SUPREME COURT, STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203 Telephone: (720) 625-5150 Opinion by the Court of Appeals Case No. 2019CA203 Appeal from Boulder County District Court Case No. 2018CV30036 **JOY MAPHIS,** Petitioner, v. **CITY OF BOULDER, COLORADO,** Respondent.	DATE FILED: March 2, 2021 11:30 PM FILING ID: AEC85120AED3F CASE NUMBER: 2020SC646 ▲ **COURT USE ONLY** ▲
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BRIEF OF AMICUS CURIAE THE COLORADO TRIAL LAWYERS ASSOCIATION

Amicus Curiae Colorado Trial Lawyers Association ("CTLA") respectfully submits this Brief in support of the Plaintiff, Joy Maphis, in the above-captioned case:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3738 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ John F. Poor
John F. Poor

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I. STATEMENT OF INTEREST

Established in 1953, the Colorado Trial Lawyers Association ("CTLA") is the largest specialty bar association in Colorado. CTLA consists of approximately 1,300 Colorado trial attorneys who represent claimants, particularly individuals, in a wide variety of litigation. The stated mission of CTLA is to protect the rights of the individual, advance trial advocacy skills and promote high ethical standards and professionalism in the ongoing effort to preserve and improve the American system of jurisprudence. The organization is active in promoting fairness and equity in legislation, including the provisions of the Colorado Governmental Immunity Act ("CGIA" or "GIA") that are at issue in this case.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW & STATEMENT OF THE CASE

CTLA incorporates by reference the Statement of Issues Presented for Review, Statement of the Case and factual recitations contained in the Opening Brief filed the Petitioner, Joy Maphis.

As relevant here, Ms. Maphis suffered multiple serious injuries, including a crushed right elbow and a broken left elbow, when she tripped and fell on a raised piece of sidewalk that was owned and maintained by the City of Boulder. It is undisputed that (a) the deviation over which Ms. Maphis tripped was approximately 2 ½ inches in height; (b) City of Boulder policy dictated that any

vertical displacement in excess of ¾ of an inch was sufficiently dangerous to warrant repair; (c) the vertical deviation in this case blended visually with the horizontal face of the sidewalk such that the hazard was not visible to pedestrians; (d) the City placed no warnings or visual markings to alert Ms. Maphis or other pedestrians of the danger, and (e) Ms. Maphis did not see or otherwise perceive the dangerous condition before she tripped on it.

Based on the foregoing, the trial court concluded that Ms. Maphis had sufficiently established that she had been injured as the result of a "dangerous condition" of a public sidewalk within the City of Boulder, and that the City of Boulder was therefore not immune from suit pursuant to § 24-10-106(1)(d)(I), C.R.S. The court of appeals reversed. Although the appeals court accepted the above facts as found by the trial court, it nonetheless concluded that the trial court's holding that immunity was waived was a legal conclusion that it was obligated to review de novo. Under a de novo standard of review, the court of appeals concluded that the danger in posed by the sidewalk was not "unreasonable" and that the City of Boulder thus retained its immunity.

III. SUMMARY OF THE ARGUMENT

The CGIA was enacted in derogation of the common law, and this Court has repeatedly instructed lower courts to construe its grants of immunity narrowly in

favor of compensating victims of governmental negligence. Accordingly, this Court should make clear that the burden upon plaintiffs to establish subject matter jurisdiction through a waiver of sovereign immunity is a relatively lenient one under which a plaintiff is entitled to the benefit of all reasonable inferences that can be drawn from the facts as found by the trial court.

CTLA encourages this Court to make clear that an appellate court reviewing a trial court's conclusion that immunity is waived has a limited role. While matters of statutory construction are properly reviewed de novo, the trial court's factual findings should be reviewed under a clearly erroneous standard, and the appellate court should not substitute its judgment for that of the trial court when the trial court has applied the proper analytical framework. To hold otherwise would contravene this Court's repeated direction that grants of immunity under the CGIA are to be construed narrowly, and would impose a particularly onerous burden on injured claimants.

Applying these principles in this case, this Court should hold that the court of appeals erred by second-guessing the factual findings of the trial court and, in so doing, by effectively conducting a de novo review of the trial court's conclusion that immunity was waived.

IV. ARGUMENT

A. THE CGIA WAS ENACTED IN DEROGATION OF THE COMMON LAW, AND THIS COURT HAS REPEATEDLY HELD THAT ITS GRANTS OF IMMUNITY SHOULD BE CONSTRUED NARROWLY.

Prior to 1971, Colorado courts recognized the doctrine of governmental immunity in tort-based actions. *See City of Colo. Springs v. Powell*, 48 P.3d 561, 563 (Colo. 2002). In *Evans v. Bd. of Cnty. Comm'rs*, 482 P.2d 968 (Colo. 1971), *superseded by statute*, Ch. 323, Sec. 1, §§ 130-11-1 to -17, 1971 Colo. Sess. Laws 1204, 1 204-11, this Court abrogated the doctrine of governmental immunity, holding that the state and its subdivisions were subject to suit.[1] This Court did so in part because "the waivers to immunity and the exceptions to those waivers had become exceedingly complicated and in many ways arbitrary. *Powell*, 48 P.3d at 563. This Court wrote:

> The effect of this opinion and its two contemporaries is simply to undo what this court has done and leave the situation where it should have been at the beginning, or at least should be now: in the hands of the General Assembly of the State of Colorado. If the General Assembly

[1] The Court also issued opinions in two companion cases, *Flournoy v. Sch. Dist. No. 1 of Denver*, 482 P.2d 966 (Colo. 1971) and *Proffitt v. State*, 482 P.2d 965 (Colo. 1971), both of which referenced the reasoning in the *Evans* opinion as the basis for their holdings. Subsequent opinions have referred to this group of cases as the "*Evans* trilogy." *See, e.g.*, *Bertrand v. Bd. of Cnty Comm'rs*, 872 P.2d 223, 227 (Colo. 1994), *superseded by statute on other grounds*, § 24-10-103.7(2.7), C.R.S., *as recognized in Herrera v. City & Cnty. of Denver*, 221 P.3d 423 (Colo. App. 2009).

> wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so.

Evans, 482 P.2d at 972.

In response, the General Assembly enacted the CGIA, which re-established the doctrines of sovereign and governmental immunity, but permitted injured parties to bring claims against governmental entities under certain enumerated circumstances. *See Powell*, 48 P.3d at 563 (citing § 24-10-106, C.R.S.). Since that time, this Court has repeatedly held that because the CGIA was enacted in derogation of the common law, the CGIA's grant of immunity should be construed narrowly. *Id.*; *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001); *Bertrand v. Bd. of Cnty. Comm'rs*, 872 P.2d 223, 227 (Colo. 1994) ("[T]he immunity created by the GIA is in derogation of the common law established in the *Evans* trilogy and must be strictly construed."), *superseded by statute on other grounds,* § 24-10-103(2.7), C.R.S., as *recognized by Herrera v. City & Cnty. of Denver*, 221 P.3d 423 (Colo. App. 2009); *State of Colorado v. Moldovan*, 842 P.2d 220, 222 (Colo. 1992) ("Strict construction of the scope of legislatively created immunity is consistent with one of the basic but often overlooked purposes of the Governmental

Immunity Act – that is, to permit a person to seek redress for personal injuries caused by a public entity.").[2]

Likewise, the provisions of the CGIA permitting suit against governmental entities should be construed broadly, in favor of allowing the injured party an opportunity to recover from the governmental tortfeasor. *See, e.g.*, *Walton v. State*, 968 P.2d 636, 643 (Colo. 1998) ("Because governmental immunity derogates Colorado's common law, the CGIA's waiver provisions are entitled to deferential construction in favor of victims injured by the negligence of governmental agents, while the immunity provisions are subject to strict construction.").

B. CGIA PROVISIONS APPLICABLE TO THE INSTANT CASE.

The instant case required the courts below, and will require this Court, to interpret two interrelated provisions of the CGIA. The waiver provision at issue, § 24–10–106(1)(d)(I), C.R.S., provides that immunity is waived for

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[2] In *City & Cnty. of Denver v. Gallegos*, 916 P.2d 509, 510-11 (Colo. 1996), this Court suggested the opposite, writing that "the GIA requires that exceptions to governmental immunity be interpreted narrowly in order to avoid imposing liability not specifically provided for in the statute." Subsequent decisions of this Court have made clear, however, that the CGIA's grant of immunity should be interpreted narrowly, and that the exceptions to immunity should be construed broadly. *See, e.g.*, *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000) ("Without disturbing the interpretation of the term 'public facility' that we proffered in *Gallegos*, we disapprove of the case's language that immunity waivers are to be construed narrowly.")

> A *dangerous condition* of a public highway, road, or street which physically interferes with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, ...

(Emphasis added). Elsewhere, the CGIA defines a "dangerous condition" as

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

§ 24–10–103(1.3), C.R.S. Read together, these provisions dictate that the City of Boulder is not immune from suit if Ms. Maphis can satisfy the court that her injury resulted from (1) a physical condition of the sidewalk; (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. *Cf. Maphis v. City of Boulder*, Court of Appeals No. 19CA0203, at *6 (Colo. App. June 25, 2020), *cert. granted* No. 2020SC646 (Jan. 19, 2021).

C. THE ROLE OF THE TRIAL COURT IN A *TRINITY* HEARING IS LIMITED TO DECIDING WHETHER THE PLAINTIFF HAS ESTABLISHED SUFFICIENT JURISDICTIONAL FACTS TO ALLOW THE CASE TO PROCEED ON THE MERITS.

This Court has long instructed that when a defendant challenges the trial court's jurisdiction under the CGIA, the trial court must suspend all discovery not related to the jurisdictional dispute and resolve the immunity issue before proceeding to the merits of the case. *See, e.g.*, *City of Denver v. Dennis*, 2018 CO 37, ¶ 10; § 24-10-108, C.R.S. The reason for this is straightforward; immunity under the CGIA is intended to protect the government from suit where it applies, *see id.*, and "[t]he sovereign cannot be forced to trial if a jurisdictional prerequisite has not been met." *Trinity Broadcasting v. Westminster*, 848 P.2d 916, 924 (Colo. 1993). Accordingly, the plaintiff bears the burden in the first instance of establishing facts that give rise to a waiver of immunity under the CGIA. *Dennis*, 2018 CO 38, ¶ 10. Only then may the court and the parties proceed to discovery and eventual trial on the merits of the plaintiff's claims.

However, because the trial court's role at a *Trinity* hearing is limited to deciding whether the court has jurisdiction to hear the case, the burden that a plaintiff must meet in order to establish subject matter jurisdiction through a waiver of sovereign immunity is "a relatively lenient one." *Tidwell v. City and Cnty. of Denver*, 83 P.3d 75, 86 (Colo. 2003). Where facts are disputed, the court

must begin by making factual findings. *Dennis*, 2018 CO 38, ¶ 11. Once the court becomes convinced of the truth of the plaintiff's factual allegations, however, the plaintiff is entitled to the benefit of all reasonable inferences that can be drawn from the facts. *Id*. Importantly, this Court has emphasized that the trial court is *not* tasked with deciding whether the governmental defendant actually committed negligence or whether the government's negligence actually caused the plaintiff's injury. *See id.*; *see also Swieckowski by Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997). Those questions are ultimately for resolution by the trier of fact.

D. THE COURT OF APPEALS FRAMEWORK IMPOSES A HEAVY BURDEN ON PLAINTIFFS THAT IS INCONSISTENT WITH THE INTENT OF THE CGIA.

The trial court in this case conducted a *Trinity* hearing, as it was required to do. Following that hearing, the trial court found that Maphis had established sufficient facts to satisfy the court that it had jurisdiction to hear the merits of the case.

In reversing the trial court, the court of appeals relied heavily on its interpretation of the guidance that this Court set forth in *Dennis* regarding the standards that an appellate court should apply in its review of the trial court's findings concerning a CGIA immunity waiver. In *Dennis*, this Court wrote:

> When the facts are disputed, the court must begin by making a factual finding. If the court determines that the plaintiff's allegations are true, then it should award the plaintiff the reasonable inferences from her evidence. However, because *Trinity* hearings 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. We will uphold the factual determinations of the district court unless those determinations are clearly erroneous. Once the questions of fact are resolved, we review questions of governmental immunity de novo.

(Internal citations omitted)

The court of appeals interpreted this language to mean that, in this case, "[t]he 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" that was therefore subject to de novo review. *Maphis*, 19CA0203, at *7-8.

The majority in the court of appeals candidly acknowledged that the 2 ½ inch, non-visible, unmarked vertical deviation in the sidewalk created a risk of injury, *id.* at *13, that the problem had been recognized by the City of Boulder, and that the condition was in the queue to be repaired, *id.* at *13-14. The court wrote, "[W]e acknowledge that the deviation was substantial and, as the district court found, difficult to see due to the uniform coloration of the sidewalk slabs." *Id.* Notwithstanding, the court of appeals found that Boulder was immune from suit

because, in majority's judgment, and based on this Court's opinion in *Dennis*, the condition had not "created a chance of injury, damage, or loss which exceeded the bounds of reason," and the danger was thus not unreasonable as a matter of law. *Id.* at *13 (citing *Dennis*, 2018 CO 37, ¶ 23).

In reaching this conclusion, the court of appeals effectively substituted its own judgment for that of the trial court concerning a number of questions that were, in essence, factual rather than legal in nature. Incidents like the one at issue in this case – a fall occasioned by a condition of a public sidewalk – may occur in a nearly infinite array of unique factual circumstances. Factors that may bear on the issue of whether the danger posed by a particular condition is "unreasonable" might include, but most certainly are not limited to, the size and location of the displacement, hole, sheet of ice, etc. that mars a particular piece of sidewalk; the condition and coloration of the surrounding surface; the visibility or non-visibility of the hazard; the presence or absence of other elements (such as prevalent foot traffic or other nearby objects) that might interfere the ability of a pedestrian to spot the danger; lighting conditions in the area; and the presence or absence of any visible markings or warnings.[3] This list is by no means exhaustive. The trial court

[3] Although this Court has repeatedly made clear that the CGIA does not waive immunity for failure to warn, *see, e.g.*, *Medina*, 35 P.3d 443 at 462, the presence or absence of visible cones or other warnings to alert passers-by of a dangerous

was in the best position to receive and weigh the testimony and other evidence introduced at the *Trinity* hearing, draw appropriate inferences from the evidence presented, and determine whether the Plaintiff had sufficiently shown that the condition in question posed an "unreasonable risk to the health or safety of the public," that immunity was therefore waived, and that the case should be permitted to proceed on the merits. § 24–10–103(1.3), C.R.S. By couching the question of whether the condition that injured Ms. Maphis was "unreasonably dangerous" as a purely legal question meriting de novo review, the court of appeals opened the door to essentially substituting its own judgment for that of the trial court.

CTLA encourages this Court to take this opportunity to clarify that neither *Dennis* nor this Court's prior precedents compel this result. This Court should reaffirm that trial courts evaluating claims of immunity need not dispositively resolve questions of liability and causation that are most appropriately determined by the factfinder at trial. Instead, the plaintiff's burden is "relatively lenient," and if the trial court determines that the plaintiff's factual allegations bearing on immunity are meritorious, the plaintiff is entitled to the benefit of reasonable

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condition is part of the factual mosaic a trial court may consider when deciding exactly how dangerous a hazard is, and therefore whether the danger is "unreasonable," under the unique circumstances of a particular case. *See Maphis*, No. 19CA0203, at *6 (Richman, J., dissenting).

inferences to be drawn from those facts. Assuming the trial court adheres to this framework, an appellate court should not second-guess a trial court's judgment that a plaintiff has adequately shown an injury-causing condition to be unreasonably dangerous.

By way of analogy, if this Court ultimately reverses the court of appeals and upholds the trial court's holding that immunity is waived, this case will proceed toward trial on Ms. Maphis's claim against Boulder under the Colorado Premises Liability Act, § 13-21-115, C.R.S. At trial, the jury will be asked to determine whether Ms. Maphis's injury resulted from Boulder's "unreasonable failure to exercise reasonable care to protect against dangers of which [Boulder] actually knew or should have known." § 13-21-115(3)(c)(I), C.R.S. The jury will be instructed on the elements of this claim, deliberate over the merits, and render a verdict. A party dissatisfied with the jury's verdict will not be entitled to de novo appellate review on the question of whether Boulder's conduct was reasonable or unreasonable. Instead, assuming that there are no significant legal errors in the jury instructions or otherwise, the jury's verdict will be affirmed on appeal so long as the evidence, viewed in the light most favorable to the prevailing party, is sufficient to support the verdict. *Frontier Exploration, Inc. v. Am. Nat'l Fire Ins. Co.*, 849 P.2d 887, 891 (Colo. App. 1992). Although a *Trinity* hearing and a jury

trial are not directly analogous, this Court should make clear that when a trial court finds that a plaintiff has sufficiently shown that a condition is unreasonably dangerous, this conclusion warrants significant deference.

E. THE COURT OF APPEALS FRAMEWORK, IF ADOPTED BY THIS COURT, WILL HAVE HARMFUL RAMIFICATIONS FOR INJURED PERSONS.

The court of appeals' framework, if adopted by this Court, would have harmful effects for persons injured by the failure of governmental entities to appropriately maintain their streets and sidewalks.

At the outset, the nature of a *Trinity* hearing inevitably requires a plaintiff to shoulder a significant burden. When a defendant like Boulder claims governmental immunity, a plaintiff must prepare to conduct, in essence, a "mini-trial" for the court on the immunity issue. In addition to the time and expense inherent in the process, the procedure carries significant risks for the plaintiff, as an adverse ruling that leads to the dismissal of an action will almost certainly make the plaintiff legally responsible for the attorney's fees and costs incurred by the governmental defendant. *See* § 13-17-201, C.R.S.

The risks to plaintiffs will be magnified further if, after a trial court concludes that a condition that injured a plaintiff was a "dangerous condition" under the CGIA, a reviewing court is encouraged to examine the record, conduct

what effectively amounts to a de novo review of the trial court's conclusion, and potentially reach the opposite result. A plaintiff in that scenario would face the obligation to pay the governmental entity's attorney's fees and litigation costs incurred during both the trial and appellate court proceedings. Moreover, the likelihood of protracted litigation in "dangerous condition" immunity waiver cases, with multiple layers of appellate review and a strong likelihood of inconsistent outcomes, would be great, especially given the myriad factual circumstances under which a "dangerous condition" may arise. The net effect would likely be to deter severely injured parties like Ms. Maphis from bringing meritorious claims against governmental entities except in cases where an injury-causing condition is so catastrophically aberrant as to be the result of willful and wanton conduct. *See* § 24-10-118(2)(a), C.R.S. Such a result would severely undermine the ability of Colorado residents to obtain fair compensation for injuries sustained as a result of the acts or omissions of a governmental entity like the City of Boulder.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Court of Appeals, and should reinstate the trial court's ruling that immunity was waived in this case.

RESPECTFULLY SUBMITTED this 2nd day of March, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on all interested parties on the date of filing using the Colorado File & Serve System.

/s/ John F. Poor
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