DATE FILED: March 17, 2023 10:33 PM
FILING ID: BDE2D0F248E9B
CASE NUMBER: 2022CA2034

COLORADO COURT OF APPEALS

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Appeal from El Paso County District Court
The Honorable Michael P. McHenry
Case No. 2021-CV-030904

▲COURT USE ONLY ▲

JOHN H. BRUCE, JR.

Plaintiff-Appellee

v.

JONATHAN WEBB, FALCON FIRE PROTECTION DISTRICT and WILLIAM YODER

Defendant-Appellants.

Case No.: 2022CA2034

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this Opening Brief complies with all requirements of C.A.R. 28 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).

X It contains 6, 875 words.

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

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 and C.A.R. 32.

By: s/ *Sean J. Lane*
Sean J. Lane, No. 32000

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I. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it held as a matter of law that the District did not meet the requirements of COLO.REV.STAT. § 42-4-108(2), thereby waiving governmental immunity.
2. Whether the trial court erred when it permitted the Plaintiff to present witnesses who were proffered as experts without prior disclosure or notice to the District.
3. Whether the trial court erred in adopting an order that was insufficient in addition to being in contradiction to the oral order previously rendered.

II. STATEMENT OF THE CASE

On April 8, 2020, an emergency call aired over the radio concerning a fire which triggered the Falcon Fire District (hereinafter "District") to respond to an emergent situation involving a fire in a field near several residential residences. This is an undisputed fact. CF, p. 252. At the time the District, represented by Chief Jonathan Webb, was responding to the emergency situation and his emergency vehicle was operating with both lights and sirens pursuant to COLO.REV.STAT. § 42-4-213. CF, p. 252. While responding to the emergency situation, the weather was clear, the roads were free from debris and it was determined that there was nothing that would have obstructed the view of any other driver for at least ten (10) seconds prior to the crash. TR (October 21, 2022) p. 146:22-25; SUPP. EX Trinity Hearing, 10(a),(b), (c).

As Chief Webb was traveling to the emergency destination, he slowed down from 53 MPH in a 45 MPH zone to 38 MPH in a 45 MPH zone when approaching a stop sign and prior to entering the intersection of Curtis Road and Judge Orr Road. CF, p. 28-29. This entire time the emergency vehicle for which Chief Webb was driving had its emergency lights and

sirens active pursuant to the statute. CF 60. On the date and time of the accident, no visual or audio obstructions existed that prevented Mr. Yoder's detection and observance of Chief Webb's emergency vehicle. CF 60; SUPP EX Trinity Hearing, 7. In fact, one of the Plaintiff's experts opined and created a video that establishes Mr. Yoder would have seen Chief's Webb emergency vehicle for at least ten (10) seconds prior to the initial impact. TR (October 21, 2022) p. 146:22-24; SUPP. EX Trinity Hearing, 10(a),(b) and (c). The land near the intersection can be described as flat, open and free from obstruction. CF. 30.

As the Chief Webb proceeded through the intersection, his car was struck on the passenger side rear quarter panel by, Mr. Yoder, who failed to yield to oncoming emergency personnel pursuant to COLO.REV.STAT. § 42-4-705 and COLO.REV.STAT. § 42-4-213(5); CF. 60. Once the District's car was struck, it spun and impacted the Plaintiff / Appellee, John Bruce, the rider of a motorcycle who was already stopped at the intersection on the other side of the road. TR (October 21, 2022) p. 125:13-19, CF. 60. Other emergency crews were dispatched to render aid to the motorcycle rider who was severely injured.

Mr. Bruce filed suit against both the District and Mr. Yoder, alleging negligence against both parties. CF. 1. A Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) was filed on behalf of the District and Chief Webb asserting that they were entitled to immunity under the Colorado Governmental Immunity Act. CF, 21. A hearing was ultimately heard pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993) on October 21, 2022. At the conclusion of the hearing, the trial court judge made an oral ruling stating that the District and Chief Webb were not entitled to immunity because, as the trial court described, "[C]hief Webb did not meet the requirements of COLO.REV.STAT. § 42-4-108 that requires that due regard be given to the safety of the community in the intersection." TR (October 21, 2022) p. 211: 16-18. This appeal followed.

III. SUMMARY OF THE ARGUMENT

When is an accident not really an accident? This case presents what is believed to be a matter of first impression and presents a novel question of law. The purpose behind the Colorado Governmental Immunity Act

(hereinafter, the "CGIA") is to shield governmental entities from liability for mere accidents. As with any immunity issue, there are always exceptions to immunity. In the present case it has already been established and conceded that Chief Webb was following the letter of the law to a "t", however, because there was an accident the case then turned on to whether or not Chief Webb slowed down enough. TR (October 21, 2022) p. 211:21-23. This hindsight approach in making a factual determination as a matter of law has no place in this determination. *Quintana v. City of Westminster,* 56 P.3d 1193, 1197 (Colo. App. 2002) (The courts may not consider the accident or the actual damage). This case is an accident in the purest form, wherein Chief Webb followed the required statutory requirements of Colorado law, establishing that under the CGIA the District and Chief Webb retain immunity and is shielded from common law tort claims.

As the Court in *Corsentino v. Cordova,* 4 P.3d 1082 (Colo. 2000) cautioned, because it was the intent of the legislature to grant immunity in these certain circumstances, there is a real danger in creating a *per se* rule of liability. This case presents exactly what *Corsentino* was warned of twenty (20) years ago. It presents a real danger of establishing a *per se* rule

of liability, thus eroding the intent of the legislature to make governmental entities immune from tort liability for mere accidents. If the District and Chief Webb followed the law and an accident still occurred, then what more needs to happen for immunity to actually be possible? The answer should be nothing, and under the circumstances in this case an accident is an accident and the District and Chief Webb should retain immunity.

IV. ARGUMENT AND AUTHORITIES

A. The trial court erred as a matter of law when it opposed a nonexistent legal duty on Chief Webb thereby waiving immunity.

1. Standard of Review and Preservation of the Issue

Pursuant to the CGIA COLO.REV.STAT. §24-10-101, *et seq.*, "[a] public entity shall be immunity from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in [the Colorado Governmental Immunity Act]." *See* CGIA, at COLO.REV.STAT.§ 24-10-106(1) (brackets added). "The law is designed to shield public entities from tort liability, unless the circumstances of an asserted claim bring it within one (or more) of the statute's expressly

defined waiver provisions." *St. Vrain Valley School District RE-1J v. A.R.L. by and through Loveland,* 325 P.3d 1014, 1019 (Colo. 2014) citing *Young v. Brighton School District 27J,* 325 P.3d 571 (Colo. 2014).

"…[Whether the state is immune from suit under the CGIA is a question of subject-matter jurisdiction and…must be determined pursuant to C.R.C.P. 12(b)(1)." *Medina v. State,* 35 P.3d 443, 451-52 (Colo. 2001). "Issues concerning subject matter jurisdiction may be raised at any time." *Id.,* at 452. "Under C.R.C.P. 12(b)(1), the plaintiff has the burden of proving jurisdiction and the trial court is authorized to make appropriate factual findings. *Id.* (internal citations omitted). The trial court "need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5)." *Id.* "…Rule 12(b)(1) permits the court 'to weigh the evidence and satisfy itself as to the existence of its power to the case.'" *Id.*

Specifically, "where a plaintiff has sued a governmental entity and that entity interposes a motion to dismiss for a lack of subject matter jurisdiction, the plaintiff has the burden of demonstrating that governmental immunity has been waived." *Tidwell v. City and County of Denver,* 83 P.3d 75, 85 (Colo. 2003). "Where 'the jurisdiction issue involves

a factual dispute, a reviewing court employs the clearly erroneous standard of review to the trial court's finding.' Where, however, the facts are undisputed and the issues is one of law, the appellate court reviews the trial court's jurisdictional ruling *de novo*." *Tidwell,* 83 P.3d at 81.

The issues raised in this case should be reviewed *de novo* where the facts are undisputed and it becomes a question of law. As evidenced in the record, it is undisputed that pursuant to COLO.REV.STAT. § 42-4-213, Chief Webb was responding to an emergency, and in doing so, was operating an emergency vehicle with lights and sirens. CF, 60.

Appellants preserved this issue in their Motion to Dismiss and its Reply in support thereof. CF, 21. The trial court ruled on this issue after conducting a hearing pursuant to *Trinity Broadcasting of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993). A proposed written order was prepared by the appellee and properly objected to. CF, 250. However, over the objection from the District the order was adopted in its entirety.

2. Discussion

It has long been understood that "the CGIA immunity provisions derogate Colorado's common law" and that based upon that

understanding, "the courts construe [C]GIA provisions that withhold immunity broadly and the exceptions to the waivers strictly." *Giron v. Hice,* 519 P.3d 1083, 1087 (Colo. App. 2022) (internal citations and quotations omitted). Since this case involves an application of construing waivers of immunity, the Court must give effect to the intent of the legislature. *Id.,* citing *Tidwell,* 83 P.3d at 81. This Court "effectuates the intent by looking at the language of the statute and giving the words their plain and ordinary meaning." *Id.*

Similar to *Giron* and *Corsentino v. Cordova,* 4 P.3d 1082 (Colo. 2000), this case involves the interplay with two separate, but equally important statutes. COLO.REV.STAT. § 24-10-106 provides that as a general matter sovereign immunity is waived for public entities if they are involved in automobile accidents, *except emergency vehicles operating within COLO.REV.STAT. § 42-4-108(2) and (3)*. (Emphasis added). However, even though the legislature provided a blanket immunity provision under the statute, they provided an exception. Reading the statute as a whole in a passive voice, and concentrating on the exception, the statute can be read to state, "emergency vehicles operating within COLO.REV.STAT. § 42-4-

108(2) and (3) are immune from liability in automobile accidents." *See Bartenwerfer v. Buckley,* 598 U.S. --- (2023) (Justice Barret discussing the use of passive voice in statutory interpretation). This reading is supported by *Corsentino* and how the court summed up the interplay between the statutes:

- "“[S]ection 24-10-106 grants immunity to public entities and their employees generally."
- "The motor vehicle immunity waiver of section 24-10-106(1)(a) takes away this immunity for the operation of motor vehicles by public entities and their employees."
- "The emergency vehicle exception, however, restores immunity to the public entities and their employees operating emergency vehicles in response to emergency calls."
- "Subsections (a) to (d) of section 42-4-108(2) specifically grant immunity for specific traffic violations, such as speeding and running stop signals." Finally,
- "[T]here are possible conditions to the violations of subsections (b) and (c), which, if left unsatisfied, may place the public entities and their employees back within the motor vehicle immunity waiver, thereby subjecting them to potential liability in tort.”"

Giron, 519 P.3d at 1089, citing *Corsentino,* 4 P.3d at 1087.

Taking into account the summation of the various statutes intertwining on this issue from *Corsentino*, it is clear that the legislature intended to protect emergency vehicles from liability so long as they

complied with the statutory provisions of COLO.REV.STAT. § 42-4-108 (2) and (3).

COLO.REV.STAT. § 42-4-108(2) and COLO.REV.STAT. § 42-4-108(3) establishes, in pertinent part, that an emergency vehicle utilizing its emergency lights and/or siren is generally immune, as follows:

> "The exemptions and conditions provided in paragraphs (b) to (d), in their entirety, of subsection (2) of this section for an authorized emergency vehicle shall continue to apply to section 24-10-106(1)(a), C.R.S., only when such vehicle is making use of audible *or* visual signals meeting the requirements of section 42-4-213, and the exemption granted in paragraph (a) of subsection (2) of this section shall apply only when such vehicle is making use of visual signals meeting the requirements of section 42-4-213 unless using such visual signals would cause an obstruction to the normal flow of traffic…Nothing in this section shall be construed to require an emergency vehicle to make use of audible signals when such vehicle is not moving, whether or not the vehicle is occupied."

COLO.REV.STAT. § 42-4-108(3); *see also* COLO.REV.STAT. § 42-4-213.

As *Giron* pointed out, "the net effect of these statutes is that a governmental entity is generally immune from tort liability in connection with the operation of an emergency vehicle so long as the vehicle is operating with emergency lights and sirens activated." *Giron,* 519 P.3d at 1089, citing *Tidwell,* 83 P.3d at 81. The basis for which the Court in

Tidwell, Corsentino and *Giron* determined that the governmental entity was liable is due to the facts, not necessarily the situation and those facts are vastly different than the ones present in this case. There is no question that in this instant case, Chief Webb was operating his emergency vehicle with active lights and sirens. CF 252.

This is because Sovereign immunity is not waived by a public entity in an action for injuries resulting from the operation of an emergency vehicle responding to an emergency or fire alarm, who exceeds lawful speeds or proceeds past a stop sign, after slowing down as may be necessary for safe operation. *See* COLO.REV.STAT. § 42-4-108(b) and (c). In determining whether the operator of an emergency vehicle acted reasonably, thereby maintaining governmental immunity, the court must not consider the accident or actual damage resulting from the speeding or vehicle's procession past a stop sign, nor should it consider whether the emergency vehicle operator was responding to an actual emergency; instead, courts should limit their inquiry to the relationship between the conduct of the emergency operator prior to the accident and the circumstances surrounding the conduct, including the legal speed limit in

the area, the speed at which the operator was driving, the conditions of the road, and the type of area in which he was driving. *Quintana v. City of Westminster*, 56 P.3d 1193, 1197 (Colo. App. 2002) citing *Corsentino v. Cordova*, 4 P.3d 1082 (Colo. 2000). "Thus, 'the [official's] driving must be evaluated in the context of all relevant circumstances.'" *Id.*, citing *Quintana v. City of Westminster*, 8 P.3d 527 (Colo. App. 2000) (*Quintana* I) (brackets added).

In *Giron* it was established that Officer Hice was attempting to pull over another driver for speeding. During that pursuit, Officer Hice reached speeds in excess of 100 MPH and only had his emergency lights activated. *Giron,* 519 P.3d at 1091. More importantly, Officer Hice did not have his lights activated during the entire time, but rather a mere fraction of the total pursuit. *Id.* Upon finding that Officer Hice was not entitled to immunity for the accident, the Court noted that "to be entitled to immunity, Officer Hice would have need to have activated his emergency lights or sirens the moment he exceeded the speed limit during the pursuit." *Id.* The important take away from *Giron* that plays a factor in the present case is that it was established Officer Hice did not fully follow the

law and only operated his lights, but not his sirens during a very high-speed pursuit ultimately leading to the subject accident.

The Colorado Supreme Court in *Corsentino* was tasked with interpreting the "endanger life or property" condition of the immunity provision. *Corsentino,* 4 P.3d at 1092; COLO.REV.STAT. § 42-4-108(2)(C). The *Corsentino* case involved Deputy Sheriff Cortese who was responding to a burglary call when he was involved in a fatal accident. *Id.* at 1085. During an evidentiary hearing, it was established that Deputy Cortese was speeding between 50-60 MPH in a 35 MPH zone towards his destination while operating lights and sirens. *Id.* When approaching an intersection, Deputy Cortese did not slow down and ended up colliding with Erlinda Cordova. *Id.* In ruling finding a waiver of immunity by Deputy Cortese, the Supreme Court determined that based upon the fact that the Deputy was speeding in a residential neighborhood and that there was no clear line of sight due to overgrowth of trees on the median of the intersection, responding to the emergency in those circumstances in the manner used by Deputy Corteses, endangered the life or property of another and therefore, immunity was waived in this particular circumstance. *Id.* at

1093. Even though the Court ruled against Deputy Cortese, they acknowledged the danger of creating a *per se* rule of liability and believed that by establishing a list of some factors the Court could consider would minimize the potential abrogation of sovereign immunity.

Several years after the Colorado Supreme Court announced its decision in *Corsentino,* they were tasked again with interpreting the CGIA and the application on emergency vehicles in *Tidwell.* The circumstances in *Tidwell* were different than the other cases decided, due to the fact the emergency personal was not directly involved in an accident. In *Tidwell,* Officer McAleer started pursuit of an automobile in a residential part of Denver based upon his reasonable suspicion that a crime had been committed. *Tidwell,* 83 P.3d at 78. During this pursuit, Officer McAleer was driving at about 40-45 MPH in a 30 MPH zone and did not have his emergency lights activated. *Id.* While Officer McAleer was chasing the alleged suspect, the car that was being chased ultimately caused an accident at an intersection that resulted in one person deceased and another person seriously injured. *Id.* The plaintiff sued the City and County of Denver alleging that Officer McAleer was a contributing factor

based upon the manner of which he pursued the vehicle. Ultimately, the Court determined that Officer McAleer was not entitled to immunity based upon the fact that he was in pursuit of a vehicle and failed to meet the standards under the statute, i.e., lights and sirens. *Id.* at 87.

In a more recent case that analyzed CGIA and an emergency vehicle, the issue that was presented concerned the provision of COLO.REV.STAT. § 42-4-108 (2)(b) "as may be necessary for safe operation." *Bilderback v. McNabb,* 474 P.3d 247, 251 (Colo. App. 2020). *Bilderback* concerned Denver Police Officer McNabb who had been involved in a collision with a motorcyclist during an emergency call. *Id.* at 250. At the time of the collision, there was an issue of material fact of whether McNabb's view was blocked so he could not see incoming traffic. *Id.* at 252. When Officer McNabb received the emergency call, he was already stopped at a red light and put on his lights and sirens. It was when he proceeded through the intersection that the accident occurred with an oncoming motorcycle who had the right of way. It was reaffirmed that it is an error for the trial court to require that drivers of emergency vehicles to drive with "due regard to the safety of all persons" as it has already been determined that

COLO.REV.STAT. § 42-4-108 (4) duty of care standard is not applicable when analyzing COLO.REV.STAT. § 42-4-108(2) and (3). *Id.* at 252 citing *Fogg v. Macaluso,* 892 P.2d 271, 277 (Colo. 1995). The case was ultimately remanded to the trial court for further proceedings.

The four cases cited *supra* all had substantial differences the instant case that impact on the way the Colorado Courts analyze the relevant portion of the statutes. In *Giron*, the officer did not make use of his lights and sirens which would have warned oncoming traffic of the emergency situation until the last moment. *Giron,* 519 P.3d at 1091. More importantly, at the time of the incident occurring in *Giron* the officer was exceeding the posted speed limit during the pursuit which made it even more dangerous to the general public without using his lights and sirens. *Id.* To put it another way, the basis for which immunity was denied was on account that we had an officer speeding excessively without lights and sirens that ultimately caused a crash.

Now in *Corsentino* there was an officer who was at the time operating with his lights and sirens, however, he was traveling at a rate of speed, which was, ultimately, double the speed limit through a residential

neighborhood and went through the signage for him to stop without a clear line of sight, that ultimately led to an accident. *Corsentino,* 4 P.3d at 1093. Both *Giron* and *Corsentino* addressed officers speeding excessively which endangered the community as a whole, whether it be driving with lights and sirens or not. The same can be said for *Tidwell* where the officer was unreasonably speeding through a residential neighborhood without lights and sirens, which, it was argued, contributed to the crash. *Tidwell,* 83 P.3d at 78. The only case that is somewhat similar to the present case is *Bilderback* where the officer was not speeding and had activated his lights and sirens, however, he did not have a clear line of sight. *Bilderback,* 474 P.3d at 251.

In the present case it is undisputed that Chief Webb was responding to an emergency call and in doing so was operating the emergency vehicle with both lights and sirens. CF, 252. It has already been established that Chief Webb met all the statutory requirements of COLO.REV.STAT. § 42-4-108(3). The crux of this case is whether or not Chief Webb met the requirements of COLO.REV.STAT. § 42-4-108(2)(b). The lower court judge determined that "the District did not give *due to regard* to the safety of the

community at the time he ran the stop sign… the data establishes the District slowed before entering the intersection, as a matter of law it was insufficient." TR (October 21, 2022), p. 211:14-25. The foundation upon which the lower court made its determination was in error.

First and foremost, it has long been recognized that "due regard" has no bearing in the interpretation of COLO.REV.STAT. § 42-4-108(2). *Bilderback,* 474 P.3d at 252. Under the facts of this case, even if due regard were somehow applicable, the evidence establishes that Chief Webb was appropriately responding to an emergency in his vehicle operating both lights and sirens. CF, 140. The weather was clear and there were no obstructions in any of the drivers' line of sight. CF, 139. In fact, one previously designated expert testified that there appears to be 10 seconds of a clear line of sight with the District Vehicle and the vehicle driven by the other driver, Yoder. TR (October 21, 2022) p. 153:22-25. Upon approaching the intersection, Chief Webb's vehicle slowed to below the speed limit thereby travelling at an appropriate speed. CF, 29. Based upon the testimony of witnesses, all but one vehicle, Mr. Yoder's, was stopped as Chief Webb's vehicle was approaching the intersection. TR (October 21,

2022), p. 109: 10-138:8. That only other vehicle that was not stopped was Mr. Yoder's. TR (October 21, 2022), p. 122:1-9.

Taking these facts together establishes that this accident is completely distinguishable from *Giron* and *Corsentino* as the District was not speeding upon approaching the intersection of a stop sign, in fact it is clear that Chief Webb was operating 7 MPH below the speed limit upon entering the intersection. CF, 29. Moreover, this was not a residential intersection, but a country road highway where there were no obstructions from view and multiple witnesses were able to see the emergency vehicle approaching from a great distance. TR (October 21, 2022), p. 153:22-25. Furthermore, unlike *Bilderback* there were no obstructions that would have prevented any other individual from seeing the emergency vehicle approaching. In fact, one witness stated that they were able to see the emergency vehicle approaching for a significant period prior to the stop sign. TR (October 21, 2022), p. 117: 4-23. This same witness also testified that vehicles were, except, apparently, for Mr. Yoder, pulling over to yield to the emergency vehicle. *Id.* Based upon the unobstructed view from all parties, the trial court failed to take into account that Mr. Yoder had a

mandatory duty to provide Chief Webb with the right of way in the intersection. TR (October 21, 2022), p. 153:22-25

Pursuant to COLO.REV.STAT. § 42-4-705(1), when an emergency vehicle is approaching making use of audio or visual signals, the driver of every other vehicle *shall* yield the right of way. The key word in this statue, for which the trial court did not even address or consider is “shall.” The term “shall” indicate a mandatory provision. *People v. District Court,* 713 P.2d 918 (Colo. 1986). This is important as COLO.REV.STAT. 42-4-108(2)(b) only requires that the emergency vehicle need slow down “as may be necessary for safe operation.” Chief Webb slowed to below the speed limit and could not anticipate that Mr. Yoder would violate the law and ignore the emergency lights and sirens. All other vehicles had yielded to Chief Webb’s emergency vehicles at the intersection as it is demonstrated that based upon the evidence Chief Webb was not entering into a crowded intersection. Chief Webb entered into a clear intersection and was struck on the passenger side, rear quarter panel of his vehicle, just before he cleared the intersection. CF 62.

In sum, what is present under the circumstances was an emergency vehicle operating within the dictates of law. There is nothing in the facts of this case that mimic's any other cases for which immunity has been waived. In fact, the opposite occurred here. There was no speeding through residential neighborhoods or exceeding the lawful speed limit, it was established that Chief Webb was traveling below the speed limit as he approached and entered the intersection. There were no visual obstructions for Chief Webb or any other driver, and every other driver on the road took care to yield the right of way. Even though all of this occurred, an accident still happened, but that does not mean necessarily that immunity should be waived.

B. The trial court abused its discretion when it allowed multiple witnesses to be designated as experts without prior designation or notice which ultimately affected the decision in the case.

1. Standard of Review and Preservation of the issue

An evidentiary decision is reviewed under an abuse of discretion standard. *People v. Stewart,* 55 P.3d 107, 122 (Colo. 2002). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *Id.* "Whether a witness's testimony is lay, or expert depends on

the facts and surrounding circumstances of the case." *Venalonzo v. People,* 388 P.3d 868, 874 (Colo. 2017). As such, the Colorado Rules of Evidence (CRE) are the starting point on the analysis of what the witness testified to and what was opined. *Id.* Granted, when allowing a late disclosed or undisclosed expert to testify, the reviewing court looks at this in not only an abuse of discretion standard, but also whether or not this was a harmless error. *Saturn Systems Inc.,* 252 P.3d at 525. Therefore, the appropriate standard of review is for an abuse of discretion and harmless error.

This matter was preserved when the appellant objected to the designation of Officer Rodgers as an expert in emergency response and accident investigation. TR (October 21, 2022), p. 15:5-8.

2. Discussion

As a general matter, these proceedings were conducted in accordance with *Trinity Broadcasting v. Westminster,* 848 P.2d 916 (Colo. 1993) as an issue of whether the Court has jurisdiction to hear the matter. Based upon the CGIA being implicated, for the most part discovery is suspended, except discovery necessary to decide the issue of immunity. *See*

COLO.REV.STAT. § 24-10-108. Even if most discovery is suspended, other than the limited discovery to resolve the issue of immunity, it is incumbent on the parties to comply with the respective Colorado Rules of Civil Procedure for purposes of the evidentiary hearing. *Saturn Systems Inc., v. Militare,* 252 P.3d 516 (Colo. App. 2011).

However, in this instant case it is not just the fact that nearly every witness that the Appellee presented at the evidentiary hearing was first designated as an expert during the course of the hearing, other than Brent Graham who was properly designated in accordance with C.R.C.P. 26(a). The problem is the testimony elicited from these experts was intended to speak to the ultimate legal issue in this case. This is evidenced in the trial courts own ruling.

During Officer Rodger's testimony, it was asked:

> Q: What did you determine as to the safety of Mr. Webb's speed given the circumstances.?
> A: So it does show that he did start to slow down and he did slow to about 38, but at some point began to accelerate prior to the intersection again continuing going quicker then stopping at that sign, obviously, and there's still traffic coming through. So with that in mind and seeing the intersection, I

> would say that that probably wasn't slow enough or good enough, like, to stop and go kind of thing."

TR (October 21, 2022), p 31:1-8.

After it was brought to the Court's attention that all of the expert answers were objectionable, especially given the fact that Officer Rodgers was an improper expert, the more glaring problem with the testimony comes several minutes later where Officer Rodgers was asked to provide an ultimate conclusion.

> Q: So your training and experience in running code is what ultimately influenced your conclusions in this case, and so what was your conclusion or your determination?
> A: That he did not take the *due regard* for other as he was driving through the intersection.

TR (October 21, 2022) p. 35: 15-19 (Emphasis added)

Moving on to Captain Scott Hopan's, testimony. On a preliminary matter, it should be recognized that Captain Hopan was also designated as an expert during the hearing, rather than by prior notice as mandated by C.R.C.P. 26(a). Similar to Officer Rodger's, Captain Hopan was ultimately asked to provide legal conclusion. Captain Hopan was asked:

> Q: So would you just tell us what's your understanding about what rules you have to follow when you're running code, specifically when you're going to go through a stop sign or a stop light?
> A: So the law requires that you drive with *due regard* even if you're operating an emergency vehicle…

TR (October 21, 2022) p 71:2-10

While allowing a late disclosed expert to testify may be a minor error in other circumstances, under the present set of facts it is clear that the erroneous statements made by multiple untimely experts improperly played a factor in the trial court's ruling, creating reversible error.

In this case, Officer Rodgers claimed that "due regard" was required under the law. TR (October 21, 2022) p. 35:18-19. Then Captain Hopan claimed that "due regard" was required under the law. TR (October 21, 2022), p. 72:2-10. Finally, you have Sergeant Wolf testifying that "you can violate the rules of the road such as red lights, stop signs, lane changes, with *due regard* to the safety of the community." TR (October 21, 2022) p. 113:19-22. Ultimately, the trial court apparently agreed that the statute requires *due regard* to be given and that in the present case it was not. TR (October 21, 2022) p. 211:14-23.

The law has been clear since 1995 when the Colorado Supreme Court announced that "due regard" is not imposed under COLO.REV.STAT. § 42-4-106(2) and (3) on emergency vehicle drivers who are responding to an emergency. *Fogg v. Macaluso,* 892 P.2d 271, 278 (Colo. 1995); *Cline v. Rabson,* 862 P.2d 1035, 1036 (Colo. App. 1993). Overall, it was an error to permit undisclosed experts to render a legal opinion that was clearly wrong. By all accounts, at least three testifying witnesses informed the trial court that due regard was required under the statute and under the facts of the incident, due regard was not used by the District. It appears that the Judge was swayed by three experts informing him about this statutory duty of due regard, as his oral decision reflected such. TR (October 21, 2022) p. 211:14-23. However, when this duty does not exist, then allowing these undisclosed experts to render a wrong legal conclusion is reversible error.

C. The trial court's order is factually insufficient and legally incorrect therefore should not stand.

1. Standard of Review and Preservation of the Issue

A decision from a trial court regarding factual disputes "are accorded great deference and, therefore, a reviewing court applies the clear error standard of review." *Walton v. State,* 968 P.2d 636 (Colo. 1998). The trial courts findings of fact supporting a determination under the CGIA will not be reversed unless clearly erroneous. *Trinity,* 848 P.2d at 917. In order to establish that a finding is clearly erroneous, and therefore, lacking support of competent evidence, when, although there may be evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). However, if there are no factual disputes, legal conclusions are reviewed *de novo* with deference given to the factual determinations to the trial court. *People v. Kyler,* 991 P.2d 810, 818 (Colo. 1999). This issue was preserved when the oral decision was converted into writing which was properly and timely objected to. CF 250.

2. Discussion

While it may be hard to remember verbatim what one party said days, if not weeks before, our judicial system has long practiced recording the proceedings to definitively establish what we all know as the "record." In the instant case, there are two conflicting orders both of which could be equally subject to reversal in this matter. On one hand, we have the oral ruling, made by the trial court on the day of the hearing, which was at the freshest point of reference. TR (October 21, 2022) p. 211:14-23. On the other hand, we have a proposed written order, tendered by Appellee, which was objected to. CF, 250. The oral decision actually rendered by the trial court judge, substantially differs from what the Appellee suggested as a written order. *Compare* TR (October 21, 2022) p. 211:14-23 *to* CF 252. The problem with the written order, which was adopted by the trial court judge, is that not only is it factually incorrect, but the legal conclusions are in opposition. Therefore, neither order should stand.

Sovereign immunity is not waived by a public entity in an action for injuries resulting from the operation of an emergency vehicle responding to an emergency or fire alarm, who exceeds lawful speeds or proceeds past

a stop sign, after slowing down as may be necessary for safe operation. *See* COLO.REV.STAT. § 42-4-108(b) and (c). In determining whether the operator of an emergency vehicle acted reasonably, thereby maintaining governmental immunity, the court must not consider the accident or actual damage resulting from the speeding or vehicle's procession past a stop sign, nor should it consider whether the emergency vehicle operator was responding to an actual emergency; instead, courts must limit their inquiry to the relationship between the conduct of the emergency operator prior to the accident and the circumstances surrounding the conduct, including the legal speed limit in the area, the speed at which the operator was driving, the conditions of the road, and the type of area in which he was driving. *See Quintana v. City of Westminster*, 56 P.3d 1193, 1197 (Colo.App. 2002) (*Quintana II*) citing *Corsentino v. Cordova*, 4 P.3d 1082 (Colo. 2000). "Thus, 'the [official's] driving must be evaluated in the context of all relevant circumstances.'" *Id.*, citing *Quintana v. City of Westminster*, 8 P.3d 527 (Colo.App. 2000) (*Quintana I*) (brackets added).

In the instant case, both the oral and written decisions are legally flawed. In the oral decision, not only was there a lack of factual support to

support the determination made by the court, the court also based the conclusion on an erroneous legal ground. As discussed *infra,* the trial court determined that the District and Chief Webb waived governmental immunity by failing to give "*due regard* to the safety of the community in the intersection at the time the stop sign was run." TR (October 21, 2022) p. 211:17-19. The standard of *due regard* has been determined not to be applicable to COLO.REV.STAT. § 42-4-106(2) and (3). *Fogg,* 892 P.2d at 277.

Moreover, besides the fact that the trial courts legal reasoning is clearly wrong, the trial court did not provide a sufficient factual analysis as to why it formed the basis that *due regard* was not met. In the trial courts oral decision, the decision seemed to rest solely on the "objective data black box recording that shows the speed" and the trial court discounts some or all of the witness testimony. TR (October 21, 2022) p. 211:20-25. In essence, the trial court failed to carefully and clearly articulate how the factors in both *Quintana II* and *Bilderback* were satisfied, prior to ruling that immunity had been waived.

However, the written order prepared by the Appellee in this matter does not address the problem. The alleged factual analysis as to why the

trial court determined that immunity has been waived is couched in a single paragraph near the bottom of the order. CF 252. In the order, it claims that the Court took into consideration various factors in making the determination. *Id.* However, none of those factors espoused in the written order appear in actual words spoken by the trial court at the time the decision was rendered. *Compare* TR (October 21, 2022) p. 211-212 *to* CF 251-252.

Even more concerning is the language that Appellee tendered to the trial court where it is claimed that "[t]he court hereby finds that Chief Webb in proceeding past the stop sign in question failed to slow down as may be necessary for safe operation." CF 252. At no point during the oral decision did the court ever come close to stating that "as may be necessary." It is quite fact the opposite, where the court determined that "due regard was not given." TR (October 21, 2022) p. 211:17-19.

In sum, the oral ruling is not clearly reflected in the written opinion tendered by the Appellee and properly objected to. What we have in the instant case appears to be two conflicting decisions, neither of which have sufficient factual support in the orders to uphold a waiver of immunity.

The trial courts are tasked with developing their own record to make their own determinations that formed the basis of their decision. In the present case, the proposed written order does not align with the trial courts determination and therefore should be ignored.

V. CONCLUSION

There are only two ways to approach this case, both of which would render a favorable decision to Appellants. The first approach would be to remand the case back to the trial court on the grounds that an inappropriate legal standard was applied. This would be considered the easier approach. The second approach, which the appellant believes is the more correct approach, is to address the elephant in the room. And that is, when is an accident not really an accident?

As *Corsentino* contemplated, there are legitimate concerns about creating a *per se* rule that would *de factor* abrogate the immunity granted to emergency vehicles under CGIA. *Corsentino,* 4 P.3d at 1093. The instant case is an example of this *per se* rule being created. In the instant case, we have Chief Webb responding to an emergency situation in his emergency vehicle while operating his emergency lights and sirens. This fact is

undisputed. While traveling down a country road approaching an intersection where there is a stop sign, Chief Webb slowed his emergency vehicle down below the posted and reasonable speed limit while approaching the stop sign. This fact is also undisputed. It is claimed that for at least ten (10) seconds prior to the intersection, all drivers on the road had a clear and unobstructed view of the emergency vehicle, thereby imputing on them a mandatory duty to yield to the approaching emergency vehicle under COLO.REV.STAT. § 42-4-705(1). This fact is also undisputed. As Chief Webb proceeded through the intersection, his emergency vehicle was struck by Mr. Yoder, which ultimately caused the emergency vehicle to spin and strike another motorist on the other side of the road. There is no dispute that Mr. Yoder failed to yield, which caused his vehicle to make the first impact to Chief Webb's vehicle.

Yet, with this unfortunate series of events, the trial court determined that immunity had been waived because Chief Webb did not operate with due regard to the safety of the community and did not slow down enough. The reasoning and legal basis for which the trial court based its determination goes against the letter and intent of the legislature when

this statute was last amended. As *Corsentino* pointed out the intent of the legislature was to have emergency vehicles to continue to act in accordance with COLO.REV.STAT. § 42-4-108(2) and that if they follow the law then they should rightfully have immunity. *Corsentino,* 4 P.3d at 1092 (discussing Senator Thiebaut statement). Not only did the trial court error with an incorrect legal standard, but also implicitly placed the burden on Chief Webb in establishing that he slowed down enough and that if he had maybe then the accident would not have occurred. If that is the case, then there would be no need for the legislature granting immunity for situations that involve accidents at all. Accidents do happen, however in the instant case, an accident by and of itself, does not necessarily mean that immunity has been waived without something more.

Respectfully submitted this March 17, 2023.

Duly Signed Original Available at the offices of:

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CERTIFICATE OF SERVICE

I hereby certify that on this March 17, 2023, a true and correct copy of the above and foregoing **OPENING BRIEF** was, unless otherwise indicated, filed with the Court who provides notice to the following:

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