Colorado law. Truth be told, this argument can be rejected with the same hypothetical Defendant presented in the Opening Brief. In the Opening Brief, Defendant analogized departing the cart path to a driver making a U-turn through the earthen median of a divided highway. (Opening Brief, pp 10-11.) Driving through an earthen median on a divided highway is generally prohibited except in specified areas. C.R.S. § 42-4-1010(1) ("No vehicle shall be driven over, across, or

within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection as established[.]") If the median does not have a barrier physically preventing a car from driving through the median, any vehicle could drive through the median despite the statutory prohibition. But it would be absurd to allow a driver who left the paved roadway to drive through the median to recover damages if their vehicle was damaged by driving through a median which was not intended for vehicular travel. Certainly, the driver could argue that the public entity should have put up a barrier or had someone in the area to enforce the law, just as Plaintiffs do here. The driver could also argue the public entity knew the median was dangerous to vehicles and should have been maintained to allow for people to make U-turns. But none of that means that the car should have driven through the median simply because it was more convenient. The same logic applies here as the course rules specifically state that golf carts should not depart the cart path within 30 feet of tee boxes. Whatever risk the stump posed in its location was reasonable given the course rules asking golfers not to use carts near tee boxes and the availability of a safe cart path that would have taken Plaintiffs to the exact location they wished to go, albeit a few seconds later. Defendant was not obligated to threaten golfers into compliance with course rules.

Plaintiffs' argument also must fail because it rests on the flawed premise that a public entity must upgrade or modify a facility to accommodate the preferences of some users. There is no duty placed on public entities to update, modernize, or alter a facility to account for new, different, or unexpected uses. *Karr v. City & Cty. of Denver*, 677 P.2d 1384, 1386 (Colo. App. 1984) (city was not required to modify or improve intersection based on changing use); *Medina*, 35 P.3d at 457 ("designs that become inadequate over time—because of a change in use of the highway or because of changing safety standards—need not be corrected."). While some golfers, such as Plaintiffs, may have ignored course rules, the course was designed with a cart path which Defendant directed golfers to utilize. Simply because some, or even many, golfers ignored the course rules, that does not require Defendant to update the design or institute different practices to accommodate the undesired uses. 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.")

3. <u>Plaintiffs Fail to Dispute the Stump was a Design Choice</u>

On a conceptual level, nearly the entirety of a golf course is the result of design choices, and design choices are made almost daily. From how tall to let the grass grow on the fairway, to how much water to apply to different areas of the

course, all the way to where the hole should be located on the putting green, most elements on a golf course result from some deliberative process culminating in a decision. Despite failing to identify any specific maintenance failure led to the existence of a tree stump, Plaintiffs nonetheless insist that the tree stump could not have been the result of a design decision. Plaintiffs fail to support their position with any record evidence.

Plaintiffs admit that they have no evidence rebutting the assertion that the stump was the result of a design choice by Defendant. In fact, Plaintiffs' entire challenge to Defendant's position regarding design boils down to their belief that the stump did not serve an aesthetic purpose, did not provide a functional use, and could only create a danger. (Answer Brief, p 21.) Without getting into the merits of aesthetics (which naturally are subjective) and functional purpose (many elements on a course simply exist to be in the way but have no identifiable function), the design issue can be resolved with a straightforward question: did the stump exist because of a decision by Defendant? Because the answer to that question is "yes," immunity is not waived.

Plaintiffs posit that the stump resulted from either a fallen tree or a tree that was cut down. (Answer Brief, p 21.) Plaintiffs are not necessarily wrong, but the assertion only serves to prove that the stump remained as a design choice. If an

existing tree fell, and the fallen tree does not remain on the course, then that means that Defendant removed the fallen tree.[2] At the same time, a stump remained, and a decision had to be made whether to leave the stump or remove it. Since the stump was present at the time of Plaintiffs' accident, that means Defendant made the design choice to leave the stump.

The same thought process necessarily applies if the tree was cut down since a stump would remain in that scenario as well. Once the three was cut and removed, Defendant made the design choice to leave the stump to retain a more natural aesthetic. Plaintiffs may not agree with the choice, or that a stump can fit into any aesthetic scheme, but it was a choice.

Having established that the stump remained because of a decision by Defendant following the felling of the tree, a design choice, the inquiry should end. Yet, Plaintiffs final point, that leaving the stump created an unreasonable risk of injury, can also be addressed and dispatched. A design choice, no matter how ill-advised, does not waive immunity. This principal has been unquestionably acknowledged by the Colorado Supreme Court in a case with far more egregious facts. In *Swieckowski v. City of Ft. Collins*, the Supreme Court held that they could not find an immunity-waiving dangerous condition even though "the condition that

[2] Of course, it could also be that the stump existed at the time the course was built and the decision was made to leave it. That would be design, as well.

caused [the] accident was one which was readily predictable and could have been easily avoided." *Swieckowski by Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1387 (Colo. 1997). Indeed, "[t]he potential for severe and disabling injury to persons…should have been known to the City's professionals, such as the city engineer, who approved the developer's design and construction of the newly widened section of the road." *Id*. In fact, the *Swieckowski* court noted that the public entity knew of the issues some twelve months before the accident, "which gave the City adequate time to install some type of warning device." *Id*. Even with all of that—an unquestionably sympathetic plaintiff, life-altering injuries, and a design which was almost destined to cause injuries like the plaintiff's—the *Swieckowski* court concluded that the danger was the result of a design decision, expressly acknowledging that it was not their role to decide whether governmental immunity was good policy, or to "substitute our view of public policy for that of the General Assembly." *Id*. Instead, the role of courts is to "interpret statutory language consistently with the intent of the General Assembly and with the plain meaning of the words chosen by this body when it enacts a statute." *Id*.

As it applies here, whether Defendant knew that leaving the stump may present a risk of injury does not mean there was no design decision. *St. Vrain Valley Sch. Dist. RE-1J v. Loveland by and through Loveland*, 395 P.3d 751, 757

(Colo. 2017) (even if zip line located in elementary school playground is an inherently dangerous piece of equipment, immunity not waived as CGIA "does not recognize such blanket claims of danger based on the design of a public facility."); *see also Szymanski v. Dept. of Highways of State of Colo.*, 776 P.2d 1124, 1125 (Colo. App. 1989) (dismissing a complaint which alleged intersection was dangerous due to a blind spot, poor sight lines, improperly high speed limit, and lack of warning signs, on basis that these were design elements even if the plaintiffs characterized them otherwise.) Surely, lakes present some risk of danger, particularly when there are slopes nearby and people may slip and fall in. Plaintiffs would need to show that Defendant knew of some specific risk and negligently allowed it to continue. *See DeAnzona v. City and County of Denver*, 222 F.3d 1229, 1237 (10th Cir. 2000) ("Even if dangerous conditions did exist, DeAnzona had to show that Denver knew of the risk and either originally created the risk or negligently allowed the risk to continue.") There is no evidence in the record that Defendant had any notice of a danger posed by the stump, particularly since golfers should not be driving golf carts right next to tee boxes.

In short, all available evidence shows that the stump was a design decision, either in cutting the tree and leaving the stump, or removing the fallen tree and deciding to leave the stump. Whatever danger resulted from the design choice does

not waive immunity since dangerous conditions must result from negligent maintenance. Plaintiffs' entire theory is no different than the road design in *Swieckowski* or the zip line installed on an elementary school playground in *Loveland*. Perhaps it was a bad idea to have a tree stump near tee boxes, just the same as it may have been a bad idea to have a road abruptly narrow with "no guards, barriers, signs, signals, or markings indicated the presence of the ditch to warn a bicycle rider such as Swieckowski that he might drop off from the widened section of the road into the ditch." *Swieckowski*, 934 P.2d at 1383. Or maybe the tree stump was as "inherently dangerous" to golfers as a zip line is to young children. *Loveland*, 395 P.3d at 757. But bad design ideas do not waive immunity. In fact, the CGIA "explicitly precludes such claims." *Id.*

CONCLUSION

Plaintiffs failed to establish their claim falls within a recognized immunity waiver, and the trial court erred in denying Defendant's motion to dismiss. The trial court's order (CF, pp 195-201) should be reversed and the case should be remanded with instructions to dismiss the matter and award Defendant its reasonable attorney fees incurred throughout the defense of this matter.

DATED: June 29, 2021

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

By: *_/s/ Winslow R. Taylor, III_*
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **REPLY 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 29, 2021, copies addressed to:

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/s/ Cheryll A. Paull
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