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Opinion by the Colorado Court of Appeals, Case No. 2019CA203 Appeal from Boulder County District Court Case No. 2018CV30036	
JOY MAPHIS, Petitioner v. **CITY OF BOULDER, COLORADO**, Respondent	**▲COURT USE ONLY▲**
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BRIEF OF *AMICI CURIAE*, THE COLORADO MUNICIPAL LEAGUE AND THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY, IN SUPPORT OF THE CITY OF BOULDER

CERTIFICATION

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 4,426 words (does not exceed 4,750 words).

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

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.

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In accordance with Rule 29, C.A.R., the Colorado Municipal League ("CML") and the Colorado Intergovernmental Risk Sharing Agency ("CIRSA") respectfully submit the following *Amici Curiae* Brief in Support of the position of Respondent City of Boulder.

IDENTITY OF CML AND CIRSA AND THEIR INTEREST IN THIS CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. Its members include all 103 home rule municipalities, 166 of the 168 statutory municipalities and the lone territorial charter city. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. Since its inception, CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide.

CIRSA is a Colorado public entity self-insurance pool providing property, liability, and workers' compensation coverages throughout the State of Colorado. Formed in 1982 by 18 municipalities, it now serves 282 member municipalities and affiliated legal entities. CIRSA is not an insurance company, but an entity created by intergovernmental agreement of its members as provided for by § 24-10-115.5, C.R.S. In addition to various coverages and associated risk management

services, CIRSA provides its members sample publications, training, and consultation services. Member cities and towns govern CIRSA and support it through financial contributions. The contributions pay for covered claims against the members and their officers and employees. The contributions are also used to buy certain excess insurance or reinsurance coverage. Whenever CIRSA members are sued in tort under the Colorado Governmental Immunity Act ("CGIA"), CIRSA provides coverage and legal defense for such claims.

This case revisits the extent to which municipalities may be sued in tort under the CGIA for risks associated with their sidewalks. Public sidewalks exist in virtually every municipality in Colorado. In older municipalities like Boulder, sidewalk networks date back a century or more. No municipal sidewalk system is perfectly hazard-free at all times, particularly given Colorado's harsh climate and other environmental factors. Uneven and cracked sidewalks can result from the freeze-thaw cycle, expansive soils, upheaval from tree roots, subsidence from water infiltration, and other natural forces that are constantly in play. Add to these forces damage caused by construction and other human activity. Like Boulder, municipalities throughout Colorado take a multi-faceted approach to addressing damaged or uneven sidewalks such as: capital planning and budgeting for infrastructure maintenance, setting up complaint systems, performing periodic

inspections, dispatching city crews to make repairs, contracting for repairs, and adopting ordinances requiring adjacent owners to maintain sidewalks in a safe condition.

Long before the adoption of the CGIA, municipalities have been subject to tort liability for injuries arising from dangerous sidewalk conditions, but only when the danger is measured against a rule of reason and evaluated under all the circumstances of a particular case. This Court has a long tradition of balancing the right of injured pedestrians to seek damages for injuries arising from an uneven or slippery sidewalk surface against the practical reality that no municipality can be expected to keep every sidewalk surface in a pristine condition at all times. This case may determine whether the traditional paradigm for analyzing actionable sidewalk risks continues to hold true, or instead whether municipalities and their taxpayers will now be held to a higher standard of preventative maintenance of sidewalks throughout Colorado.

The decision in this case may also touch on transcendent issues that go well beyond sidewalk liability. If the Court re-interprets the terms "dangerous condition" or "unreasonable risk to the health or safety of the public" in this case, it will affect adjudication of tort claims under every other section of the CGIA where these terms are relevant, *e.g*. claims related to an alleged dangerous

condition of any public buildings, roadways, public hospitals, jails, parks and recreation facilities, or public utilities. §24-10-106 (1)(c), (d), and (e), C.R.S. And even more broadly, if the Court were now to depart from its longstanding tradition of treating any final ruling on a Rule 12(b)(1) motion to dismiss a tort claim under the CGIA for lack of subject matter jurisdiction as being subject to *de novo* review by the appellate courts, it may affect the way all CGIA claims are adjudicated in the future. Such a holding will result in more protracted and uncertain litigation against municipalities contrary to the letter and spirit of the CGIA.

SUMMARY OF ARGUMENT

Not every hazardous condition on a municipal sidewalk should be deemed to create an unreasonable risk to the safety of the general public and therefore be actionable in tort. Colorado courts have a longstanding tradition of recognizing this principle. When the CGIA was amended in 1986 to add the word "unreasonable" to the definition of "dangerous condition," this legislative enactment was consistent with prior case law in Colorado and common law throughout the United States. The change also reflected the overall intent of the CGIA to balance the rights of injured persons to seek redress for more egregious

examples of hazardous infrastructure against the practical impossibility of public entities keeping all public infrastructure completely hazard-free at all times.

In this case, the court of appeals correctly interpreted the word "unreasonable" and properly applied a *de novo* standard of review in reversing the conclusion of the trial court on this issue. To survive a motion for dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction under the CGIA, it is incumbent on the plaintiff to plead and prove in a *Trinity* hearing that the alleged dangerous condition of the sidewalk posed an unreasonable risk to the general public. This determination requires a contextual and multi-faceted analysis of a municipality's overall sidewalk system and how the municipality maintains the system within available resources. Since the CGIA waives immunity only for conditions of sidewalks that cause unreasonable risks to the public, any ruling on this question is jurisdictional and therefore subject to *de novo* review.

ARGUMENT

i. Colorado municipalities have never been obligated to provide risk-free sidewalks

The CGIA waives immunity for claims arising from a dangerous condition of a municipal sidewalk only when the condition poses "an unreasonable risk to the health or safety of the public." C.R.S. §§ 24-10-106(1)(d)(I) and 24-10-103(1.3). In *City and County of Denver v. Dennis*, 418 P.3d 489 (Colo. 2018) this Court, for

the first time, interpreted the term "unreasonable risk" and, applying a dictionary definition, construed the term to mean a condition that "created a chance of injury, damage or loss that exceeded the bounds of reason."[1] *Id.* at ¶ 23. The Court also based its decision on the overall policy underlying the CGIA: "Here, the court of appeals' reading of the statute is at odds with the policy behind the CGIA itself. The 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. §24-10-102, C.R.S. (2017)." *Id.* at ¶19.

In the instant case, the court of appeals essentially applied the same interpretation of "unreasonable risk" as this Court did in the *Dennis* decision, but added a reference to a scholarly treatise on torts that elucidates the manner in which unreasonableness of any particular sidewalk risk should be assessed:

> . . . courts considering the application of sovereign immunity typically consider all the facts and circumstances in context, including (1) the width, depth, elevation, irregularity, and appearance of the defect; (2) the time, place and circumstances 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.

[1] Although *Dennis* was a split decision, apparently all seven justices agreed with this definition of "unreasonable risk." *See* the Dissenting Opinion authored by Justice Gabriel, ¶30.

Maphis v. City of Boulder, Court of Appeals No. 19CA0203, at ¶28.

Even before the adoption of the CGIA in 1972, the common law doctrine of sovereign immunity did not shield Colorado municipalities from tort claims arising from dangerous sidewalk conditions. However, this Court has always recognized a distinction between reasonable and unreasonable risks associated with municipal sidewalks. For example, shortly after statehood, this Court said:

> Mr. Dillon, in his work on Municipal Corporations, (section 1006), sums up the law applicable to this class of cases as follows: 'The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. Before a recovery can be had, it must appear, upon the whole testimony, that the person injured used, under all the circumstances, ordinary care to avoid danger; nor is the corporation required to have its sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, generally stated, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence.'

City of Boulder v. Niles, 12 P. 632 at 634 (Colo. 1886) (emphasis supplied); *see also City and County of Denver v. Dugdale*, 256 P.2d 898 (Colo. 1953).

In another early decision examining the scope of municipal sidewalk liability, this Court said: "A municipality is not required to do the impossible, or what is practically impossible, but it is required to exercise ordinary care to keep its sidewalks in a reasonably safe condition for travel, and a failure so to do is negligence. And what is ordinary care in a given case 'must be determined by the

locality, climate, weather conditions, and other circumstances.' 43 C.J. p. 1020." *City of Alamosa v. Johnson*, 60 P.2d 1087, 1088 (Colo. 1936).

From early on, Colorado courts also addressed the question of whether municipalities could absolve themselves of any duty to maintain or repair deteriorated sidewalks by assigning this responsibility to adjacent property owners.[2] Traditionally, this Court has taken the position that, "any attempt of a municipality to shift its liability and primary duty with respect to the safety of its public sidewalks to property owners is ineffectual and abortive." *W.T. Grant Co. v. Casady*, 188 P.2d 881, 884 (Colo. 1948).[3]

[2] In this case, the Boulder Municipal Code placed a duty on the adjacent property owner to repair sidewalks but did not expressly purport to absolve the City from liability. The Plaintiff sued both the City and the adjacent owner for damages. CF, pp. 6-7.

[3] In the report of a legislative Task Force in advance of amendments to the CGIA in 1986, "the Task Force agreed that the adjacent homeowner or property owner should *share* civil liability with the governmental entity which owns the right-of-way in question . . . . it was felt that liability in such cases should be *divided between the property owner and the public entity* in a manner that would equitably reflect responsibility for the condition that caused the injury. The apportionment recommendation was not adopted by the General Assembly." *City of Aspen v. Meserole*, 803 P.2d 950, 955 (Colo. 1990). However, there is some support in Colorado case law for the proposition that municipalities can assign to property owners some forms of civil liability related to sidewalk maintenance. For example, an ordinance in Colorado Springs imposes liability on property owners who fail to report to the city engineer damage to adjacent sidewalks. *Andrade v. Johnson*, 409 P.3d 582 (Colo. App. 2016).

When the CGIA was originally adopted in 1972, the statute carried forward the principle that municipalities could be sued in tort for injuries arising from the "dangerous condition" of a public sidewalk. However, at least initially, the language in the statute did not capture the distinction between reasonable and unreasonable risks to public health or safety. This oversight was corrected through the adoption of a wide-ranging tort reform measure in 1986, House Bill 86-1196. According to the chief sponsor of the legislation, "the three main goals of H.B. 1196 were to address judicial constructions that weakened the effectiveness of the Governmental Immunity Act, to address the 'insurance crisis' faced by municipalities, and to 'insure that the Act would protect public entities and taxpayers from excessive or unpredictable liability.'" *City of Aspen v. Meserole,* 803 P.2d 950, 953 (Colo. 1990).[4]

Among many other things, Section 2 of House Bill 1196 re-tooled the definition of "dangerous condition" and added the qualifier "unreasonable" to the phrase "risk to the health or safety of the public." According to the chief sponsor of the bill, the purpose of this amendment was to provide "for a reasonableness

[4] A full explanation of the purposes and content of the 1986 legislation is provided by Berry & Tanoue, *Amendments to the Colorado Governmental Immunity Act,* 15 Colo. Law. 1193 (1986). This article also illustrates the intimate role CML played in promoting the legislation.

standard in the definition of 'dangerous condition.'"[5] In this fashion, the Colorado General Assembly reinvigorated the principle that not every roadway or sidewalk hazard is actionable in tort against a Colorado municipality, and presaged this Court's ultimate decision in the *Dennis* case.

Once the distinction between reasonable and unreasonable sidewalk risks was incorporated into the CGIA, trial courts only have subject matter jurisdiction over the latter and any plaintiff who does not establish an unreasonable risk is subject to dismissal under Rule 12(b)(1). *Trinity Broadcasting v. City of Westminster,* 848 P.2d 916 (Colo. 1993).

ii. It would be unreasonable to expect municipalities to instantaneously repair any known sidewalk defect, nor does the CGIA require it

In *Dennis,* this Court recognized that, in the real world of fiscal constraints on public entities, not every infrastructure problem can be fixed immediately.

> 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; because the court of appeals ignored this policy declaration and expanded the potential burdens on taxpayers, the court of appeals erred.

[5] *Id.* at p. 1194.

Dennis at ¶ 19.

In the instant case, the court of appeals adopted the foregoing reasoning and appropriately considered the practical reality that a public entity may need to prioritize repairs whenever a sidewalk defect is discovered. The court noted at ¶ 26, "To be sure Maphis presented evidence that the sidewalk was a tripping hazard, but there was no direct evidence that it required immediate repair." Among other things, the court noted the absence of any prior complaints at that location. Later at ¶ 30 the court reiterated, "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."

This case also highlights several practical dilemmas municipalities throughout Colorado face when they obtain actual knowledge of a defective sidewalk, beyond basic budgetary and resource constraints. As was true with Boulder in this case, CF, p. 779, most municipalities depend on private contractors to perform sidewalk repairs, and the response time on any repair may depend on the availability of the contractor to do the work.

Many municipalities in Colorado have adopted ordinances requiring the adjacent property owner to maintain and repair sidewalks. *See W.T. Grant Co. v. Casady*, *supra* p. 8. Indeed, as demonstrated in this case, Sec. 8-2-6(a) of the

Boulder Municipal Code imposes such a requirement (albeit the City elected to commission the repair itself). These kinds of ordinances are ubiquitous throughout the state.[6] Depending on the wording of such an ordinance, upon receipt of a complaint about dangerous sidewalk conditions, a municipality may contact the abutting property owner and order the owner to fix the problem. Irrespective of whether an identified problem is addressed via a contractor, notice to the abutting owner, or assignment of a municipality's own crew, the reality is that any repair takes time.

The court of appeals astutely observed that if municipalities are held to a standard of care that required immediate repair each time a sidewalk defect is discovered, it may have the perverse effect of discouraging municipalities from proactively inspecting their own sidewalk systems. This Court should avoid any ruling in this case that would disrupt the ability of municipalities to prioritize sidewalk repairs, within available resources, as the need for a repair is discovered.

[6] Examples of municipal ordinances in Colorado requiring landowners to maintain and repair adjacent sidewalks include: §11-5-5, Englewood Municipal Code; §11-5-70, Windsor Municipal Code; §11.08.060, Golden Municipal Code; §20-33, Steamboat Springs Municipal Code; §090.040.070, Glenwood Springs Municipal Code; §94-68, Arvada Municipal Code; §8-2-2, Littleton Municipal Code; §9-1-3, Westminster Municipal Code; §12-16-030, Castle Rock Municipal Code; §6-2013, Commerce City Municipal Code.

iii. The plaintiff failed to plead facts in her complaint or adduce evidence at the *Trinity* hearing showing that the uneven sidewalk posed an "unreasonable risk" to public safety

The original Complaint in this case was filed on January 11, 2018. This Court issued its decision in the *Dennis* case on May 21, 2018, rendering for the first time the Court's take on the meaning of the term "unreasonable risk to the health or safety of the public" under the CGIA. Thus, the plaintiff did not know at the time she filed her Complaint that, in order to survive a motion to dismiss on jurisdictional grounds, she needed to plead and prove facts what would show that the uneven sidewalk condition she encountered on a quiet residential street in Boulder "created a chance of injury, damage or loss that exceeded the bounds of reason."

Instead, the Complaint reflected a "failure to warn" theory of the case, i.e., an assertion that after the city inspector found the displaced sidewalk slab the city should have done a better job of marking it so the hazard would be more visible. However, from the start, this theory would prove to be unavailing since a public entity's failure to warn of a dangerous condition is not actionable under the CGIA. *Medina v. State*, 35 P.3d 443 (Colo. 2001). The Complaint and the Plaintiff's subsequent briefing in the case also relied heavily on Boulder's own technical standards for assessing sidewalk risks and prioritizing repairs. However, even

while denying Boulder's Rule 12(b)(1) motion to dismiss, the trial court observed: "The city's definition of the particular deviation as a hazard does not, in and of itself, relieve Plaintiff of her burden to show it was an unreasonably dangerous condition."[7] CF, p. 459. In other words, there needs to be "something more" to prove that a particular sidewalk hazard rises to the level of an "unreasonable risk" to public safety.

In this case, that "something else" from the perspective of the trial court seems to have been the fact that "the coloring of the sidewalk makes the deviation difficult to detect." CF, p. 459-60. In her Complaint and briefing at the trial court level, the Plaintiff emphasized how hard it was to see the edge of the displaced sidewalk slab, even in broad daylight. And in her Opening Brief she continues to base her "unreasonable risk" argument primarily on the fact that "the vertical face

[7] As previously noted, this Court should avoid any ruling in this case that would discourage municipalities from proactively inspecting their sidewalks. Likewise, CML and CIRSA sincerely urge the Court to avoid a decision that would encourage plaintiffs to weaponize a municipality's published construction standards and use these standards against the municipality in future cases. Such a result would run counter to the Court's jurisprudence that liability for a dangerous condition is a multi-faceted analysis and to the intent of § 24-10-106.5, C.R.S., which provides that the adoption of a policy or regulation—or in this case, construction standards—intended to aid in the protection of public health or safety shall not give rise to a duty of care where none otherwise existed. Thus, by extension, construction standards themselves should not be the measure of what constitutes unreasonableness.

of the slab of the concrete blended into the horizontal face before and after the deviation in the sidewalk." The Plaintiff even goes so far as to call the tripping hazard "invisible" from her perspective. Opening Brief, p. 3.

But how does the similarity in coloration on the vertical and horizontal surfaces of a concrete slab create an "unreasonable risk" within the meaning of the CGIA? Concrete, by its very nature, has a consistent surface color on all of its surfaces once the concrete has been poured and has set. Concrete sidewalk slabs throughout Boulder (as shown by the photographic evidence in this case, CF, pp. 73-190) and in other municipalities throughout Colorado, are notorious for shifting along the expansion joints between the slabs, creating a lip that produces a possible tripping hazard. Inevitably, the vertical lip is approximately the same color as the horizontal surface of the adjacent slabs.

Irregularities in a sidewalk's surface at joints between the concrete slabs are so common in municipalities throughout Colorado, pedestrians can and should anticipate these hazards and usually avoid them. Precisely because they are so common, the trip-and-fall risks associated with this kind of sidewalk condition cannot be considered "beyond reason" as a matter of law within the meaning of the CGIA. Thus, the legal conclusion of the court of appeals on the question of "unreasonable risk" should be affirmed.

iv. The ultimate ruling on any Rule 12(b)(1) motion in a CGIA case is subject to de novo review

In *Dennis* this Court was divided over whether the Plaintiff had met his burden of proof at the *Trinity* hearing sufficient to survive a Rule 12(b)(1) motion to dismiss. The dissent at ¶¶ 47-49 drew the conclusion that the undisputed facts regarding the condition of the street in that case and the city's lack of any remedial reaction in response to those conditions met the definition of unreasonable risk within the meaning of the CGIA.

However, all seven Justices in *Dennis* agreed on the proper standard of review in the case. In the dissenting opinion at ¶39 Justice Gabriel concurred with Justice Rice's articulation of the standard of review when she wrote at ¶¶11-12:

> 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 Cty. Of Denver*, 83 P.3d 75, 85-86 (Colo 2003). When the facts are disputed, the court must begin by making a factual finding. 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. at 85. 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. Id. at 86; see *also Swieckowski by Swieckowski v. City of Fort Collins*, 934 P.2d 1380, 1384 (Colo. 1997) ("[W]e emphasize that we do not address issues of negligence or causation, which are matters properly resolved by the trier of fact.").

> We 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). Once the questions of fact are resolved, we review questions of governmental immunity de novo. *Id*. at 452-53.

(Emphasis supplied).

The foregoing explanation of how appeals from rulings on Rule 12(b)(1) motions in *Trinity* hearings have been repeatedly reviewed de novo by this Court simply reflects this broader principle: "When, as in this case, the controlling facts are undisputed, the legal effect of those facts constitutes a question of law. An appellate court is not bound by conclusions of law reached by lower courts." *Lakewood Associates Ltd. v. Maes*, 907 P.2d 580, 583-84 (Colo. 1995) (internal citations omitted).

In the courts below, Boulder did not dispute any of the factual assertions made by the Plaintiff. The city simply challenges the legal conclusion to be drawn from those facts, in particular the question of whether the facts demonstrate the existence of dangerous condition that "exceeded the bounds of reason" as a matter of law within the meaning of the CGIA.

Both in the court of appeals and in her Opening Brief in this case, the Plaintiff appears to conflate the role of the jurisdictional ruling in a *Trinity* hearing with the role of a jury to determine questions of negligence and causation in a trial. If this Court were to agree that the determination of whether a particular sidewalk

condition creates an "unreasonable risk" is merely a factual determination indistinguishable from the question of negligence, the result would be to effectively write the word "unreasonable" out of the statute for jurisdictional purposes.

The CGIA waives immunity for the dangerous condition of a municipal sidewalk (and for many other types of municipal infrastructure) only when the condition creates an "unreasonable risk" to public health or safety. Trial courts simply lack jurisdiction over any alleged condition that does not constitute an unreasonable risk. Therefore, when a trial court makes a jurisdictional ruling on the evidence presented in a *Trinity* hearing regarding the level of risk associated with any particular set of undisputed facts, the court is drawing a legal conclusion and the ruling should always be reviewed *de novo*.

CONCLUSION

One of the fundamental purposes of the CGIA is to spare public entities and their taxpayers from excessive fiscal burdens. Further, it has long been recognized by this Court and by the CGIA that not all imperfect conditions of public infrastructure are the basis of liability, and the CGIA was specifically amended in 1986 to waive immunity only for dangerous conditions that impose an "unreasonable risk" to public safety. The purpose of *Trinity* hearings is to

expeditiously resolve jurisdictional questions as a matter of law when tort claims are asserted against public entities. In view of these considerations, and for the reasons set forth in this Brief, CML and CIRSA respectfully urge this Court to affirm the decision of the court of appeals.

DATED this 30th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2021, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE,* THE COLORADO MUNICIPAL LEAGUE AND THE COLORADO INTERGOVERNMENTAL RISK SHARING AGENCY, IN SUPPORT OF THE CITY OF BOULDER** was served via Colorado Courts E-Filing to the following:

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