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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203

Certiorari to the Court of Appeals, 2019CA203
District Court, Boulder County, 2018CV30036

Petitioner,

Joy Maphis

v.

Respondent,

City of Boulder, Colorado.

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Case Number: 2020SC646

CITY OF BOULDER'S ANSWER BRIEF
[*WITH CORRECTED TABLE OF AUTHORITIES*]

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 7,283 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. 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.

2. 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).

STATEMENT OF THE CASE

This is a personal injury case filed by Petitioner Joy Maphis against the City of Boulder, alleging that she tripped over a displaced sidewalk slab at 1115 Pennsylvania Ave. in Boulder on April 8, 2017 and suffered injuries. The City knew of the existence of the sidewalk hazard because a City employee had walked the neighborhood in anticipation of sidewalk repairs scheduled for later in April and marked it to be repaired along with other sidewalk hazards existing in that same area. The repairs were scheduled pursuant to a City program intended to address sidewalk damage proactively, in order of priority established through a thorough evaluation of community needs.

The City moved to dismiss Ms. Maphis's complaint pursuant to C.R.C.P. 12(b)(1), arguing that the district court lacked subject matter jurisdiction because Ms. Maphis could not establish a waiver of sovereign immunity under the Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-101-120. The City argued, among other things, that the raised concrete slab over which she tripped did not constitute a "dangerous condition" because it did not present an "unreasonable risk" as those terms have been defined in the CGIA and interpreted by this Court in *City and Cnty. of Denver v. Dennis*, 2018 CO 37. CF, pp. 65-71. In support of its motion, the City submitted a series of photos of locations within Boulder where sidewalk conditions were equal to or worse than the hazard in this case. CF, pp. 72-190. It also submitted its Sidewalk Repair Program Update (the "Update"), a 2010 document that describes the City's sidewalk repair programs and explains how the City prioritized the repair of sidewalk hazards under the proactive program under which the location where Ms. Maphis tripped had been marked for repair. CF, pp. 191-304. The City argued that to declare this particular hazard unreasonably risky, in view of all the similar or worse risks the City had to face and prioritize repair, would impose an impossible burden on the City. CF, p. 69.

On January 9, 2019, the district court conducted a hearing pursuant to *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). At the *Trinity* hearing, Ms. Maphis testified that she was watching where she was going, but she could not see the raised sidewalk slab because the concrete on the vertical face of the slab was the same color as the horizontal face and there were no visible warnings of the hazard. CF, pp. 749-50, Tr. 1/9/19, pp. 8:17-9:11. She also reviewed photos of a tape measure placed next to the raised sidewalk slab and testified that the deviation over which she tripped was approximately 2 1/2" in height. CF, p. 735-36, 750-51, Tr. 1/9/19 pp. 9:12 – 10:3. In the photos of the scene introduced by Ms. Maphis at the hearing, the raised slab over which she said she tripped is visible. CF, pp. 734-36.

The City's evidence at the *Trinity* hearing established the following: In the early 1990s, the City initiated an annual sidewalk repair program for the purpose of proactively addressing hazards on the City's sidewalks. CF p. 762-63, Tr. 1/9/19, pp. 24:14-25:3. In 2010, the City issued the Update, a 101-page document that reprioritized the City's proactive sidewalk maintenance program. CF pp. 578-678. To create the Update, the City collected data and considered 13 factors, including sidewalk damage, pedestrian volumes, trip incident complaints, and land use characteristics. CF, pp. 619, 765-66, Tr. 1/9/19, pp. 24:19-25:1. Based on these

factors, the City was divided into 30 zones, ranked in order of priority, to undergo proactive repairs. CF, pp. 618, 661-78, 766, Tr. 1/9/19 p. 25:4-14.

In addition to the proactive program, the City responds to community reports of dangerous sidewalks through a reactive program called the Miscellaneous Sidewalk Repair Program. CF, pp. 594, 763, Tr. 1/9/19 p. 22:4-12. The City never received a complaint regarding the sidewalk condition at 1115 Pennsylvania Ave. before the date of Ms. Maphis's injury.

On the specific question of tripping hazards, the Update identified "high severity" damaged sidewalks as those with a deviation of ¾" or greater, and "medium severity" as those with a "crack or displacement that may be approaching" the criteria for repair. CF, pp. 596-97. A map showing locations of high and medium severity sidewalk damage locations may be found at p. 19 of the Update, CF p. 605.[1] The map depicts hundreds of "high severity" locations.

Through the Update, the 1100 block of Pennsylvania Ave. was designated as part of Zone 2, the second highest priority zone. CF, p. 766, Tr. 1/9/19 pp. 25:4-14. In 2015, a City contractor walked through Zone 2 to identify places that needed repair and did not note any problem at the 1115 Pennsylvania Ave. location. CF,

[1] The University of Colorado campus shows as blank space on the map (marked CU) because the university is responsible for maintaining sidewalks on campus.

pp. 766-67, Tr. 1/9/19 pp. 25:18-26:19. Prior to Ms. Maphis's fall, no one had notified the City about the damaged sidewalk at that address. The City discovered the raised sidewalk slab when a City employee walked the neighborhood in March 2019 in anticipation of repairs scheduled for April of that year as part of the proactive repair program. CF, pp. 767-78, Tr. 1/9/19 pp. 26:20-27:7. That City employee marked the sidewalk with white paint to indicate the need for repair. CF., pp. 734-35, 760, 783-84.

When the City attempted to introduce photographs of other sidewalks in Boulder with worse damage than the one at 1115 Pennsylvania Ave., Ms. Maphis's counsel objected that they were irrelevant. CF, p. 769, Tr. 1/9/19 p. 28:4-20. Counsel for the City explained that evidence confirmed there are many sidewalks in Boulder with equal or worse damage and was relevant to the question whether the sidewalk damage in this case was unreasonable. The district court reacted skeptically, observing that there could be different degrees of damage that were all unreasonable. The exhibits were admitted, but the district court did not refer to them in its ruling. CF, pp. 455-60, 769-70, Tr. 1/9/19 pp. 28:11-29:12.

On cross-examination, the City's principal transportation projects engineer, Gerrit Slatter, testified that the City's ability to respond to sidewalk hazards is limited, not only by budgetary constraints, but by the fact that the City must bid for

and schedule contractors to perform the work. CF, pp. 778-781, 1/9/19 Tr., 37:19 – 38:9, 39:11 – 40:3.

At the close of the hearing, the trial court denied the City's motion. CF, 455-60. It did not mention nor purport to apply this Court's holding that a condition is "unreasonably dangerous" when it "created a chance of injury, damage or loss which exceeded the bounds of reason." *City and Cnty. of Denver v. Dennis*, 2018 CO 37 at ¶ 23. It made no findings at all regarding the City's sidewalk repair program, even though the thrust of the City's motion was that uncontradicted evidence that a municipal employee inspected the hazard in advance of previously scheduled repairs, and had no reason to believe it was necessary under the City's sidewalk repair program to repair this hazard before the others, required a finding that the risk presented was not unreasonable.

The trial court noted only three facts. First, the deviation between the two sidewalk slabs was approximately 2 ½" inches. Second, the Update identifies any deviation of greater than ¾" as a hazard; this was the only reference in the district court's ruling to any evidence presented by the City. Third, the sidewalk deviation was "largely imperceptible" because the horizontal and vertical faces of the sidewalk were the same color. The trial court concluded that the sidewalk hazard was "unreasonably dangerous" and denied the motion. CF, pp. 455-60.

The City timely appealed the district court's order pursuant to C.R.S. § 24-10-108, and the Court of Appeals reversed the district court in a 2-1 decision. *Maphis v. City of Boulder*, Colorado Court of Appeals Case No. 2019 CA 0203 (June 25, 2020). The panel majority agreed with the City that, just as in *Dennis*, the City was aware of the existence of the hazard, but the hazard did not require immediate repair under the City's sidewalk repair plan. *Maphis*, slip op. at ¶¶ 29-30. The majority held that "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." *Id*. at ¶ 30. It reversed the trial court because Ms. Maphis had not met her burden to establish that the sidewalk's physicial condition "created a risk of injury, damage or loss beyond the bounds of reason." *Id*.

The Court granted Ms. Maphis's petition for certiorari to review that judgment.

SUMMARY OF ARGUMENT

Whether a set of facts establishes the existence of a "dangerous condition," as that term is defined in the CGIA, is a mixed question of law and fact. The ultimate conclusion that the statutory criteria for a waiver are or are not satisfied is a legal question reviewed de novo.

Colorado and federal courts reviewing orders on motions to dismiss under C.R.C.P. 12(b)(1) and its federal counterpart agree that on appellate review of a trial court's order on a motion to dismiss for lack of subject matter jurisdiction, the trial court's determination of facts upon which the existence of jurisdiction may turn are reviewed for clear error, while its ultimate determination that subject matter jurisdiction exists is reviewed de novo.

The appellate courts are in a better position than the trial court to determine how the legal standard should be applied uniformly across the state. Application of the law will not be uniform if appellate courts defer to a trial court's subjective opinion as to what is or is not reasonable. The standard of review on mixed questions of law and fact is flexible, varying on whether factual or legal issues predominate, but in this case, the legal question predominates.

The trial court's determination that the hazard was unreasonable was based on the facts that the horizontal and vertical faces of the raised sidewalk slab were the same color, rendering the hazard "largely imperceptible," and that the size of the deviation was 2 ½" inches. It treated the City's designation of sidewalk deviations of ¾" inches or greater as hazards out of context as an admission, without giving any consideration to any other evidence submitted by the City. The trial court erred by viewing the hazard in isolation and treating the City's evidence

regarding other hazards in Boulder that the City had to prioritize and address as irrelevant. Sidewalks in general are of uniform color, and there was no evidence that a 2 ½" inch deviation is unreasonably riskier than a ¾" deviation. Even if the trial court was permitted to ignore all the City's evidence except for the description of a ¾" deviation as a hazard, Ms. Maphis failed to establish that the sidewalk deviation presented a risk "beyond the bounds of reason."

The trial court should have considered all the relevant facts and circumstances to determine whether this particular risk was unreasonable. This includes the City's thorough evaluation of sidewalk repair needs and its plan to repair numerous hazards at the same time through its proactive repair program. In the absence of any evidence that the City was wrong to treat this hazard as requiring repair in advance of the previously scheduled repair of all sidewalk hazards in that area, or that it is uncommon for a sidewalk to be of uniform color or for a sidewalk slab to protrude 2 ½" above the adjacent slab, the trial court erred when it denied the City's motion to dismiss. Therefore, the Court of Appeals' judgment should be affirmed.

ARGUMENT

I. The Court of Appeals Applied the Correct Standard of Review.

A. Statement Regarding Standard of Review and Preservation of Issue.

The City disagrees with Ms. Maphis's statement regarding the standard of review. Whether the Court of Appeals applied the correct standard of review is a legal question this Court reviews de novo. *A.R. v. D.R.*, 2020 CO 10, ¶ 37. The City agrees that this issue has been preserved.

B. The Standard of Review of the Trial Court's Application of Law to Fact Does Not Vary Depending on Whether the Facts Were Disputed Below.

1. Whether A Sidewalk Hazard Is A "Dangerous Condition" Is A Mixed Question of Law and Fact.

The Court should reject Ms. Maphis' argument that the question whether the sidewalk was a "dangerous condition" is a pure question of fact, subject to a deferential standard of review. To the contrary, a court faced with the question whether a set of characteristics of a public sidewalk amount to a "dangerous condition" must interpret and apply the CGIA's legal definition to the facts established at the *Trinity* hearing or otherwise. The ultimate determination that a particular set of facts is sufficient to establish a waiver under the CGIA is a legal conclusion reviewed de novo. *See Dennis*, 2018 CO 37 at ¶ 12.

In support of her argument, Ms. Maphis cites two Court of Appeals cases, both decided before *Dennis*, for the proposition that whether a "dangerous condition" exists is a question of fact. Opening Brief at 13 (*citing McKinley v. City of Glenwood Springs*, 2015 COA 126, and *Colucci v. Town of Vail*, 232 P.3d 218 (Colo. App. 2019)). Neither case supports her position.

The primary issue in *McKinley* was whether the CGIA waives immunity for dangerous conditions in parking areas on city streets as opposed to state highways, a legal contention that the Court of Appeals reviewed de novo without describing its review that way. *McKinley*, 2015 COA 16, ¶¶ 5-10. *McKinley*'s statement that the existence of a "dangerous condition" is a question of fact is based on a misinterpretation of *Colucci*. *See id.* at ¶ 12 (*citing Colucci*, 232 P.3d at 222). The portion of *Colucci* cited by the *McKinley* court said only that the question whether a dangerous condition existed in that case "involved a factual dispute," so a remand was necessary to develop the pertinent jurisdictional facts. *Colucci*, 232 P.2d at 222. Elsewhere in the same opinion, the *Colucci* court stated that the standard of review for "findings of jurisdictional fact" is clear error, but that the application of the law to undisputed facts is reviewed de novo. *Id*. at 219. *McKinley* and *Colucci* provide no support for the contention that the existence of a dangerous condition is a pure question of fact.

Dennis is to the contrary. In that case, the Court held that, to establish the existence of a dangerous condition, a plaintiff must show that the condition "created a chance of injury, damage, or loss which exceeded the bounds of reason." 2018 CO 37, ¶ 23. This was a legal holding based on a plain-language interpretation of the CGIA. *See id*. The Court stated that the reasonableness inquiry is "fact-specific," and the principal disagreement between the majority and dissenting opinions was how to apply the "exceeded the bounds of reason" test to the facts of that case. Neither the majority nor the dissenting opinions, however, rested their analysis on the proposition that the trial court's reasonableness determination was a pure question of fact to be reviewed only for clear error. *Compare id*. at ¶ 28 (holding that plaintiff's evidence was insufficient to demonstrate that the roadway presented an unreasonable risk) *with id*. at ¶ 46 (Gabriel, J., dissenting) (stating that plaintiff had met her burden).

Ms. Maphis analogizes the posture of this case to review of a judgment entered after a jury verdict. A *Trinity* hearing is not a jury trial. The trial court serves as the gatekeeper to ensure that a municipality entitled to immunity is not forced to go to trial. *See Trinity Broad.*, 848 P.2d at 924. The CGIA expressly makes the trial court responsible for deciding dispositive motions based on governmental immunity and declares those determinations to be final judgments

subject to interlocutory appellate review. C.R.S. § 24-10-108. "Any factual dispute *upon which the existence of jurisdiction may turn* is for the court alone, and not a jury to determine." *Trinity Broad.*, 848 P.2d at 924 (emphasis added).

The Court chose its words carefully. The trial court's findings of the facts "upon which the existence of jurisdiction may turn" are subject to review for clear error. *Id*. at 924-25. The ultimate legal question – how the existence of jurisdiction turns on those facts – remains a legal conclusion reviewed de novo. *See id*. at 925 ("If we were satisfied that all the relevant evidence had been presented to the trial court, we could apply C.R.C.P. 12(b)(1) to the record before us. . . . However, we are unable to do so").

In any event, a trial court's ruling after a *Trinity* hearing is more akin to a judgment entered after a bench trial than one entered after a jury trial. On review of judgments entered after bench trials, the trial court's resolution of questions of fact is reviewed for clear error and its determination of questions of law is reviewed de novo. *Sandstead-Corona v. Sandstead*, 2018 CO 26, ¶ 37.

Also, contrary to Ms. Maphis's suggestion, jury determinations of reasonableness are not unreviewable. Even on review of a judgment entered after a jury trial, the question whether a particular jury instruction accurately states the

law is reviewed de novo. *Steward Software Co., LLC v. Kopcho*, 266 P.3d 1085, 1087 (Colo. 2011).

The trial court's determination whether the condition of a sidewalk is a "dangerous condition" is similar to a trial court's determination that a proposed condemnation is for a "public use." *See Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 2019 CO 51, ¶¶ 4-5, *cert. denied*, 140 S. Ct. 2507 (2020). In both cases, the trial court finds the pertinent facts, then the appellate court reviews its application of the law to those facts to ensure that the statute is applied uniformly across the state. *See id*. at ¶ 20. The determination that a particular hazard presents unreasonable risks ought to be based on a rule applied uniformly throughout the state, and not on the subjective opinion of the trial judge.

For these reasons, the question whether a hazard presents a "dangerous condition" for purposes of the CGIA is best viewed as a mixed question of law and fact, with the ultimate determination that the trial court had subject matter jurisdiction treated as a legal conclusion to be reviewed de novo. *See Carousel Farms,* 2019 CO 51, ¶¶ 20-21.

2. Case Law Under C.R.C.P. 12(b)(1) and Fed. R. Civ. P. 12(b)(1) Support the Standard of Review Applied by The Court of Appeals.

This Court has repeatedly held that motions to dismiss on the ground that the governmental defendant is immune from suit under the CGIA should be treated as motions to dismiss for lack of subject matter jurisdiction governed by C.R.C.P. 12(b)(1). *See, e.g., Dennis*, 2018 CO 37, ¶ 10; *Trinity Broad.*, 848 P.2d at 924-25. Colorado and federal authorities regarding appellate review of judgments granting or denying those motions support the standard of review applied by the Court of Appeals.

In *Dennis*, this Court stated that "[w]e 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." *Dennis*, 2018 CO 37, ¶ 12 (citation omitted). The dissenting opinion in *Dennis* described the standard of review somewhat differently: "When the jurisdictional issue involves factual disputes, an appellate court reviews the district court's findings under the clearly erroneous standard. When, however, the facts are undisputed and the issue is one of law, an appellate court reviews the district court's jurisdictional ruling de novo." *Dennis*, 2018 CO 37 at ¶ 39 (Gabriel, J., dissenting); *see also Springer v. City and Cnty. of Denver*, 13 P.3d 794, 799 (Colo. 2000) (same). *Dennis*, however, did not turn on the standard of review nor present the question whether it matters to the standard of review if the appellant objects to

the trial court's application of the law to undisputed facts, or its application to the facts established at the *Trinity* hearing.

This Court has applied the same standard to an appeal of a ruling on a C.R.C.P. 12(b)(1) motion regardless of whether the parties stipulated to or disputed the facts below. *See Walton v. State*, 968 P.2d 636 (Colo. 1998). The Court in *Walton* stated that it would "defer to the trial court's jurisdictional findings under a clearly erroneous standard of review," but then described the trial court's determination that those facts established a waiver of immunity as a "conclusion of law." *Id*. at 639. It rejected the state's argument that there were no facts in dispute and proceeded to "examine the CGIA's provision regarding dangerous condition of a public facility, in light of [the trial court's] findings." *Id*. at 643-44. After analyzing the pertinent provision of the CGIA, the Court observed again that the trial court's findings were supported by the record and held that it "agree[d] that the trial court's conclusion of law that this suit is within the governmental immunity waiver of C.R.S. § 24-10-106(1)(c) and may proceed." *Id*. at 645-46; *see also Corsentino v. Cordova*, 4 P.3d 1082, 1087 (Colo. 2000) ("a court's application of a legal standard to the historical facts of a case is a question of law") (quotation omitted).

This Court's decision in *Tidwell v. City and Cnty. of Denver*, 83 P.3d 75 (Colo. 2003), a case involving the "pursuit" exception to the CGIA provision that generally waives immunity for claims arising from the operation of a motor vehicle, also applied the de novo standard even though the parties had contested the facts at a *Trinity* hearing. The trial court in *Tidwell* held a two-day *Trinity* hearing, but at the conclusion of that hearing, ruled only that the defendant municipality was immune from suit under the "pursuit" exception. *Id*. at 79-80 (*citing* C.R.S. § 24-10-106(1)(a)). For purposes of its legal interpretation of that exception, this Court noted that the fact that the police officer had not activated the vehicle's emergency lights or siren was undisputed, and the facts that the officer was "exceeding the lawful speed limit and otherwise disregarding normal traffic regulations" were subject to "no real dispute." *Id*. at 81. It then proceeded to apply the de novo standard of review to these undisputed facts. *Id*.[2]

Walton, *Tidwell*, and *Corsentino* demonstrate that even when the facts are disputed at a *Trinity* hearing, the determination whether the evidence supports a finding of waiver under the CGIA is a legal conclusion. Legal conclusions are

[2] As explained more fully in Section II below, the trial court did not resolve any disputed questions regarding the jurisdictional facts; its ruling is primarily based on its unstated legal conclusion that facts regarding Boulder's sidewalk repair program and need to prioritize among hazards are irrelevant.

reviewed de novo. *See, e.g., Carousel Farms*, 2019 CO 51, ¶¶ 4-5; *Corsentino*, 4 P.3d at 1087.

Federal authorities construing Fed. R. Civ. P. 12(b)(1) also apply the de novo standard to the legal conclusion whether subject matter jurisdiction exists. That federal rule is identical to C.R.C.P. 12(b)(1), and cases construing it provide persuasive authority for courts construing the parallel Colorado rule. *See Cash Advance & Preferred Cash Loans v. State ex rel. Suthers*, 242 P.3d 1099, 1113 (Colo. 2010). On review of the grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the federal appellate courts uniformly review the trial court's factual determinations for clear error, but its legal conclusion regarding the existence of subject matter jurisdiction de novo. *See, e.g., Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020); *Sanders v. United States*, 937 F.3d 316, 327 (4th Cir. 2019); *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019); *St. Louis Heart Ctr., Inc. v. Nomax, Inc*., 899 F.3d 500, 503 (7th Cir. 2018); *Citizens United v. Schneiderman*, 882 F.3d 374, 380 (2d Cir. 2018); *Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, 834 F.3d 110, 116 (1st Cir. 2016); *Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co*., 807 F.3d 806, 810 (6th Cir. 2015); *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 332 (3d Cir. 2012); *Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir.

2011); *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Cont'l Cas. Co. v. Am. Nat'l Ins. Co*., 417 F.3d 727, 731-32 (8th Cir. 2005); *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).[3] None of these courts apply a different standard depending on whether the facts were disputed before the trial court. There is no reason for this Court to apply a different standard here.

3. Case Law Regarding Mixed Questions of Law and Fact Support the Court of Appeals' Standard of Review.

Cases arising outside of the C.R.C.P. 12(b)(1) context also support the Court of Appeals' ruling on the standard of review. In cases presenting mixed questions of law and fact, the trial court finds the pertinent facts, then the appellate court reviews its application of the law to those facts to ensure that the statute is applied uniformly across the state. *See Carousel Farms*, 2019 CO 51, ¶ 20. In an appeal from judgment entered after a bench trial, this Court held that "[w]e apply a bifurcated standard to such questions, reviewing the evidentiary factual findings for an abuse of discretion and the legal conclusions de novo." *Sandstead-Corona*, 2018 CO 26, ¶ 37 (*quoting State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12). There is no practical difference between a bench trial and a *Trinity*

[3] The Federal Circuit applies the law of the regional circuit to review of dismissals under Fed. R. Civ. P. 12(b)(1). *Madey v. Duke Univ*., 307 F.3d 1351, 1358 (Fed. Cir. 2002).

hearing that would support application of a different standard of review to judgments entered after the latter.

In *Carousel Farms*, this Court identified two factors that inform the standard of review to be applied in a particular case: judicial economy and institutional competence. 2019 CO 51, ¶¶ 18-19. Both factors support the standard of review applied by the Court of Appeals below.

The appellate courts are in a better position than the trial courts to determine whether a legal standard has been satisfied and to ensure uniform application of the law throughout the state. *See id.*, ¶ 18. The need for uniformity is critical here. If, as Ms. Maphis would have it, the determination of reasonableness is a pure question of fact, whether a waiver applied to a particular set of facts could vary depending on which judge was drawn to a particular case, based on each judge's own subjective opinion of what is reasonable. Municipalities and other public entities would have no guidance as to how to evaluate the applicability of the CGIA to a particular claim arising under new and different facts. But as this Court held, "de novo review is appropriate 'when applying the law involves developing auxiliary legal principles of use in other cases.'" *Id*. at ¶ 21 (*quoting U.S. Bank Nat. Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018)); *see also Corsentino*, 4 P.3d at 1087.

The appellate courts are also in a better position than the trial court to determine the meaning of the CGIA's waiver provision and how it should apply to the facts of a particular case. *See Carousel Farms*, 2019 CO 51 at ¶ 19. Like the public use determination in *Carousel Farms*, the question whether a physical condition constitutes a "dangerous condition" as defined in the CGIA is a mixed question of law and fact, and the appellate courts should "set standards around the varied circumstances" in which personal injury claims against governmental entities arise by reviewing the ultimate jurisdictional determination de novo. *See id*. at ¶ 20; *see also U.S. Bank*, 138 S. Ct. at 967 ("Mixed questions are not all alike. As U.S. Bank suggests, some require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision de novo").

The Court of Appeals correctly determined that the trial court's factual findings are reviewed for clear error, while its determination that those facts established a waiver of governmental immunity was a legal conclusion to be reviewed de novo.

II. Ms. Maphis Did Not Establish That the Hazard Presented an Unreasonable Risk to the Public.

A. Statement Regarding Standard of Review and Preservation of Issue.

For the reasons stated in Section I, above, the City disagrees with Ms. Maphis's statement of the standard of review. This Court reviews the trial court's factual findings for clear error, but its ultimate conclusion regarding subject matter jurisdiction de novo. *See, e.g., Dennis*, 2018 CO 37, ¶ 12.

The City agrees that the issue has been preserved.

B. Ms. Maphis's Evidence Did Not Establish That the Hazard Exceeded the Bounds of Reason.

When a defendant makes a factual challenge to subject matter jurisdiction under C.R.C.P. 12(b)(1), the burden of proof is on the plaintiff to establish facts supporting jurisdiction by a preponderance of the evidence. *Cash Advance*, 242 P.2d at 1113. Because there is no presumption against state court subject matter jurisdiction, and because legislative grants of immunity are narrowly construed, the plaintiff is entitled to all reasonable inferences from her evidence. *Tidwell*, 83 P.3d at 85-86. This does not mean, however, that the trial court is entitled to ignore the defendants' evidence.

Tidwell described the burden on the plaintiff as "relatively lenient," but applied that statement as a rule of statutory construction, not as guidance as to how

trial courts should weigh evidence. *See id*. at 86. The Court was addressing a plaintiff's burden to establish that he suffered "injuries resulting from" the defendant's conduct. It held that the statutory language should not be interpreted as requiring proof of causation in the tort sense, but only a showing of a "minimal causal connection" between the conduct and the injury. *See id*. In contrast, here the Court has already interpreted the relevant CGIA provision based on its plain language. *See Dennis*, 2018 CO 37 at ¶ 23.

Even if the trial court was entitled to disregard all the City's evidence, except its designation of sidewalk deviations of greater than ¾" as "hazards," the evidence Ms. Maphis presented, and the findings the trial court made, are insufficient to prove that the sidewalk deviation posed a risk to the public that exceeded the bounds of reason.

Ms. Maphis makes much of the fact that she was permitted to opine, over the City's objection, that the hazard was "unreasonably dangerous." CF, pp. 756-57, 1/9/19 Tr. pp. 15:13 – 16:2. The trial court overruled the City's objection, but regardless, Ms. Maphis's personal opinion is not evidence that the hazard presented an unreasonable risk to the public at large, as opposed to herself at that particular moment in time. She was not asked her opinion about risk to the general

public. In any event, the trial court did not rely on Ms. Maphis's opinion as support for its ruling.

The trial court's ruling was based on the facts that the sidewalk deviation measured at approximately 2 ½", and that because the horizontal and vertical faces of the protruding sidewalk slab were the same color, the deviation was "largely imperceptible" and "difficult to detect." CF, p. 513. The trial court did not find, as Ms. Maphis would have it, that the deviation was "invisible." Indeed, the deviation can be seen in the photographs Ms. Maphis introduced at the hearing. CF, pp. 734-36 (Plaintiff's Exhibits 2, 3, and 4). Rather, the trial court found that "the coloring of the top surface of the sidewalk in this area is substantially identical to the coloring and appearance of the vertical plane or 'face' of the raised slab at issue, making the deviation largely imperceptible." CF, p. 513.

The trial court's other finding, that the deviation was approximately 2 ½", was compared only to the ¾" threshold used by the City to determine whether a sidewalk deviation was a "hazard" for purposes of data collection in connection with the Update. There was no evidence that the hazard posed by a 2 ½" deviation

is greater than the hazard presented by a ¾" deviation, much less to the point of unreasonableness.[4]

The key fact upon which the trial court based its finding of unreasonableness – that the side and top of the sidewalk slab were the same color – is commonplace. The trial court made no finding, and Ms. Maphis presented no evidence, that it is unusual for the side and top of a sidewalk slab to be the same color. Even combined with the 2 ½" height of the deviation, all the evidence showed was a hazard typical of all sidewalks.

The fact that the deviation was difficult for Ms. Maphis to see at that moment in time does not mean that it was so for all pedestrians in all lighting conditions. In addition, as Mr. Slatter testified, the City must also account for the needs of visually impaired pedestrians. CF., p. 776, Tr. 1/9/19 at p. 35:10 – 21. The principle that the plaintiff is entitled to the reasonable inferences from her evidence is not a license to deem an ordinary risk to be extraordinary.

Under the trial court's analysis, every sidewalk deviation 2 ½" or greater presents an unreasonable risk to the public because the coloring of the side and top

[4] To the contrary, Mr. Slatter testified that under the standards set forth in the Update, anything over ¾" is considered a hazard and there is no further definition that would make the City consider a 2 ½" deviation more hazardous. CF, pp. 776-77, 1/9/19 Tr. pp. 35:22 – 36:3.

of all of them are the same. The trial court appeared unperturbed by this prospect, as shown by its expression of skepticism when the City offered Exhibit C into evidence. CF, pp. 769-70, Tr. 1/9/19 pp. 28:11-29:12. However, this Court has held that the CGIA should not be applied in a way that would require municipalities to simultaneously repair a great number of conditions without any ability to prioritize those repairs, while also being potentially liable to persons injured on hazards that had not yet been repaired. *See Dennis*, 2018 CO 37, ¶ 19.

The trial court did not explain why this combination of two commonplace factors presented an unreasonable risk to the public, and none appears. Thus, even if the trial court was permitted to ignore the City's evidence, and granting Ms. Maphis the reasonable inferences from her evidence, she failed to prove that the condition presented an unreasonable risk to the public at large.

C. The Reasonableness Inquiry Should Include All of The Facts and Circumstances Regarding the Condition.

This Court in *Dennis* interpreted the CGIA's "dangerous condition" language as requiring proof that the physical condition that allegedly caused the injury presented a risk which "exceeded the bounds of reason." *Id*. at ¶ 23. The Court of Appeals correctly held that the inquiry should involve consideration of "all of the facts and circumstances in context." *Maphis*, slip op. at ¶ 28.

The trial court's fundamental error was believing that evidence regarding other hazards existing in Boulder, and the City's need to prioritize and schedule repairs, was irrelevant to the question whether the sidewalk condition presented an unreasonable risk to the public. In a variety of other legal contexts, courts are advised to consider all the surrounding facts and circumstances when determining reasonableness. *See, e.g.*, *In re Marriage of Thornhill*, 232 P.3d 782, 788-89 (Colo. 2010) (when a court determines maintenance in a dissolution of marriage action, "the two-pronged threshold test looking to reasonable needs and appropriate employment is to be assessed within the broader context of the particular facts and circumstances of the parties and their marriage") (further quotation omitted); *People v. Padgett*, 932 P.2d 810, 815 (Colo. 1997) ("In determining whether an investigatory stop is valid, a court must take into account the facts and circumstances known to the officer at the time of the intrusion"); *City of Thornton v. Bijou Irrigation Co*., 926 P.2d 1, 24 (Colo. 1996) (to evaluate sufficiency of resume notice in a water case, Supreme Court "must take into account the particular facts and circumstances of the case, and must assess the reasonableness of the notice in the context of the practicalities and peculiarities of the water project at issue") (further quotation omitted). The trial court was wrong to

disregard the entirety of the City's case except for the Update's description of sidewalk deviations of ¾" or more as hazards.

The facts of this case more clearly support a determination that the hazard was not a "dangerous condition" than was the case in *Dennis*. As explained in Section II. B. above, Ms. Maphis's showing of unreasonableness was weaker than the evidence presented by the plaintiff in *Dennis*. In addition, the City's evidence that the hazard was not unreasonable was stronger than the evidence Denver presented in that case.

In *Dennis*, Denver's engineer testified that he had inspected the road a week prior to the accident and determined, based on his observation of the conditions, that it did not require immediate repair. 2018 CO 37, ¶ 25. Here, the City's evidence established that it commissioned a study of sidewalk conditions throughout Boulder, considered 13 factors, and based on those factors created a schedule to repair sidewalks in various zones ranked in order of priority, while also maintaining a program to respond to citizen complaints about sidewalk hazards. CF pp. 578-678. The City knew of the hazard only because pursuant to its proactive maintenance program, a City employee inspected the sidewalk at 1115 Pennsylvania Ave. and marked it to be repaired at the same time as all the other sidewalk hazards in that portion of Zone 2. CF, pp. 766-67, Tr. 1/9/19 pp. 25:18-

26:19. This is uncontradicted evidence that the sidewalk deviation at 1115 Pennsylvania Ave. did not present a risk to the public out of the ordinary.

To determine that the risk was unreasonable under the facts of this case would require a court to find that the City's Update was itself unreasonable, because it did not require immediate repair of 2 ½" sidewalk deviations where the side and top of the sidewalk were the same color. Ms. Maphis presented no such evidence, and the trial court made no such finding. It apparently believed that evidence of the context in which the City must operate is irrelevant.

The Court of Appeals' decision should not be read as requiring that a plaintiff establish the five factors identified at ¶ 28 of its opinion to survive a motion to dismiss under the CGIA. Rather, the court was providing a nonexclusive list of factors that could be relevant to the determination of unreasonableness. *Cf. Corsentino*, 4 P.3d at 1093 (identifying nonexclusive list of factors pertinent to the determination under the CGIA whether an emergency vehicle operator endangered life or property).

To require a court to consider all the relevant facts and circumstances would not impose an impossible burden on the plaintiff. As noted above, courts are frequently asked to consider the totality of the circumstances. Such a requirement would, however, provide breathing room for municipalities that wish to consider

all the sidewalk hazards in their jurisdiction, and not just the one that allegedly caused an injury to a particular plaintiff.

A totality of the circumstances test would require a trial court to consider a municipality's reasonable efforts to prioritize sidewalk repair as one factor in determining reasonableness. Reversing the Court of Appeals in *Dennis*, this Court cautioned against interpreting the CGIA in a manner that would impose excessive burdens on municipal taxpayers:

> [W]hen 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.

2018 CO 37, ¶ 19. The Court of Appeals in this case properly considered the General Assembly's declaration of policy. It correctly noted that to allow the trial court's ruling in this case to stand would incentivize municipalities to discontinue proactive sidewalk repair programs. *Maphis*, slip op. at ¶¶ 30-31.

The problem is that, in the course of a proactive repair program, a municipality inevitably will acquire actual knowledge of sidewalk defects. The knowledge element of a waiver will always be established. Should this Court reverse the Court of Appeals, trial courts would be free to disregard the terms of

the municipality's proactive maintenance program pursuant to which the municipality acquired actual knowledge of the known hazard. At the same time, the trial court would be permitted to search the municipality's program documents for statements regarding risks that could be used out of context against the municipality as admissions. Moreover, whether the "unreasonable risk" factor was satisfied in a particular case would depend on the trial judge's subjective opinion.

This result would incentivize municipalities to end proactive repair programs and assume a defensive crouch, focusing only on rapid response to reported hazards. Doing so would preserve the municipality's ability to argue that it did not have actual or constructive knowledge of a particular defect and would prevent the criteria the municipality would have used to prioritize hazards from being used against it as evidence that a sidewalk problem constituted a dangerous condition.

The CGIA should not be applied in a way that penalizes those municipalities that make the policy choice to address sidewalk problems proactively for the benefit of the entire community. Trial courts should consider the existence of a proactive sidewalk repair program as part of the totality of the circumstances pertinent to the question whether a particular hazard presented an unreasonable risk. In addition to the absence of evidence that the risk presented by this hazard was in any way unusual, uncontradicted evidence that the City thoroughly studied

the problem and reasonably addressed this hazard at the same time as others in the area leads only to the conclusion that the hazard at 1115 Pennsylvania Ave. in Boulder was not unreasonably risky.

CONCLUSION

The facts established at the *Trinity* hearing demonstrated the existence of an ordinary hazard that the City properly could address at the same time as the other sidewalk hazards in the area. Therefore, the Court of Appeals correctly determined that Ms. Maphis did not establish that the sidewalk slab in question was a "dangerous condition" for purposes of establishing a waiver of governmental immunity under the CGIA.

WHEREFORE, Respondent City of Boulder respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted this 30th day of April 2021.

OFFICE OF THE CITY ATTORNEY

By: */s/ Luis A. Toro*
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Senior Assistant City Attorney
Attorney for Respondent City of Boulder

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2021, a true and correct copy of the foregoing **CITY OF BOULDER'S ANSWER BRIEF [*WITH CORRECTED TABLE OF AUTHORITIES*]**was filed and served via the Colorado Courts E-Filing System to counsel of record appearing herein.

s/ Lisa R. Thompson
Lisa R. Thompson