Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 24, 2021 1:37 PM FILING ID: CD84D50619D5F CASE NUMBER: 2020SC646
Certiorari to the Court of Appeals, 2019CA203 District Court, Boulder County, 2018 CV30036	
Petitioner: **JOY MAPHIS** **v.** **Respondent:** **City of Boulder, Colorado**	**▲ COURT USE ONLY▲**
Attorneys for Petitioner Randall J. Paulsen RANDALL J. PAULSEN & ASSOCIATES, P.C. 8704 Yates Drive, Suite 100 Westminster, CO 80031 Phone: 303-426-7336 Email: randy@rjpaulsenlaw.com Fax: 303-426-7411 Atty Reg. #10643 Shauna O'Brien, #46526 O'BRIEN LAW FIRM, LLC 8704 Yates Drive, Suite 100 Westminster, CO 80031 Phone: 720-984-2996 Email: shauna@obrientriallaw.com1 Fax: 303-200-8963 Atty Reg. #46526	Supreme Court Case No. 2020SC646
OPENING BRIEF	

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i, ii, iii

TABLE OF AUTHORITIES ..... iv, v

ISSUES PRESENTED FOR REVIEW 1

I. Whether the Court of Appeals erred by reviewing the Trial Court's findings of fact for clear error and its legal conclusion–that the sidewalk did not constitute such a dangerous condition as to waive Boulder's immunity–*de novo*? 1

II. Whether the Court of Appeals erred by holding that the sidewalk did not constitute a dangerous condition for purposes of waiving Boulder's immunity pursuant to the Colorado General Immunity Act, Section 24-10-106(1)(d)(I), C.R.S. (2020)? 1

I. NATURE OF THE CASE 1

A. Relevant Facts 1

B. Procedural History 9

C. Court of Appeals Ruling 10

D. Judgment or Ruling Presented for Review 10

II. SUMMARY OF ARGUMENTS 10

A. The Court of Appeals Erred by Holding the Sidewalk in Question Did Not Constitute an Unreasonably Dangerous Condition, as a Matter of Law, Despite the Absence of a Legal Question, and Despite the Findings of Jurisdictional Facts by the District Court Which Were Well Supported by the Evidence at the Trinity Hearing 10

(1) The only question posed by the City's C.R.C.P. 12(b)(1) motion; i.e., "was the sidewalk unreasonably dangerous," was a question of fact, not law 10

(2) An Appellate Court only reviews issues *de novo* where the issue is one of law. *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (2003). 11

B. The Court of Appeals Erred by Holding, as Matter of Law, the Sidewalk Did Not Constitute an Unreasonably Dangerous Condition Pursuant to 24-10-106(1)(d)(I), C.R.S. 2020. 11

(1) The Court of Appeals Erred by Holding the Petitioner's Evidence Did Not Constitute an Unreasonable Risk of Harm to the Health and Safety of the Public Because it Did Not Occur in a More Public Location. 11

(2) The Court of Appeals Erred by Refusing to Liberally Construe the Petitioner's Waiver Claims 11

(3) The Court of Appeals Erred When it Denied Deference to the Trial Court and Decided Purely Factual Issues as a Matter of Law in Conflict With Other Divisions of the Court of Appeals. 11

III. ARGUMENT 11

A. The Court of Appeals Erred by Holding the Sidewalk in Question Did Not Constitute an Unreasonably Dangerous Condition, as a Matter of Law, Despite the Absence of a Legal Question, and Despite the Findings of Jurisdictional Facts by the District Court Which Were Well Supported by the Evidence at the Trinity Hearing. 11

a. Statement of Applicable Standard of Review. 11

b. This Issue Was Preserved for Appeal 12

(1) The Only Question Posed by the City's C.R.C.P. 12(b)(1) Motion; i.e., Was the Sidewalk "Unreasonably Dangerous," Was a Question of Fact, Not Law. 13

(2). An Appellate Court Only Reviews Issues *De Novo* under C.R.C.P. 12(b)(1) Setting Where the Issue Is One of Law. *Tidwell V. City and County of Denver*, 83 P.3d 75, 81 (2003). 20

B. The Court of Appeals Erred in Holding as a Matter of Law, the Sidewalk Did Not Constitute an Unreasonably Dangerous Condition Pursuant to 24-10-106(1)(d)(I), C.R.S. 2020. 21

a. Statement of Applicable Standard of Review 21

b. This Issue Was Preserved for Appeal 22

(1) the Court of Appeals Erred in Holding the Petitioner's Evidence Did Not Constitute an Unreasonable Risk of Harm to the Health and Safety of the Public Because it Did Not Occur in a More Public Location. 23

(2) The Court of Appeals Majority Erred by Refusing to Liberally Construe the Petitioner's Waiver Claims 30

(3) The Court of Appeals Erred When it Denied Deference to the Trial Court and Decided Purely Factual Issues as a Matter of Law in Conflict With Other Divisions of the Court of Appeals 33

CONCLUSION 41

APPENDIX 44

TABLE OF AUTHORITIES

CASES:

Bertrand v. Bd. of County Com'rs, 872 P.2d 223, 227 (Colo. 1994)..... 14

Bloomer v. Bd of County Com'rs, 799 P.2d 942, 944 (Colo. 1990)..... 20

City and County of Denver v Crandall, 161 P.3d 627, 633 (Colo. 2007)..... 18, 33

City of Denver v. Dennis, 418 P.3d 489, 494 (Colo. 2018) 15, 18, 19, 23,24-26, 28-30, 32, 34-36

Colorado Division of Employment Training v. Parkview Episcopal Hospital, 725 P.2d 787, 790 (Colo. 1986)..... 20

Colucci v. Vail, 232 P.3d 218, 219 (Colo.App. 2009)..... 11, 12, 20, 21, 22

Corsentino v. Cordova, 4 P.3d 1082, 1087 (Colo. 2000)..... 12, 14, 19, 22, 30

Daniel v. City of Colorado Springs, Mun. Corp., 327 P.3d 891, 894 (Colo. 2014) 20

Dig. Landscape, Inc. v. Media Kings, LLC, 2018 COA 142, ¶ 68 37

Evans v. Romer, 854 P.2d 1270, 1274 (Colo. 1993) 21

Fogg v. Macaluso, 892 P.2d 271, 276 (Colo. 1995)..... 12, 13, 21

McKinley v. City of Glenwood Springs, 361 P.3d 1080 ..... 12, 13, 21, 36

Smokebrush Found. v. City of Colorado Springs, 2018 Colo.10, ¶ 18, 410 P.3d 1236, 1240..... 24, 30

Springer v. City & County of Denver, 13 P.3d 794 (Colo. 2000). 11, 13, 18, 19, 21, 24

St. Vrain Valley School Dist. RE-1J v. Loveland, 217 Colo. 54 ..... 24, 25, 27

Swieckowski v. City of Fort Collins, 934 P.2d 1380 (Colo. 1997) 15, 18, 23, 26, 30, 33

Tidwell v. City & County of Denver, 83 P.3d 75, 81 (2003) .. 10, 12, 13, 15, 18, 22, 23

Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993) 9, 12, 22

Trujillo v. Regional Transportation Dist., 2018 COA 182, ¶ 5 ..... 18, 34

Walton v. State, 968 P.2d 636, 643 (Colo. 1998) 14, 19, 32

STATUTES:

C.R.S. §24-10-106(1)(d)(I) 1, 9, 11, 28, 31, 34

C.R.S. §24-10-101 13

C.R.S.§24-10-103 (2.5) 17

RULES:

C.R.C.P. 12(b)(1) 9, 10, 12, 13, 14, 15, 20, 22

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. The undersigned certifies that the brief complies with C.A.R. 28(g) in that it contains 9428 words, exclusive of the caption, table of contents, table of authorities, certificate of compliance, certificate of service and signature blocks. The brief complies with C.A.R. 28(k) in that it contains under a separate heading a concise statement of the applicable standard of appellate review the citation of authority and contains a citation to the precise location in the record where each issue was raised and ruled on.

I have the following separately titled sub-sections:

1. **The Standard of Review:** The applicable standard of review is based on one's interpretation. The Petitioner maintains the applicable standard of review is a clearly erroneous standard reviewing the opinion and findings of the Boulder County District Court. The Court of Appeals applied a mixed standard of review purporting to adopt the findings of fact of the Boulder County District Court in reviewing the determination of law *de novo.*
2. **Preservation:** All of the issues raised in this Petition for Certiorari were preserved in the lower court.

I understand that my brief may be rejected if I fail to comply with these rules.

DATED: August 3, 2020.

Respectfully submitted,

RANDALL J. PAULSEN & ASSOCIATES, P.C.

By: 

Randall J. Paulsen

ISSUES PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred by reviewing the Trial Court's findings of fact for clear error and its legal conclusion–that the sidewalk did not constitute such a dangerous condition as to waive Boulder's immunity–*de novo*?

II. Whether the Court of Appeals erred by holding that the sidewalk did not constitute a dangerous condition for purposes of waiving Boulder's immunity pursuant to the Colorado General Immunity Act, Section 24-10-106(1)(d)(I), C.R.S. (2020)?

I. NATURE OF THE CASE

A. Relevant Facts:

On April 8, 2017, as Joy Maphis, walked on the sidewalk adjacent to 1115 Pennsylvania Street in Boulder, Colorado, she tripped over a deviation in the sidewalk elevation of approximately two and one-half inches. The top surface of the sidewalk, as well as the vertical surface of the deviation were identical in color and essentially invisible to Ms. Maphis. She fell forward, landing on the concrete sidewalk with both elbows and her face. Her right elbow was shattered and her left elbow was broken. Her face required sutures to repair her lip. [TR 1/9/19, p 8:4-13.]

As Ms. Maphis proceeded along the sidewalk, she was being careful and watching where she was going. [TR 1/9/19, p 8:14-18.] She was unable to see the deviation in the sidewalk, which was essentially invisible to her [TR 1/9/19, p 8:19-20]. The vertical face of the slab of the concrete blended into the horizontal face before and after the deviation in the sidewalk. Accordingly, Ms. Maphis was unable to see the deviation as she walked down Pennsylvania Avenue. [TR 1/9/19, pp 8:25-9:7.] As Ms. Maphis walked down the sidewalk, there was no advance warning there might be some impediment to her travel. [TR 1/9/19, p 9:8-11.] The Petitioner, at the Trinity Hearing, produced three exhibits of the sidewalk in question. She testified, based on her observations of the three photographs and her memory; there was no way she could have seen the deviation as she proceeded down the sidewalk. [TR 1/9/19, p 11:9-13.]

Ms. Maphis went to Boulder Community Hospital to have her lip sutured on the inside. [TR 1/9/19, p 12:18-25.] In addition, to a crushed right elbow, a broken left elbow, and the stitches in her face, Ms. Maphis also suffered a bruised knee. [TR 1/9/19, p 13:8-9.]

As a result of the broken right elbow, Ms. Maphis underwent two surgeries. After the first surgery, she was unable to get any meaningful range of motion. She

could not straighten her arm, touch her face, eat with a fork, etc. [TR 1/9/19, p 14:15-20.] Subsequently, Ms. Maphis had a second surgery to remove the metal from her right elbow and refashion her radial head in her right forearm with a mesh ball. [TR 1/9/19, p 14:21-24.]

At the Trinity Hearing, Ms. Maphis testified as follows:

> Q. Looking back at this event, on the 8th of April 2017, do you believe that the sidewalk that was not visible to you in terms of any defects was an unreasonably dangerous condition?
>
> A. Yes.

[TR 1/9/19, p 15:13-17.] No one else testified to the contrary.

Ms. Maphis believed this was an unreasonably dangerous condition because it was invisible to her; she couldn't see it as she was walking down the sidewalk, and as a result, she tripped over it causing serious injuries. [TR 1/9/19, p 15:2-16.] Ms. Maphis testified that if the area had been marked, she would have seen it, however, there were no markings. [TR 1/9/19, pp 16:22-17:1.] Similarly, Ms. Maphis testified there were no cones anywhere to be seen at the time she fell. Had there been cones, she would have seen them and would have been able to avoid falling. [TR 1/9/19, p 17:13-21.]

The City called Mr. Garret Slatter, who is the principle Transportation Projects Engineer for the City of Boulder. [TR 1/9/19, p 21:3.] Mr. Slatter is responsible for "overseeing a team of project managers, engineers and engineering technicians and planners who are responsible for planning, design, and construction of transportation capital improvements within the City of Boulder." [TR 1/9/19, p 21:6-10.]

The City has a sidewalk repair program document which was admitted at the Trinity Hearing. [EX hearing, pp1-101.] The manual from the City acknowledged as follows: "Broken or damaged sidewalks are not only an eyesore and an inconvenience, but they can be a safety hazard or a barrier to pedestrian travel." [EX hearing, p 5.] Pursuant to the sidewalk repair manual, the City acknowledges a need to repair all "hazardous sidewalks" and determines the criteria used to determine repairs. According to the manual:

> The criteria used to determine repair needs are cited in the Boulder Revised Code and list, among other things, the following:
>
> - Any vertical displacement exceeds 3/4 of an inch.
> - The sidewalk is a safety hazard.

[EX hearing, p 12.]

Mr. Slatter, in his testimony, agreed a deviation of greater than 3/4 of an inch is a hazard. [TR 1/9/19, p 31:9-18.] In defining a hazard, Mr. Slatter agreed a hazard is dangerous, it is unsafe, and potentially injurious to someone using the sidewalk. [TR 1/9/19, p 33:5-10.] Mr. Slatter equated dangerousness and hazardousness to being unsafe and agreed a deviation exceeding 3/4 of an inch is an unsafe sidewalk. [TR 1/9/19, p 33:18-25.] Mr. Slatter agreed there is only one number which defines an unsafe elevation, and the number is 3/4 of an inch. [TR 1/9/19, p 44:18-22.] If a deviation is over 3/4 of an inch, it is a tripping hazard, according to Mr. Slatter. [TR 1/9/19 p 44:23-35.] Once a deviation is greater than 3/4 of an inch, it is an unsafe sidewalk according to Mr. Slatter. [TR 1/9/19, p 33:22-25.]

Mr. Slatter was asked why it took from July of 2016 to March of 2017, over eight months, for the City to address a complaint of a sidewalk which had been tripped over several times? Mr. Slatter testified the answer was multi factorial and included the following:

- There are numerous other types of complaints received on a regular basis.
- The City has a limited budget with which to address these concerns.

- The City tries to address the concerns in the order in which they are received.

- The City is reliant on contractor resources and is entirely dependent on the availability of contractors.

[TR 1/9/19, pp 37:7-38:9.]

Based on the foregoing factors, Mr. Slatter was asked the following questions at the Trinity Hearing: "So regardless of whether the condition is a hazard or it's dangerous or it's unsafe, whether or not it gets repaired is based on budgetary constraints and management; is that what I understand you to be saying?" Mr. Slatter answered as follows: "Whether it gets repaired or not is–the budget is a factor, and how the–the speed with which we are able to address it yes." [TR1/9/19, p 38:10-16.] Mr. Slatter also cited scheduling difficulties and competition among cities to line up contractors as reasons for the delays in repairing dangerous sidewalks. [TR 1/9/19, p 39:22-25.]

The following colloquy took place between counsel for the Petitioner and Mr. Slatter:

> Q. Okay. And so, what I hear you saying is the relative degree of safety or lack thereof, or the relative degree of dangerousness, the relative degree of a hazard really sort of takes second fiddle to whether you have got the resources or the money to get it fixed? True?

A. I always like to think about how to respond to that.

Q. That's probably a good idea.

A. So you are saying–you're asking me whether we respond to an issue as a function–or a concern, is a function of the availability budget we have?

Q. I think that's what you just told me on a couple of different occasions but correct me if I'm wrong.

A. Yes, I am saying that is a fact. That is a reality that we deal with.

Q. Let me just direct you to Exhibit 16. This was a person who she indicated she tripped over this elevation which greatly exceeded the 3/4 inch limit and–on several occasions, and that she reported it several times in the past and that she walks there in the dark but she tries to avoid it now, and she believes it is a dangerous condition, yet no one addressed it, either with a temporary patch or a permanent fix for eight months. And that's–as I understand your testimony, is based upon budgetary constraints, the ability to mechanize a workforce to get the work done, and dangerousness, hazardousness, and safety really has to take second fiddle to those other considerations; is that correct?

A. So once it's identified as a concern the degree of the concern is not as important to our ability to be able to mobilize the resources to be able to address the repair. That is correct.

[TR 1/9/19, pp 40:40-41:9.]

Although Ms. Maphis did not fall until April 8, 2017, the sidewalk which was unsafe, had been marked for replacement in March, the month prior to Ms.

Maphis' injuries. [TR 1/9/19, p 42:18-24.] The marking placed on the sidewalk, however, was not designed to warn anyone there was a problem with the sidewalk. [TR 1/9/19, p 32:13-15.]

At the Trinity Hearing, counsel for the City essentially argued there were other sidewalks in Boulder in the same or worse condition than the sidewalk where Ms. Maphis tripped, and introduced Exhibit "C" in support of his argument. With respect to those exhibits, the court had the following colloquy with counsel for the City:

> The Court: Why is "C" relevant?
>
> Mr. Toro: These are relevant to show larger scheme, that tends to show that the hazard in this case was no[t] (sic) unreasonable, that there is–throughout the City, there is many locations of damage that are equal to or greater than what was experienced in this case. And that goes to the issue of whether the anomaly in this case was unreasonably dangerous.
>
> The Court: Well there are degrees of unreasonably dangerous, right?
>
> Mr. Toro: There could be.
>
> The Court: Well there are right?
>
> Mr. Toro: I suppose, yes.

[TR 1/9/19, pp 28:24-29:11.]

B. Procedural History:

1. The City of Boulder moved to dismiss the Plaintiff's Complaint pursuant to C.R.C.P. 12(b)(1) and requested a hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). [CF, pp 0065-0072.]

2. A Trinity Hearing was held on January 9, 2019, before the Honorable Thomas Mulvahill, Boulder County District Court Judge. The Court found the condition of the sidewalk constituted an unreasonable risk of harm to the health and safety of the public, such that the Plaintiff overcame her burden to prove that the City has waived its immunity in the matter and the Court has subject matter jurisdiction to hear the case. [CF, p 014.]

3. The City of Boulder filed an interlocutory appeal and on June 25, 2020, the Court of Appeals reversed the District Court and remanded the case to the District Court with directions to dismiss Maphis' claim against Boulder. The opinion was authored by Judge Grove, with Judge Freyre concurring and Judge Richman dissenting. [CA @ 018.]

4. Ms. Maphis filed a Petition for Writ of Certiorari on August 5, 2020.

5. The Supreme Court granted the Petition for Certiorari on January 19, 2021, as to two re-framed issues and denied all other requests for relief. [*See* Appendix B, Order Granting Petition for Certiorari.]

C. Court of Appeals Ruling

The Court of Appeals published its Order reversing the Order of the District Court and remanding the case to the District Court to be dismissed on June 25, 2020. [*See* Appendix A, Court of Appeals Order.]

D. Judgment or Ruling Presented for Review.

Ms. Maphis presents for review the Court of Appeals Order announced June 25, 2020, which is attached hereto and incorporated herein by this reference.

II. SUMMARY OF ARGUMENTS

A. The Court of Appeals Erred by Holding the Sidewalk in Question Did Not Constitute an Unreasonably Dangerous Condition, as a Matter of Law, Despite the Absence of a Legal Question, and Despite the Findings of Jurisdictional Facts by the District Court Which Were Well Supported by the Evidence at the Trinity Hearing.

(1) The only question posed by the City's C.R.C.P. 12(b)(1) motion; i.e., "was the sidewalk unreasonably dangerous," was a question of fact, not law.

(2) An Appellate Court only reviews issues *de novo* where the issue is one of law. *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (2003).

B. The Court of Appeals Erred by Holding, as Matter of Law, the Sidewalk Did Not Constitute an Unreasonably Dangerous Condition Pursuant to 24-10-106(1)(d)(I), C.R.S. 2020.

(1) The Court of Appeals Erred by Holding the Petitioner's Evidence Did Not Constitute an Unreasonable Risk of Harm to the Health and Safety of the Public Because it Did Not Occur in a More Public Location.

(2) The Court of Appeals Erred by Refusing to Liberally Construe the Petitioner's Waiver Claims

(3) The Court of Appeals Erred When it Denied Deference to the Trial Court and Decided Purely Factual Issues as a Matter of Law in Conflict With Other Divisions of the Court of Appeals.

III. ARGUMENT

A. The Court of Appeals Erred by Holding the Sidewalk in Question Did Not Constitute an Unreasonably Dangerous Condition, as a Matter of Law, Despite the Absence of a Legal Question, and Despite the Findings of Jurisdictional Facts by the District Court Which Were Well Supported by the Evidence at the Trinity Hearing.

a. Statement of Applicable Standard of Review:

"A reviewing court employs the clearly erroneous standard of review in considering the trial court's findings of jurisdictional fact." *Springer v. City and County of Denver*, 13 P.3d 794, 798 (Colo. 2000), *Colucci v. Vail*, 232 P.3d 218, 219 (Colo.App. 2009); the existence of a dangerous condition and its interference

with traffic are questions of fact. *Mckinley v. City of Glenwood Springs*, 361 P.3d 1080, 1082 (Colo.App. 2015). The issue of immunity under the Colorado Governmental Immunity Act is an issue of subject matter jurisdiction. *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995). Such questions are reviewed pursuant to C.R.C.P. 12(b)(1). *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000). Where the relevant facts are not in dispute and the issue is one of law, the appellate court reviews jurisdictional rulings *de novo*. *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (Colo. 2003). *See Colucci v. Vail*, 232 P.3d 218, 219 (Colo.App. 2009). Such is not the case here; no question of law was at issue.

b. This Issue Was Preserved for Appeal.

See City of Boulder's Motion to Dismiss for lack of subject matter jurisdiction pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). [CF, p 0065.] *See* Plaintiff's Response in Opposition to City of Boulder's Motion to Dismiss for Lack of Subject Matter Jurisdiction filed November 5, 2018. [CF, p 0335.] *See* Plaintiff's Amended Response in Opposition to City of Boulder' Motion to Dismiss for Lack of Subject Matter Jurisdiction. [CF, p 0382.] *See* Order of the Honorable Thomas Mulvahill

dated January 9, 2019. [CF, p 0455.] *See* Notice of Appeal by City of Boulder. [CF, p 0501.]

(1) The Only Question Posed by the City's C.R.C.P. 12(b)(1) Motion; i.e., Was the Sidewalk "Unreasonably Dangerous," Was a Question of Fact, Not Law.

The primary issue in this appeal is whether the Court of Appeals' review of the District Court findings involve a question of law or a question of fact. If the only issue being decided by the District Court was a question of fact, then it must be reviewed by employing the clearly erroneous standard of review. *Springer v. City and County of Denver*, 13 P.3d 794, 798 (Colo. 2000). Only if the question being reviewed is one of law does the reviewing court review *de novo*. *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (Colo. 2003); *Colucci v. Vail*, 232 P.3d 218, 219 (Colo.App. 2009).

"The existence of a dangerous condition and its interference with traffic are questions of fact." *McKinley v. City of Glenwood Springs*, 361 P.3d 1080, 1082 (Colo.App. 2015); *see also Colucci, supra.*

The existence of immunity under the Colorado Governmental Immunity Act (CGIA) [§24-10-101, *et. seq.*, C.R.S.] is an issue of subject matter jurisdiction. *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995). The issue is raised pursuant

to C.R.C.P. 12(b)(1) on a motion to dismiss. *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000). Governmental immunity under the Colorado Governmental Immunity Act is in derogation of Colorado's Common Law and must be strictly construed. *See Bertrand v. Bd. of County Com'rs*, 872 P.2d 223, 227 (Colo. 1994). Provisions waiving immunity, on the other hand, are broadly construed in the interest of compensating victims of governmental negligence. *Corsentino, supra; Walton v. State*, 968 P.2d 636, 643 (Colo. 1998).

Under the facts present here, the question to be determined by both the District Court and the Court of Appeals on review, is clearly a question of fact. The question, simply put, is whether the sidewalk in question, factually, presented an unreasonable risk of harm to the health and safety of the public, and secondarily, whether it physically interfered with the movement of traffic. Should this case proceed to trial, a jury would be instructed on the definition of an unreasonably dangerous condition. Pursuant to statute, the jury would be instructed that an unreasonably dangerous condition presents "an unreasonable risk of harm to the health and safety of the public." It would then be up to the jury, as fact finders, to decide whether the sidewalk in question posed an unreasonable risk of harm to the health and safety of the public. The jury would

not be called upon to rule on any question of law, any more than the District Court was required to rule on a question of law at the Trinity Hearing.

Governmental Immunity raises a jurisdictional issue. *Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1383-84 (Colo. 1997). Because Trinity Hearings pursuant to C.R.C.P. 12(b)(1) are limited in nature and "because tort concepts are naturally subjective, the District Court should not fully resolve the issue of whether the government has committed negligence; rather, the court should only satisfy itself that it has the ability to hear the case. *Tidwell ex rel. Tidwell v. City and County of Denver*, 83 P.3d 75, 85 @ 86 (Colo. 2003)." Neither the Trial Court nor the reviewing court will address issues of negligence or causation "which are matters properly resolved by the Trier of Fact." *City of Denver v. Dennis*, 418 P.3d 489, 494 (Colo. 2018).

A court reviewing the factual determinations of the District Court must uphold those factual determinations unless they are clearly erroneous. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

With the foregoing principles in mind, a review of the District Court's specific findings is in order. The District Court made specific findings regarding the City's waiver of immunity as follows:

> Plaintiff presented credible testimony in the matter at hand which is substantially corroborated by that of Mr. Slater, that there was a deviation in the height of the slabs of sidewalk where plaintiff was walking, that she tripped over the raised slab of sidewalk, and this caused her to hit her head and elbows on the concrete. A deviation between sidewalk slabs was measured by one of plaintiff's coworkers and shown to be approximately two and one-half inches in height. The deviation is shown in Exhibits 2, 3 and 4 and there is no evidence contradicting the magnitude of the deviation reported. The City does not dispute that it had notice of the raised condition of the sidewalk slab prior to plaintiff's fall on April 8, 2017.

[CF, p 513.]

The District Court also made the following findings:

> The City has their own standards for the maintenance and repair of sidewalks, as set forth in Exhibit A, which explains that a sidewalk deviation greater than three-quarters of an inch constitutes a "hazard" by the City's own definition. The City's definition of this particular deviation as a hazard does not [sic] of itself relieve the plaintiff of her burden to show it was an unreasonably dangerous condition. It does give an indication of the degree of deviation at hand and the fact that the City agrees it is a hazard for pedestrians and other sidewalk users.
>
> Additionally, Exhibits 2, 3 and 4 indicate that the coloring of the top surface of the sidewalk in this area is substantially identical to the coloring appearance of the vertical plain or face of the raised slab at issue, making the deviation largely imperceptible. The testimony from plaintiff was that she was unable to notice the deviation by the appearance of the sidewalk, and the evidence and Exhibits 2, 3, and 4 corroborates that testimony. Where plaintiff's allegations in evidence

> are undisputed, the court will give her the benefit of all reasonable inferences from that evidence.

[CF, p 513.]

The Court went on to find as follows:

> THE COURT FINDS that the coloring of the sidewalk makes the deviation difficult to detect, increases the degree of the tripping hazard and thus the risk to the walking public. The Court finds that on April 8, 2017, the condition of the sidewalk constituted an unreasonable risk of harm to the health and safety of the public such that plaintiff has overcome her burden to prove that the City has waived its immunity in this matter and the Court does have subject matter jurisdiction to hear this case.
>
> The Court disagrees with the City's position that they must have caused the condition of the sidewalk to waive their immunity pursuant to the CGIA provisions. Waiver may result either from action or inaction to conduct proper maintenance of the hazardous condition, as plainly defined in §24-10-103 (2.5) C.R.S.

[CF, p 014.]

At no time did the District Court interpret or rule upon any question of law. To the contrary, the Court's findings were all specifically factual in nature and all were well supported by the testimony and exhibits produced at the Trinity Hearing.

The Court of Appeals took issue with the notion the reviewing court must apply the Clear Error Standard. The Court of Appeals stated as follows:

> *Citing City and 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 the Trial Court's findings of jurisdictional facts unless they are clearly erroneous."); *see also Sweikowski 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.")
>
> 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. Regional Transportation 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").

[*See* Court of Appeals Order dated June 25, 2020, attached hereto.]

With all due respect, the Court of Appeals' argument begs the question. Although there are numerous cases supporting the notion of *de novo* review where the relevant facts are not in dispute and the issue is one of law, the issue must be "one of law." *See Tidwell, supra* @ 81; *see Colucci, supra* @ 219. In *Springer, supra*, this Court noted "where the jurisdictional issue involves a factual dispute, the reviewing court employs the clearly erroneous standard of review in considering the trial court's

findings of jurisdictional fact." *Citing Walton*, 968 P.2d @ 643. However, if the alleged facts are undisputed and the issue is purely one of law, the appellate court reviews the jurisdictional matter *de novo*. *Citing Corsentino*, 4 P.3d @ 1087; *Sweikowski* @ 1384. In *Springer*, the Court determined the review should be *de novo* "because the issue of immunity when a public entity uses an independent contractor to construct its building is a legal question." *Springer* @ 798-99.

City and County of Denver v. Dennis, 418. P.3d 489 (Colo. 2018), does not compel a different result. The issue in *Dennis* was one of law. As the Supreme Court stated:

> The Court of Appeals' definition of "unreasonable risk" is 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. *Sweikowski*, 934 P.2d @1385. ["while the government has no duty to improve a roadway, it does have a duty to repair a roadway where the roadway has changed from its original condition and this change poses a danger."] It is only once the road becomes unreasonably risky that the government has a duty to "take the steps necessary to return the road to the same general state of being, repair, or efficiency as initially constructed, but nothing more." *Medina*, 35 P.3d @ 457. [Emphasis added.]

[*Dennis* @ 495, 96.]

It is important to recognize *Dennis* turned on a question of law which converted appellate review to a *de novo* standard as opposed to a clearly erroneous

factual standard in cases where questions of law are not involved. To hold otherwise would be the exception which swallows the rule. It clearly makes sense for a *de novo* standard to apply where questions of law are at issue. When the law changes, the application of facts may change as well. If, as the Court of Appeals found, the factual determination of whether a sidewalk constitutes a "dangerous condition," converts the long-standing clear error standard to one of *de novo* review, then there would be no clear error in a trinity hearing review.

(2). An Appellate Court Only Reviews Issues *De Novo* under C.R.C.P. 12(b)(1) Setting Where the Issue Is One of Law. *Tidwell V. City and County of Denver*, 83 P.3d 75, 81 (2003).

"An Appellate Court reviews jurisdictional rulings *de novo* where the relevant facts are not in dispute and the issue is one of law." *Tidwell, supra* @ 81 (Colo. 2003); *Colucci, supra* @ 219.

Ms. Maphis is not arguing the *de novo* standard has no place in the context of a C.R.C.P. 12(b)(1) review. It clearly does. However, *de novo* review is reserved for questions of law, and not questions of fact. "Construction of a statute is a question of law, not a factual determination. *Colorado Division of Employment Training v. Parkview Episcopal Hospital,* 725 P.2d 787, 790 (Colo. 1986). "An Appellate Court need not defer to trial courts when reviewing questions of law." *Bloomer v. Bd of*

County Com'rs, 799 P.2d 942, 944 (Colo. 1990); *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993).

In *Daniel v. City of Colorado Springs, Mun. Corp.,* 327 P.3d 891, 894 (Colo. 2014), appellate review was *de novo* because the Court of Appeals' holding turned "on its interpretation of the CGIA's recreation area waiver, a question of law."

The relevant determination in deciding whether the standard of review is a clearly erroneous standard or a *de novo* standard, is not whether the jurisdictional findings are undisputed, but whether the jurisdictional findings are undisputed and the issue presents a question of law. *Medina v. State*, 35 P.3d 143, 452 (Colo. 2001).

B. The Court of Appeals Erred in Holding as a Matter of Law, the Sidewalk Did Not Constitute an Unreasonably Dangerous Condition Pursuant to 24-10-106(1)(d)(I), C.R.S. 2020.

a. Statement of Applicable Standard of Review:

"A reviewing court employs the clearly erroneous standard of review in considering the trial court's findings of jurisdictional fact." *Springer v. City and County of Denver*, 13 P.3d 794, 798 (Colo. 2000), *Colucci v. Vail*, 232 P.3d 218, 219 (Colo.App. 2009); the existence of a dangerous condition and its interference with traffic are questions of fact. *Mckinley v. City of Glenwood Springs*, 361 P.3d 1080, 1082 (Colo.App. 2015). The issue of immunity under the Colorado Governmental Immunity Act is an issue of subject matter jurisdiction. *Fogg v. Macaluso*, 892 P.2d

271, 276 (Colo. 1995). Such questions are reviewed pursuant to C.R.C.P. 12(b)(1). *Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000). Where the relevant facts are not in dispute and the issue is one of law, the appellate court reviews jurisdictional rulings *de novo*. *Tidwell v. City and County of Denver*, 83 P.3d 75, 81 (Colo. 2003). *See Colucci v. Vail*, 232 P.3d 218, 219 (Colo.App. 2009). Such is not the case here; no question of law was at issue.

b. This Issue Was Preserved for Appeal.

See City of Boulder's Motion to Dismiss for lack of subject matter jurisdiction pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). [CF, p 0065.] *See* Plaintiff's Response in Opposition to City of Boulder's Motion to Dismiss for Lack of Subject Matter Jurisdiction filed November 5, 2018. [CF, p 0335.] *See* Plaintiff's Amended Response in Opposition to City of Boulder' Motion to Dismiss for Lack of Subject Matter Jurisdiction. [CF, p 0382.] *See* Order of the Honorable Thomas Mulvahill dated January 9, 2019. [CF, p 0455.] *See* Notice of Appeal by City of Boulder. [CF, p 0501.]

(1) the Court of Appeals Erred in Holding the Petitioner's Evidence Did Not Constitute an Unreasonable Risk of Harm to the Health and Safety of the Public Because it Did Not Occur in a More Public Location.

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." *Tidwell ex. rel. Tidwell v. City and County of Denver*, 83 P.3d 75, 85-86 (Colo. 2003). "When the facts are disputed, the court must begin by making a factual finding."[1] *Id.* If the court determines that the plaintiff's allegations are true, then it should award the plaintiff the reasonable inferences from her evidence. *Id. @ 85.*

The Trial Court, after listening to Ms. Maphis' testimony and reviewing the photographs, agreed. (CF, p 513.) The sidewalk constituted an unreasonable risk of harm to the safety of the public such that the Petitioner has overcome her burden to prove the City waived its immunity. (CF, p 014.)

The obligation of the District Court is not to fully resolve whether the government has committed negligence, but rather, the court should satisfy itself that it has the ability to hear the case. *Id. @* 86; *see also Swieckowski by Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997). Issues of negligence and causation are matters properly reserved for the trier of fact. *Dennis, supra.*, ¶ 11.

[1] Here, Ms. Maphis testified the sidewalk deviation which was invisible to her was an unreasonably dangerous condition. No one at the Trinity Hearing testified otherwise.

In reviewing factual determinations the court will uphold the factual determinations of the District Court unless those determinations are clearly erroneous. *Medina v. State* 35 P.3d 443, 452 (Colo. 2001). *Dennis, supra* @ ¶ 12.

Once questions of fact are resolved, the question of governmental immunity is reviewed *de novo*. *Medina* @ 452-53; *Dennis* @ ¶12. As previously stated, this should only occur when a question of law is at issue. [*See Springer, supra.*]

When interpreting a statute, the court's focus is on legislative intent, and the statute is construed as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *St. Vrain Valley School Dist. RE-1J v. Loveland*, 217 Colo. 54, Paragraph 11, 395 P.3d 751, 754. *Dennis* @ ¶ 12. This analysis was not at issue under our facts. The District Court did not address any statutory legal analysis or questions of law.

Even had the court addressed a question of law, in any statutory review, the court does not add or subtract words from the statute, and if the language is unambiguous, the court will "give effect to its plain and ordinary meaning and look no further." *Smokebrush Found, v. City of Colorado Springs*, 2018 Colo.10, ¶ 18, 410 P.3d 1236, 1240. This applies equally to appellate court review.

C.R.S. §24-10-103(1.3) defines a dangerous condition as follows:

> 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.

Accordingly, the Supreme Court in *Dennis* interpreted C.R.S. §24-10-103(1.3) to require the following four elements:

(1) The Physical condition of the street; (here sidewalk)

(2) constituted an unreasonable risk to the health or safety of the public;

(3) Denver (here, Boulder) knew or should have known of the risk, and;

(4) The Petitioner's injury was proximately caused by the City's negligent omission in maintaining the street.

[*Citing St. Vrain, supra*, ¶ 16, 395 P.3d @ 755.]

In *Dennis*, the Court of Appeals' opinion held that "the failure to keep a road in the same general state of repair or efficiency as it was originally constructed . . . constitutes an unreasonable risk, and that a plaintiff satisfies his burden of proving an unreasonable risk to the health or safety of the public under 24-10-103(1.3) when he or she shows that a governmental entity failed to restore a damaged road to its same state of efficiency or repair as initially constructed. *Dennis,* ¶ 36.

The Supreme Court determined the Court of Appeals had "misread the law." *Dennis* @ ¶ 13. Rather than requiring a governmental entity to maintain all roads in their originally constructed condition, the Supreme Court held the government's duty to maintain a road is "triggered only after the road becomes unreasonably dangerous." *Swieckowski*, 934 P.2d @ 1385. Although "the government has no duty to improve a roadway, it does have a duty to repair a roadway where the roadway has changed from its original condition and this change poses a danger."[2] *Id* @ ¶ 18. Only after a road "becomes" unreasonably risky does the government have a duty to "take steps necessary to return the road to the same general state of being, repair or efficiency as initially constructed, but nothing more." *Medina, supra*, 35 P.2d @ 547. "Just because a road is not 'like new' does not mean it automatically constitutes an unreasonable risk to the health and safety of the public." *Id* @ ¶ 18.

The facts of *Dennis* do not square at all with the facts herein. The sidewalk deviation over which Ms. Maphis tripped causing severe injury was known to the City in the month before it was repaired. The deviation in the sidewalk, by the City's own definition, was a tripping hazard. The deviation exceeded the City's threshold

[2] One cannot argue this defect did not pose a danger where its invisibility and deviation tripped Ms. Maphis and caused her severe injuries.

for tripping hazards by over three times. The tripping hazard was invisible to Ms. Maphis, who couldn't see it because there was no color differentiation between the vertical and horizontal slabs of concrete. There was no other entity, individual or reason for Ms. Maphis' fall other than the unreasonably dangerous condition of the sidewalk.

An evaluation of the four elements necessary to satisfy the definition of an unreasonably dangerous condition pursuant to C.R.S. §24-10-103(1.3) manifests the conclusion this sidewalk was an unreasonable risk to the health or safety of the public. Those elements are as follows:

1. The physical condition of the sidewalk;

2. constituted an unreasonable risk to the health or safety of the public;

3. Boulder knew or should have known of the risk, and;

4. The Petitioner's injury was proximately caused by Boulder's)negligent omission in maintaining the sidewalk.

[*See St. Vrain, supra*, ¶ 16, 395 P.3d @ 755.]

Here, the physical condition of the sidewalk was over three times what the City considered to be a tripping hazard and it was invisible to pedestrians such as Ms. Maphis. Invisible tripping hazards pose an unreasonable risk to the health or safety

of the public. They cannot be appreciated because they cannot be seen. The City knew of the risk the month before Ms. Maphis' fall, and the her injury was solely and proximately caused by the condition of the sidewalk which was maintained at a hazard level over three times what the City considered to be a tripping hazard.

The Supreme Court in *Dennis* also dealt with the question of whether the plaintiff demonstrated that the dangerous condition interfered with the movement of traffic pursuant to C.R.S. §24-10-106(1)(d)(I). In *Dennis*, a vehicle had turned left in front of the motorcycle upon which the plaintiff was riding and the testimony from the police officer indicated the road played no part in causing the plaintiff's injuries. Here, the sidewalk was the only cause of Ms. Maphis' fall and her serious injuries.

As the dissent points out at ¶ 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' complaint because the deviation was not near a 'crowded pedestrian mall' or the 'entrance to an assisted living facility.'" *Supra,* ¶ 27. Instead, because the 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. Dissenting opinion, ¶ 39[3].

As the dissent points out, "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." Dissenting opinion, ¶ 40.

Similarly, there is no language in the definition of a dangerous condition pursuant to §24-10-103(1.3) which allows the City to prioritize dangerous conditions and preserves immunity based on ministerial City decisions to allow some dangerous conditions to go unrepaired. As the dissent points out:

> 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 the 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

[3] The argument advanced by the majority necessarily assumes the defect was visible, which it was not.

> declares a sidewalk a 'hazard,' and does nothing to fix it, it has created a dangerous condition and its failure to act is unreasonable.

[Dissent @ ¶ 44.]

In short, the Colorado Governmental Immunity Act is in derogation of common law, and must be strictly construed. (*Dennis, supra*; *Corsentino v. Cordova* 2000, 4 P.3d 1082) The majority opinion of the Court of Appeals not only fails to strictly construe the statute, but essentially adds language to the statute not found in the Governmental Immunity Act which allows municipalities to prioritize dangerous conditions to repair them when they get around to it, and to add language to the statute permitting hazardous conditions to persist at less traveled locations when they might be found unreasonably dangerous at more congested locations. None of this language is found in the statute, and the Court of Appeals erred by failing to narrowly construe the statute in conformance with Colorado law. As the Court stated in *Swieckowski supra*, "the court does not add or subtract words from the statute, and if the language is unambiguous, the court will 'give effect to its plain and ordinary meaning and look no further.'" *Smokebrush, supra*, ¶18, 410 P.3d 1236, 1240.

(2) The Court of Appeals Majority Erred by Refusing to Liberally Construe the Petitioner's Waiver Claims

The exception to governmental immunity under these facts is found at C.R.S. §24-10-106(1)(d)(1). "Sovereign immunity is waived by a public entity in an action for injuries resulting from . . . a dangerous condition of . . . any public highway, road, street or sidewalk within the corporate limits of any municipality." A dangerous condition is defined under the CGIA as follows:

> 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 of omission of the public entity or public employee in constructing or maintaining such facility.

[C.R.S. §24-10-103(1.3)]

Maintenance of a facility includes both "the act of omission of a public entity or a public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from decline or failure." [C.R.S. §24-10-103(2.5).]

A waiver of governmental immunity is established if the injuries to the plaintiff occurred as a result of the following:

(1) Physical condition of the 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 such facility.

[*Walton, supra*, 968 P.2d @ 644.]

As previously stated, the District Court made specific findings regarding the City's waiver of immunity. [CF, p 513.]

At the Trinity Hearing, the City called one witness to testify, Mr. Garrett Slatter. Mr. Slatter did not opine the sidewalk where Ms. Maphis tripped was not unreasonably dangerous. To the contrary, he agreed it was a tripping hazard. Ms. Maphis, on the other hand, testified the sidewalk was unreasonably dangerous because it was essentially invisible to her. The Trial Court, in its ruling, found the Plaintiff's testimony to be credible, and further found it was confirmed by Exhibits 2, 3, and 4 admitted at the Trinity Hearing. [CF, p 014, EX (Hearing), p 157, EX (Hearing) p 158, and EX (Hearing) p 159.]

The Court of Appeals majority concluded "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." *Citing Dennis*, ¶ 11.

The clear error standard applies to the District Court's findings of jurisdictional facts. *City and County of Denver v. Crandall*, 161 P.3d 627, 633 (Colo. 2007). An appellate court should uphold a trial court's findings of jurisdictional facts unless they are clearly erroneous. *Id., 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." *Id.*

Here, despite clear authority to narrowly construe statutes which are in derogation of common law and to liberally construe waiver provisions, the Court of Appeals did neither. In the face of unrebutted evidence from the Petitioner demonstrating the invisibility of the hazard and a deviation which exceeded City standards by three times, all of which was corroborated by photographs and determined by the court to be credible, the Court of Appeals majority disregarded the testimony and the Court's factual findings, none of which were clearly erroneous.

(3) The Court of Appeals Erred When it Denied Deference to the Trial Court and Decided Purely Factual Issues as a Matter of Law in Conflict With Other Divisions of the Court of Appeals.

The Court of Appeals, in its opinion reversing the Boulder County District Court stated "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*") *citing Trujillo v. Regulation Transportation Dist.*, 2018 COA 182, ¶5. [COA Opinion, ¶15.]

The Court, in *Dennis*, however, was dealing with the issue of statutory construction and legislative intent which required a *de novo* review not present in the case of this Petitioner. *Dennis*, ¶ 12.

In *Dennis*, the issues presented on *certiorari* were as follows:

1. Whether the Court of Appeals' holding that a public road constitutes an "unreasonable risk to the health or safety of the public" simply because it is not in the same state of repair or efficiency as initially constructed and properly removes respondent's burden of proving the unreasonable risk and causation elements contained within the definition of "a dangerous condition" under the CGIA.

2. Whether the Court of Appeals erred by failing to require respondent to prove that the alleged state of disrepair of the road itself constituted a dangerous condition that physically interfered with the movement of the traffic pursuant to §24-10-106(1)(d)(I), C.R.S. (2016).

3. Whether the Court of Appeals erred by holding as a matter of law that a municipality's failure to maintain a public road in its "same state of repair or efficiency as initially constructed" constitutes "an unreasonable risk to the health or safety of the public" pursuant to the definition of a "dangerous condition" set forth in §24-10-103(1.3), C.R.S. (2016), of the Colorado Governmental Immunity Act ("CGIA").

The foregoing questions required the Court to decide a question of law. After doing so, the Court concluded "the road did not constitute an unreasonable risk; and the road did not physically interfere with the movement of traffic." *Dennis*, ¶ 13.

The dissent clearly points out the differences between the Petitioner's case and *Dennis*. [Dissent, ¶¶ 41-44.] Judge Richman stated as follows:

> 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.
>
> 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 a repair was scheduled for two days after Ms. Maphis tripped–two days too late for her.

[Dissenting Opinion, ¶¶ 41-42.]

> 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' injury, but it caused her to trip and injure herself.

[Dissenting Opinion, ¶43.]

> 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* @ ¶ *19*. To me, that defense "proves too much" because a governmental entity could always claim that repairing the cite 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 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. A 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.

[Dissenting Opinion, ¶ 44.

The Court of Appeals acknowledges there is support for the Petitioner's position that this determination should be one of fact, not one of law or one of mixed facts and law. The Court of Appeals Stated as follows:

> There is, to be sure, some support for Maphis' position and 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 the evidence and the record.") [*citation omitted*].

However, the Court of Appeals, after recognizing the conflict in other appellate divisions, declined to follow those opinions:

> But to the extent that other case 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).

[COA Opinion, ¶ 16.]

The Court went on to state as follows:

> 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.

[COA Opinion, ¶ 17.]

The Court of Appeals concluded there was no direct evidence the sidewalk required immediate repair. [COA Opinion, ¶ 26.] In fact, there was direct evidence the sidewalk required immediate repair. The sidewalk had been examined in March, a few weeks before repairs were completed, and it was scheduled to be repaired. Two days before Ms. Maphis fell, the sidewalk was in fact marked for immediate repair.

The Court of Appeals acknowledges the sidewalk deviation in the Petitioner's case could qualify as a dangerous condition. Specifically, the Court stated as follows:

> 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.

[COA Opinion, ¶ 27.]

The foregoing language ignores the most salient fact; Ms. Maphis could not see the defect because the color of the concrete blended into invisibility. One cannot avoid what they cannot see.

The Court of Appeals goes on to acknowledge "the deviation was substantial and, as the District Court found, difficult to see due to the uniform coloration of the sidewalk slabs." [COA Opinion. ¶ 28.]

In contrast, the Court of Appeals states as follows:

> 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–a conclusion that finds further support in the absence of citizen complaints alerting Boulder of the damage.

[COA Opinion, ¶ 28.]

The foregoing argument by the Court of Appeals assumes the tripping hazard is visible, which this one was not. To state "a tripping hazard of the type at issue here should have been neither an unexpected nor unusual danger to ordinary pedestrians" necessarily assumes it is visible to ordinary pedestrians. Invisible tripping hazards are not expected and do pose unusual danger to ordinary pedestrians.

As the Dissent makes clear, there is no provision in the CGIA allowing a governmental entity to prioritize its repairs. Neither is there any authority in the CGIA to allow a governmental entity to repair a tripping hazard only when the budget allows for it; or a workforce can be assembled; or eight months after they become aware of the hazard.

Here, the findings of the Boulder County District Court were clear and uncontroverted. They needed no interpretation of legislative intent and the Court of Appeals erred by applying a *de novo* review.

At no point did the Court of Appeals find the findings of the Boulder County District Court clearly erroneous. In fact, they appear to adopt the factual findings the District Court has already made.

As the Dissenting Opinion points out, it is not disputed that the condition of the sidewalk resulted from Boulder's failure to maintain it, because maintenance of the sidewalk is the City's responsibility. [Dissenting Opinion, ¶ 35.]

The Dissenting Opinion goes on to state as follows:

> 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.
>
> I seen 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.

[Dissenting Opinion, ¶¶ 39-40.]

Taken to it logical conclusion, the Court of Appeals opinion would absolutely immunize a city with responsibility for repairing sidewalks in nearly all circumstances. If uneven sidewalks are so commonplace in Boulder that a tripping hazard of this type should not be an unexpected or unusual danger to ordinary

pedestrians, then why bother fixing any of them? This would render the Governmental Immunity Act useless to protect plaintiffs' rights and convert the statute to an assumption of the risk standard.

CONCLUSION

The Court of Appeals applied an incorrect standard of review by reviewing the District Court's findings of fact *de novo.* There was no issue of law involved, only findings of fact.

The uncontroverted evidence at the Trinity Hearing established Ms. Maphis tripped over a deviation which exceeded the City's own standard by over three times, which was invisible to her. The uncontroverted evidence established she received serious injuries as a result of the fall. Ms. Maphis testified the defect was unreasonably dangerous and no one else testified differently. The Boulder County District Court made clear and unambiguous findings relying upon the testimony of Ms. Maphis and photographic evidence corroborating her testimony. Although the Court of Appeals Opinion acknowledges governmental immunity claims are to be strictly construed, and waiver claims are to be liberally construed, and further acknowledges deference to the District Court's findings of fact, those principles were

not applied in the case of the Petitioner, and the Petitioner respectfully requests this Court reverse the Court of Appeals and remand this case for trial.

Date: February 24, 2021

Respectfully submitted,

By: 

Randall J. Paulsen

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Opening Brief was electronically served through the Colorado Courts E-Filing on the following on the date hereinafter listed.

Thomas A. Carr, City Attorney
Luis A. Toro, Assistant City Attorney
Office of the City Attorney
P.O. Box 791
Boulder, CO 80306

Sandy McClain
Date: 2-24-21