COLORADO COURT OF APPEALS

DATE FILED: June 25, 2020
CASE NUMBER: 2019CA203

Court of Appeals No. 19CA0203
Boulder County District Court No. 18CV30036
Honorable Thomas F. Mulvahill, Judge

Joy Maphis,

Plaintiff-Appellee,

v.

City of Boulder, Colorado,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE GROVE
Freyre, J., concurs
Richman, J., dissents

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 25, 2020

Randall J. Paulsen & Associates, P.C., Randall J. Paulsen, Westminster, Colorado; O'Brien Law Firm, LLC, Shauna L. O'Brien, Westminster, Colorado, for Plaintiff-Appellee

Thomas A. Carr, City Attorney, Luis A. Toro, Senior Assistant City Attorney, Boulder, Colorado, for Defendant-Appellant

¶ 1 Plaintiff, Joy Maphis, was injured after she tripped and fell on an uneven concrete sidewalk owned and maintained by defendant, the City of Boulder. After Maphis sued Boulder (and an adjacent property owner who is not a party to this appeal), Boulder moved to dismiss her personal injury claim, asserting that it was immune under section 24-10-106(1)(d)(I), C.R.S. 2019, of the Colorado Governmental Immunity Act (CGIA). Following an evidentiary hearing held in accordance with *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993), the district court found that Maphis had carried her burden of showing that "the condition of the sidewalk constituted an unreasonable risk of harm to the health and safety of the public." As a result, the court concluded that Boulder had waived its immunity and that the court had subject matter jurisdiction to hear the case.

¶ 2 Boulder appeals, and we reverse. Reviewing de novo the district court's conclusion that the sidewalk was unreasonably dangerous, we hold that Maphis did not establish that the sidewalk's physical condition "created a chance of injury, damage, or loss which exceeded the bounds of reason." *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 23. Boulder therefore retained its

immunity under the CGIA, and the district court does not have subject matter jurisdiction to consider Maphis's claim on the merits.

I. Factual and Procedural Background

¶ 3 Maphis alleged that she was injured when she tripped over a raised portion of a sidewalk that Boulder owns and is responsible for maintaining. Her claim against Boulder consisted of a single request for relief under the CGIA.

¶ 4 Boulder moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that (1) there was "no evidence that the sidewalk condition was caused by any act or omission of the City," and (2) the condition of the sidewalk did not constitute a "dangerous condition" that would waive immunity. *See* § 24-10-106(1)(d)(I); *see also City of Aspen v. Meserole*, 803 P.2d 950 (Colo. 1990).

¶ 5 At the *Trinity* hearing, Maphis described the time, place, and circumstances of her injury. She testified that she tripped over a deviation in the sidewalk that was not visible to her because the concrete slabs on either side of the deviation were uniform in color,

and tendered photographs of the deviation that showed its approximate height and the color similarities.

¶ 6 Gerrit Slatter, Boulder's principal transportation projects engineer, testified that the city has both a proactive "Sidewalk Repair Program," which "focuses on the identification, prioritization, and programmatic repair of sidewalks throughout the city," and a complaint-driven "Miscellaneous Sidewalk Repair Program," which allows sidewalk repairs to be completed anywhere within city limits at any time. The transportation department did not receive any complaints about the condition of the sidewalk at issue under the complaint-driven program before Maphis's fall. However, city workers discovered the displacement during a routine area inspection in March 2017. Because the deviation exceeded three-quarters of an inch — and thus qualified as a "hazard" under the definition in Boulder's sidewalk repair program manual — they marked the sidewalk with white paint to indicate the need for repair. Maphis tripped over the sidewalk two days before the repair was completed.

¶ 7 In addition to rejecting Boulder's argument that Maphis needed to establish causation at the outset of the proceedings, the district court found that

- there was a two-and-a-half-inch deviation between the heights of the sidewalk slabs;
- Boulder's standards for maintenance and repairs of sidewalks provide that a deviation of more than three-quarters of an inch constitutes a "hazard"; and
- the coloring of the top surface of the sidewalk was substantially identical to the coloring and appearance of the vertical plane of the raised slab, making the deviation difficult to detect.

¶ 8 Based on these findings, the court concluded that the deviation constituted a "dangerous condition" that waived Boulder's immunity under the CGIA; it therefore denied the motion to dismiss.

II. Immunity Under the CGIA

¶ 9 Boulder contends that we should reverse because Maphis did not establish that (1) the sidewalk's condition was caused by an act or omission of the city and (2) the sidewalk was unreasonably

dangerous.[1] We reject Boulder's first argument but agree that the condition of the sidewalk was not unreasonably dangerous under the CGIA.

A. Applicable Law

¶ 10 "Although the CGIA generally immunizes the government from tort liability, it also waives this immunity under certain limited circumstances." *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001). In so doing, the CGIA strikes a legislatively defined balance between "protect[ing] the public against unlimited liability and excessive fiscal burdens" and "allow[ing] the common law of negligence to operate against governmental entities except to the extent it has barred suit against them." *Id.* (citation omitted). The CGIA derogates the common law; we must therefore "strictly construe its immunity provisions, but broadly construe its provisions waiving that immunity." *St. Vrain Valley Sch. Dist. RE-1J v. Loveland*, 2017 CO 54, ¶ 11.

¶ 11 As relevant here, section 24-10-106(1)(d)(I) waives a public entity's immunity from suit in an action seeking compensation for

---

[1] The City does not dispute that it owns and maintains the sidewalk or that it had notice of its condition before Maphis's fall.

injuries resulting from a "dangerous condition" of any public sidewalk within the corporate limits of a municipality. *Meserole*, 803 P.2d at 955. The CGIA defines "dangerous condition" as

> a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility.

§ 24-10-103(1.3), C.R.S. 2019.

¶ 12 To establish a "dangerous condition," a plaintiff must show that her injury resulted from (1) a physical condition of a facility or the use thereof; (2) which constituted an unreasonable risk to the health or safety of the public; (3) which was known to exist or should have been known to exist in the exercise of reasonable care; and (4) which was proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility. *Medina*, 35 P.3d at 454; *see also* § 24-10-103(1.3).

B. Standard of Review

¶ 13 Because it implicates the district court's subject matter jurisdiction, a governmental entity's claim to immunity under the

CGIA must be determined in the first instance by the trial court under C.R.C.P. 12(b)(1). *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000). "The burden of proof is on the plaintiff to prove the government has waived its immunity, but this burden is relatively lenient, as the plaintiff is afforded the reasonable inferences from her undisputed evidence." *Dennis*, ¶ 11.

¶ 14 Citing *City & County of Denver v. Crandall*, 161 P.3d 627, 633 (Colo. 2007), Maphis asserts that subject matter jurisdiction under the CGIA is reviewed for clear error. Consistent with decades of binding precedent, however, we apply the clear error standard only to the district court's findings of jurisdictional *facts*. *See id.* ("We uphold a trial court's findings of jurisdictional facts unless they are clearly erroneous."); *see also Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997) ("Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous.").

¶ 15 The ultimate question of the district court's subject matter jurisdiction — which, in this case, turns on whether the sidewalk was a "dangerous condition" — remains, as it always has been, a

question of law. *See, e.g.*, *Dennis*, ¶ 12 ("Once the questions of fact are resolved, we review questions of governmental immunity de novo."); *see also Trujillo v. Reg'l Transp. Dist.*, 2018 COA 182, ¶ 5 ("[W]e apply a mixed standard of review to the trial court's decision to deny [the defendant's] motion to dismiss for lack of subject matter jurisdiction.").

¶ 16 There is, to be sure, some support for Maphis's position in decisions issued by this court. *See, e.g.*, *McKinley v. City of Glenwood Springs*, 2015 COA 126, ¶ 12 ("The existence of a dangerous condition and its interference with traffic are questions of fact. We defer to the trial court's factual findings unless they are clearly erroneous and unsupported by evidence in the record.") (citation omitted). But to the extent that other cases have deviated from the well-settled, mixed-question approach most recently articulated by the supreme court in *Dennis*, we decline to follow them. *See Dig. Landscape Inc. v. Media Kings LLC*, 2018 COA 142, ¶ 68 (one division of the court of appeals is not bound by the decision of another division).

¶ 17 Accordingly, we review de novo the question whether the deviation in the sidewalk is a "dangerous condition," and we do so

based on the factual findings that the district court has already made.

C. "Act or Omission"

¶ 18 Before considering whether the sidewalk in question created an unreasonable risk to public health or safety, we first address Boulder's contention that the CGIA required Maphis to show as a threshold jurisdictional matter that the sidewalk's condition was caused by an act or omission of the city.

¶ 19 Boulder argues that "[t]o demonstrate a waiver of liability for a dangerous condition under the CGIA, [Maphis] needed to prove that the alleged dangerous condition was caused by the City's negligence," and that "[t]o establish negligence, it was incumbent upon [Maphis] to provide evidence of the standard of care and failure by the City to adhere to that standard." Boulder notes that the CGIA allows a plaintiff to recover only where the "condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility." § 24-10-103(1.3). And, as support for the proposition that Maphis was required to make a showing of proximate cause at the outset, Boulder, quoting *Swieckowski*, argues that "[t]o recover [for

an injury caused by a dangerous condition], a plaintiff must show as a threshold jurisdictional matter that the condition upon which the plaintiff bases his tort claim existed because of the government's act or omission in maintaining or constructing the condition." *Swieckowski*, 934 P.2d at 1384.

¶ 20 This quotation, however, is incomplete. Not only does it elide a portion of the sentence that is critical to understanding its meaning, but it also ignores the remainder of the paragraph in which the sentence appears. The sentence — and paragraph — reads as follows:

> To recover [for an injury caused by a dangerous condition], a plaintiff must show as a threshold jurisdictional matter that the condition upon which the plaintiff bases his 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. In determining whether the GIA presents a jurisdictional bar to this suit, we emphasize that we do not address issues of negligence or causation, which are matters properly resolved by the trier of fact.

Id.

¶ 21 The full and accurate quotation makes two things clear. First, the "threshold jurisdictional matter" that the trial court must

consider relates only to the nature of the plaintiff's allegations, rather than the ultimate factual question of causation. Specifically, the CGIA waives immunity for a "negligent act or omission of the public entity . . . in constructing or maintaining [a] facility," but it does not waive immunity in cases where a plaintiff alleges that she was injured "solely because the design of any facility is inadequate." § 24-10-103(1.3). As a result, a court considering whether a governmental defendant is immune under the CGIA must consider whether the plaintiff has alleged her injury was the result of inadequate construction or maintenance rather than faulty design. If the complaint alleges only inadequate design, then the court lacks subject matter jurisdiction over it.

¶ 22 Second, *Swieckowski* holds that if a complaint does allege injuries caused by inadequate construction or maintenance, then the questions of negligence and causation remain "matters properly resolved by the trier of fact." 934 P.2d at 1384. Accordingly, in the context of the CGIA, a complaint alleging that a public entity's negligent act or omission in maintaining a facility caused the plaintiff's injury will survive a motion to dismiss.

¶ 23 Maphis's complaint did just that. She did not claim that the sidewalk's *design* included a two-and-a-half-inch tripping hazard. Rather, she averred that she was injured "[as] a result of the City's failure to correct . . . a dangerous condition" — namely, the deviation that allegedly caused her to trip and fall.[2] Under *Swieckowski*, this allegation was adequate to establish that Maphis's claim was not jurisdictionally barred by the CGIA.

D. Unreasonable Risk

¶ 24 Although we conclude that Maphis was not, as a threshold jurisdictional matter, required to show negligent maintenance of the sidewalk on Boulder's part, she did need to show that the sidewalk was a "dangerous condition" in order to establish a waiver of

---

[2] Maphis also alleged that she was entitled to recover on the theory that Boulder "fail[ed] to warn of a dangerous condition," and that while Boulder's motion to dismiss addressed this issue, the district court's order did not. For the purposes of remand, we note that the supreme court has held that "as a matter of law, the CGIA does not waive immunity for claims asserting a failure to warn." *Medina v. State*, 35 P.3d 443, 449 (Colo. 2001). We do not read *Medina* as saying that the presence or absence of a warning is irrelevant in the CGIA context. Rather, *Medina* simply does not affect our analysis in this case because, on the record before us, we conclude that the deviation in the sidewalk was not unreasonably dangerous irrespective of Boulder's failure to make it more visible to pedestrians.

immunity. § 24-10-106(1)(d)(I). We conclude that she failed to do so.

¶ 25 The CGIA defines "dangerous condition" as a condition that constitutes an "unreasonable risk to the health or safety of the public." § 24-10-103(1.3). To prove this element, the plaintiff must prove that the physical condition "created a chance of injury, damage, or loss which exceeded the bounds of reason." *Dennis*, ¶ 23.

¶ 26 Based on the undisputed facts before us, there is little doubt that the sidewalk's condition created *some* risk — some chance of injury, damage, or loss — however, we are not convinced that the risk exceeded the bounds of reason. To be sure, Maphis presented evidence that the sidewalk was a tripping hazard, but there was no direct evidence that it required immediate repair. In fact, the undisputed evidence showed that (1) Boulder had not received any complaints about the deviation; (2) an engineering consultant completed an assessment of the zone in 2015 and did not identify the sidewalk as damaged; and (3) city workers first discovered the damage during a routine area inspection in March of 2017, a few weeks before repairs were completed.

¶ 27 This is not to say that a sidewalk deviation of the type and size that we consider here can never qualify as a "dangerous condition." While in some particularly vulnerable locations — a crowded pedestrian mall, for instance, or near the entrance to an assisted living facility — a two-and-a-half-inch deviation might "create[] a chance of injury, damage, or loss which exceed[s] the bounds of reason," *id.*, similar conditions might not pose the same risk in an area that has typical residential pedestrian traffic.

¶ 28 It is for this reason that courts considering the application of sovereign immunity typically consider all of the facts and circumstances in context, including (1) the width, depth, elevation, irregularity, and appearance of the defect; (2) the time, place, and circumstance of the injury; (3) whether it was an unexpected or unusual danger to ordinary sidewalk users; (4) pedestrian volume; and (5) number of complaints. *See* 5 Stuart M. Speiser et al., *The American Law of Torts* § 17:43, Westlaw (database updated Mar. 2020). Applying those considerations here, we acknowledge that the deviation was substantial and, as the district court found, difficult to see due to the uniform coloration of the sidewalk slabs. On the other hand, Slatter's testimony, along with many of the

exhibits that the district court admitted, tended to show that uneven sidewalks are commonplace in Boulder. A tripping hazard of the type at issue here should have been neither an unexpected nor unusual danger to ordinary pedestrians, particularly on a residential sidewalk with relatively modest use[3] — a conclusion that finds further support in the absence of citizen complaints alerting Boulder to the damage.

¶ 29 *Dennis*, ¶ 19, also makes clear that in adopting the CGIA, the General Assembly intended to preserve a municipality's ability to prioritize repairs. In *Dennis*, a passenger on a motorcycle was involved in an accident with an automobile. *Id.* at ¶ 1. Her conservator sued the City of Denver, alleging that the street's deteriorated condition contributed to the accident. Denver responded by asserting its immunity under the CGIA. *Id.* Its pavement engineer inspected the road and determined that while it was "indeed cracked, worn, and somewhat rutted, it did not require immediate repair." *Id.* at ¶ 5. He further testified that the

---

[3] Although Maphis offered no evidence as to typical pedestrian volumes on the sidewalk, she testified that, after falling, she laid on the ground "for about 20 minutes" before a "mail man ran over" to render assistance.

intersection was "dangerous" but not "dangerous enough" to warrant immediate repairs. *Id.* Our supreme court held that the deteriorated road did not constitute a dangerous condition because although the road "carried *some* risk," the risk was not unreasonable. *Id.* at ¶ 25.

¶ 30 In making this determination, the supreme court noted that "[t]he CGIA was enacted, in part, to 'protect the taxpayers against excessive fiscal burdens' which could arise from 'unlimited liability' that the state could incur under tort lawsuits." *Id.* at ¶ 19 (quoting § 24-10-102, C.R.S. 2019). To this end, the court explained:

> Of course, the state could not simultaneously fix every road; some roads would be prioritized and renovated before others. 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. Thus, the taxpayers would be footing both the costs of making roads like new and the costs of potential lawsuits. The CGIA intends to lessen potential burdens on taxpayers[.]

Id. Slatter's testimony was consistent with this observation. He made clear that Boulder was aware of the sidewalk's condition and

had scheduled it for repair.[4] Yet there is nothing in the record to support the conclusion that the damage to this particular sidewalk was so urgent that it needed to jump to the front of the existing queue established by the city's proactive program. As Slatter testified, Boulder responds in "as timely a fashion as we are able," but there is "a limited budget with which to be able to address these concerns."

¶ 31 The dissent minimizes the importance of budgetary constraints — asserting that "[w]hen a city knows of a dangerous condition but elects to defer repairs because it is not a priority, the city, not the citizen, should bear the risk." *Infra* ¶ 44. But similar concerns were at the heart of the supreme court's holding in *Dennis*. Adopting the dissent's approach, moreover, would threaten to disincentivize cities, like Boulder, from adopting or continuing with proactive repair programs. If simply knowing about infrastructure problems — but not being able to prioritize them —

---

[4] The repair was scheduled because, under Boulder's definition, a sidewalk deviation greater than three-fourths of an inch constitutes a "hazard." As the district court correctly noted, Boulder's decision to treat a deviation of this size as a hazard is not dispositive of whether, under the CGIA, it is an unreasonably dangerous condition.

is enough to waive immunity under the CGIA, cities in Boulder's position may simply choose to bury their collective heads in the sand and act only when they receive citizen complaints.

¶ 32 Thus, our holding that the condition of the sidewalk in this case was not a dangerous condition is consistent with the General Assembly's intent to lessen potential burdens on taxpayers, and to permit municipalities to prioritize repairs. § 24-10-102; *see Dennis*, ¶ 19.

III. Conclusion

¶ 33 The order is reversed, and the case is remanded to the district court with directions to dismiss Maphis's claim against Boulder.

JUDGE FREYRE concurs.

JUDGE RICHMAN dissents.

JUDGE RICHMAN, dissenting.

¶ 34 I disagree with the majority that the sidewalk over which Ms. Maphis tripped does not, as a matter of law, constitute a dangerous condition as defined by the CGIA. I therefore dissent from the opinion and would affirm the district court ruling.

¶ 35 The CGIA defines "dangerous condition" as

> a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility.

§ 24-10-103(1.3), C.R.S. 2019. As the majority correctly states, in order for a plaintiff to establish a dangerous condition, she must show that her injury resulted from four elements. *See Medina v. State*, 35 P.3d 443, 454 (Colo. 2001). There is no factual dispute that Ms. Maphis's injury resulted from the physical condition of the sidewalk. It is also undisputed that the condition of the sidewalk was known to the City of Boulder, as it had plans in place to repair the sidewalk. And it is not disputed that the condition of the sidewalk resulted from Boulder's failure to maintain it, because

maintenance of that sidewalk is the city's responsibility. The only dispute seems to be whether the condition of the sidewalk constituted "an unreasonable risk to the health or safety of the public." § 24-10-103(1.3); *see Medina*, 35 P.3d at 454.

¶ 36 The majority correctly states that to prove an unreasonable risk, a plaintiff must prove that the physical condition "created a chance of injury, damage, or loss which exceeded the bounds of reason." *City & Cty. of Denver v. Dennis*, 2018 CO 37, ¶ 23. The majority acknowledges, and the district found without dispute, that the sidewalk slab over which Ms. Maphis tripped had raised up two and one-half inches above the plane of the rest of the sidewalk. And Boulder acknowledges that its standards of maintenance for repairs of sidewalks provide that a deviation of more than three-quarters of an inch constitutes a "hazard." Thus, the condition of the sidewalk constituted a "hazard," exceeding the acceptable level of deviation by more than three times Boulder's own standards. This is proof enough that the condition created a chance of injury exceeding the bounds of reason. The majority acknowledges that this condition creates a risk to any pedestrian passing by. Moreover, the coloring of the top surface of the sidewalk was

substantially identical to the coloring and appearance of the vertical plane of the raised slab, making the deviation difficult to detect.

¶ 37 And perhaps most telling about this hazard is the fact that although no complaint had been made to the city about the sidewalk's condition, city workers discovered the displacement during a routine area inspection in March 2017. Because the deviation exceeded three-quarters of an inch — and thus qualified as a "hazard" under the definition in Boulder's sidewalk repair program manual — they marked the sidewalk with white paint to indicate the need for repair. Maphis tripped over the sidewalk two days before the repair was completed, on April 8, 2017.

¶ 38 Although the majority acknowledges that this type of "sidewalk deviation" *could* qualify as a dangerous condition, as it was substantial and difficult to see, it rejects Ms. Maphis's complaint because the deviation was not near a "crowded pedestrian mall" or the "entrance to an assisted living facility." *Supra* ¶ 27. Instead, because this sidewalk defect was in an area of typical residential pedestrian traffic, the majority concludes that it does not constitute a dangerous condition.

¶ 39 The majority reasons that because there was evidence that uneven sidewalks are "commonplace in Boulder," a tripping hazard of this type should not be an unexpected or unusual danger to ordinary pedestrians. *Supra* ¶ 28.

¶ 40 I see nothing in the CGIA's definition of a dangerous condition that excuses a municipality from liability because it has widespread dangerous conditions. If anything, a municipality that fails to maintain its public ways on a widespread basis should be held liable, not excused from liability.

¶ 41 Finally, the majority compares this case to *Dennis*, in which the supreme court concluded that Denver's failure to repair a road did not create a dangerous condition. This case is different.

¶ 42 First, in *Dennis*, ¶ 5, the city engineer testified that the road was "dangerous" but not "dangerous enough" to warrant immediate repairs. There is no indication in *Dennis* that the road was deemed so dangerous that repairs were scheduled. But here, Boulder did conclude that the sidewalk warranted repair, and indeed the repair was scheduled for two days after Ms. Maphis tripped — two days too late for her.

¶ 43 Second, in this case, unlike in *Dennis*, where there was a dispute over whether the condition of the road was the cause of the motorcycle losing control, here there is no dispute that the condition of the sidewalk not only "contributed" to Ms. Maphis's injury, but it caused her to trip and injure herself.

¶ 44 And in *Dennis*, the supreme court concluded that Denver's failure to repair the road was justifiable because a "state" could not simultaneously fix every road, and repairs to some roads would be prioritized. *Id.* at ¶ 19. To me, that defense "proves too much" because a governmental entity could always claim that repairing the site of an accident was not a priority under its standards. For example, I do not believe we would excuse a governmental entity for failure to make repairs if its "priorities" do not kick in until a road has a pothole five feet wide, or a sidewalk is two feet out of the plane. I don't see any language in the definition of "dangerous condition" that maintains immunity for a risk that a municipality decided was dangerous, but not a high priority. When a city knows of a dangerous condition but elects to defer repairs because it is not a priority, the city, not the citizen, should bear the risk. The city may make an administrative decision not to fix a broken sidewalk;

but when it declares the sidewalk a "hazard," and does nothing to fix it, it has created a dangerous condition and its failure to act is unreasonable.

¶ 45 Here, especially where the city not only did not fix a known hazard, but also failed to mark the sidewalk to alert pedestrians to the known hazard, I conclude the city created an unreasonable risk for which it could be held liable. Although the majority cites *Medina* for the proposition that "the CGIA does not waive immunity for claims asserting a failure to warn," 35 P.3d at 449, the preceding paragraph of *Medina* states that "we also hold that where the installation of safety devices is necessary to return the road to 'the same general state of being, repair, or efficiency as initially constructed,' then the state's duty of maintenance encompasses an obligation to install such devices." *Id.* A claim under the CGIA may not be predicated solely on a failure to warn, but it seems clear that a failure to warn of a known risk is a factor to consider in determining whether a known risk is unreasonably dangerous.

¶ 46 Because I disagree with the majority's conclusion that the sidewalk was not unreasonably dangerous as a matter of law, I dissent and would affirm the district court's order.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

***Notice to self-represented parties**: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono*