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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 MARCIA McKEE, the surviving mother of
12 GRANT QUINN McKEE, both individually
13 and on behalf of all statutory beneficiaries of
14 GRANT QUINN McKEE, deceased,

15 Plaintiffs,

16 v.

17 STATE OF ARIZONA, a public entity; and
18 the ARIZONA STATE FORESTRY
19 DIVISION, a public entity,

20 Defendants.

Case No. CV 2014-009070

**RESPONSE TO
MOTION TO DISMISS**

(Hon. J. Richard Gama)

(Oral Argument Requested)

21 This Court should deny the motion to dismiss because:

- 22 (1) The purported intergovernmental agreement (“IGA”) between the State and the
23 City of Prescott is a nullity. Thus, the State was not Grant McKee’s employer—and
24 A.R.S. § 23-1022(A)’s “exclusive remedy” clause gives it no immunity.
- 25 (2) Even if the purported IGA were valid—which it is not:
- 26 (a) The State’s “willful misconduct” caused Grant McKee’s death.
- 27 (b) Whether the State committed “willful misconduct” is a fact question.
- 28 (c) Marcia McKee could not receive workers’ compensation benefits.

1 (d) Marcia McKee did not waive her right to sue the State.

2
3 (3) The firefighter's rule does not apply.

4 (4) The facts and the law support Marcia McKee's emotional-distress claims.

5 (5) The Arizona State Forestry Division is a jural entity subject to suit.

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7 **Memorandum of Points and Authorities**

8 **Standard of Review:** Motions to dismiss are disfavored. *Maldonado v. S. Pac. Transp. Co.*,
9 129 Ariz. 165, 167, 629 P.2d 1001, 1003 (App. 1981). When reviewing them, a court must
10 "assume the truth of the well-pled factual allegations and indulge all reasonable inferences" in
11 favor of the nonmovant. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7, 189 P.3d 344,
12 346 ¶ 7 (2008). A court cannot dismiss a complaint unless satisfied, as a matter of law, that the
13 "plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of
14 proof." *Fidelity Sec. Life Ins. Co. v. State*, 191 Ariz. 222, 224 ¶ 4, 954 P.2d 580, 582 ¶ 4 (1998).

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17 Dismissal is only proper if a plaintiff would not be entitled to relief on *any* legal theory
18 under *any* facts it could seek to prove in support of the alleged claims. *Forum Dev., L.C. v.*
19 *Arizona Dept. of Revenue*, 192 Ariz. 90, 93, 961 P.2d 1038, 1041 (App. 1997). Before a trial
20 court dismisses a complaint under Rule 12(b)(6), it should give the non-moving party a chance to
21 amend the complaint if amendment will cure the defects. *Young v. Rose*, 230 Ariz. 433, 438 ¶ 30,
22 286 P.3d 518, 523 ¶ 30 (App. 2012).

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24
25 **(1) The purported intergovernmental agreement ("IGA") between the State and the City**
26 **of Prescott is a nullity. Thus, the State was not Grant McKee's employer—and A.R.S.**
27 **§ 23-1022(A)'s "exclusive remedy" clause gives it no immunity.**

28 The State argues that Grant McKee was its employee under a purported IGA with Prescott.

1 While the State provided part of the purported IGA, it failed to provide Prescott City Council's
2 ineffective attempt to enter into the purported IGA—namely, “Resolution No. 2592.” (A copy of
3 the resolution is attached as Exh. 1.) “Resolution No. 2592” does not comply with A.R.S. § 11-
4 952(F), which states:

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6 *Appropriate action by ordinance or resolution or otherwise pursuant to the*
7 *laws applicable to the governing bodies of the participating agencies approving*
8 *or extending the duration of the agreement or contract shall be necessary*
9 *before any such agreement, contract or extension may be filed or become*
10 *effective. (Emphasis added.)*

11 “Resolution No. 2952” does *not* approve *or* extend the purported IGA’s duration. As a
12 result, under A.R.S. § 11-952(F), the IGA could not “be filed or become effective.” Since the
13 purported IGA could not be filed or be effective, Grant McKee was never the State’s employee.
14 And A.R.S. § 23-1022(A)’s “exclusive remedy” immunity cannot bar this lawsuit.

15 The State may argue that the crucial phrase “approving or extending the duration of the
16 agreement” should be read to say “approving, or extending the duration of, the agreement.” But
17 the absence of those two commas in the statute is critical. Without the commas, the phrase really
18 means “approving the duration of the agreement or extending the duration of the agreement.”

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20 Grammatically, the words “approving” and “extending” must modify “duration of the
21 agreement.” “Resolution No. 2952” lacks *any* approval or *any* extension of the purported IGA’s
22 duration. Because of that, “Resolution No. 2952” fails to comply with A.R.S. § 11-952(F), and the
23 IGA legally could not be filed or become effective. The IGA is therefore a nullity.

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25 This is not nitpicking. A comma’s presence or absence can utterly transform a statute. For
26 example, in the landmark case of *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶
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1 12, 266 P.3d 349, 352 ¶ 12 (2011), the absence of a comma between “labor union” and “or other
2 legal entity” in the phrase “labor union or other legal entity,” meant that the State was *not* liable
3 under the Arizona Adult Protective Services Act. As a result of that missing comma, the State can
4 now violate APSA with impunity. The absence of the two commas in the phrase “approving or
5 extending the duration of the agreement” in A.R.S. § 11-952(F) is just as dramatic. It means that
6 the IGA is void and ineffective. Thus, A.R.S. § 23-1022(A)’s “exclusive remedy” can *only* apply
7 to the City of Prescott. It *cannot* apply to the State.
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10 The State may argue that by purporting to approve the entire IGA, Prescott was necessarily
11 approving the duration language of “will continue in force from year to year” that appears at the
12 end of the State’s boilerplate IGA form. But that would eviscerate A.R.S. § 11-952(F), which
13 requires a specific “appropriate action” by ordinance, resolution, or the like “approving or
14 extending the duration of the agreement.” *See Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d
15 1349, 1351 (1997) (Each word, phrase, clause, and sentence of a statute must be given meaning so
16 no part will be void, inert, redundant, or trivial.).
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19 Moreover, A.R.S. § 11-952(A) *already* specifically deals with overall approval of the IGA
20 by the legislative or other governing body. A.R.S. § 11-952(F) is a separate, essential statutory
21 step that Prescott had to take—*but failed to take*—to make the purported IGA effective. A.R.S. §
22 11-952(F) must be given effect and cannot be ignored or rendered redundant. *See, e.g., State ex*
23 *rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358, 362 ¶ 18, 275 P.3d 1278, 1282 ¶ 18 (2010) (“We do
24 not interpret statutes so as to render any provision redundant.”). Since Prescott failed to comply
25 with A.R.S. § 11-952(F), the purported IGA could not be filed and is not effective.
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1 Further, when, as here, a statute’s words “are plain and unambiguous, courts will not go
2 outside the language itself for interpretation.” *Emp. Sec. Comm’n of Ariz. v. Fish*, 92 Ariz. 140,
3 142, 375 P.2d 20, 22 (1962). In the pivotal *Estate of Braden* opinion discussed above, the Arizona
4 Supreme Court emphasized that: ““When the plain text of a statute is clear and unambiguous there
5 is no need to resort to other methods of statutory interpretation to determine the legislature’s
6 intent because its intent is readily discernable from the face of the statute.”” *Estate of Braden*, 228
7 Ariz. at 325 ¶ 8, 266 P.3d at 622 ¶ 8 (quoting *State v. Christian*, 205 Ariz. 64, 66 ¶ 6, 66 P.3d
8 1241, 1243 ¶ 6 (2003)). Under A.R.S. § 11-952(F)’s clear and unambiguous words, the City of
9 Prescott never approved the purported IGA’s duration or extended the purported IGA’s duration.
10 As a result, the purported IGA could not be filed and never became effective—and Marcia McKee
11 may sue the State.

12 An IGA is an important document affecting the legal and financial rights: (1) of the State,
13 (2) of the public entity with which the State is trying to make the IGA, and (3) of that public
14 entity’s employees and their families. To protect all parties, an IGA must comply strictly with its
15 enabling statute—with A.R.S. § 11-952. The point of a separate action approving or extending an
16 IGA’s duration is to require a public entity to set a specific time limit for the proposed IGA, so it
17 and its employees are not bound to an unfairly long duration. Compliance with the IGA statute is
18 thus essential. Here, there was no compliance—and there can be no immunity.

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24 **(2)(a) The State’s “willful misconduct” caused Grant McKee’s death.**

25 Even if the purported IGA were valid—which it is not—under A.R.S. § 23-1022(A), if an
26 employer’s willful misconduct causes the injury, and the misconduct indicates willful disregard of
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1 the employee's life, limb or bodily safety, "the injured employee may either claim compensation
2 or maintain an action at law for damages against the person or entity alleged to have engaged in
3 the willful misconduct." A.R.S. § 23-1022(B) states that: "'Willful misconduct' as used in this
4 section means an act done knowingly and purposely with the direct object of injuring another."

5
6 An independent state board, the Division of Occupational Safety and Health ("ADOSH")
7 of the Industrial Commission of Arizona, issued a Citation and Notification of Penalty against the
8 State on December 5, 2013. ADOSH specifically found that, during the Yarnell Hill Fire, the
9 State committed "willful serious" misconduct that killed 19 members of the Granite Mountain
10 Interagency Hotshot Crew. See the attached Exh. 2.

11
12 ADOSH made its "willful misconduct" administrative ruling after an investigation and
13 after giving the State an opportunity to present its own evidence and arguments. An adjudicative
14 determination by an administrative tribunal is entitled to the same res judicata effect as a court's
15 judgment if it contains the essential elements of a judicial adjudication. *A. Miner Contracting,*
16 *Inc. v. Toho-Tolani County Imp. Dist.*, 233 Ariz. 249, 255 ¶ 6, 311 P.3d 1062, 1068 ¶ 6 (App.
17 2013) (citing *Restatement (Second) of Judgments* § 83(2) (1982)).

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19 ADOSH settled the issue when it found the State committed willful misconduct against
20 Grant McKee and his fellow team members. As a result, under A.R.S. § 23-1022(A), Marcia
21 McKee may reject workers' compensation and "may maintain an action at law for damages
22 against the person or entity alleged to have engaged in the willful misconduct."
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26 **(2)(b) Whether the State committed "willful misconduct" is a fact question.**

27 Even if the purported IGA were valid—which it is not—A.R.S. § 23-1022(B) provides
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1 that: “‘Willful misconduct’ as used in this section means an act done knowingly and purposely
2 with the direct object of injuring another.” The statute thus requires determining the intent of the
3 State officers in charge of suppressing the Yarnell Hill Fire. The jury decides the existence of
4 intent, which need not be established by direct proof, and which the jury may determine and infer
5 from all the facts and evidence. *State v. Quatsling*, 24 Ariz. App. 105, 536 P.2d 226 (1975). *See*
6 *also Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (“Issues of credibility, including
7 questions of intent, should be left to the jury.”).
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10 In this case, reasonable jurors could conclude that several officers of the State Forestry
11 Division (“Forestry”) knowingly acted with the direct object of causing injury. For instance:

- 12 • At about 1:00 p.m. on June 30, 2013, instead of working out the command, control, and
13 cooperation problems with the two ground divisions combatting the Yarnell Hill Fire,
14 the Division Zulu Supervisor simply left the fire line, drove to the incident command
15 post, and never returned to the ground division he was supposed to supervise. *McKee*
16 *Complaint* at ¶¶ 164-68. Reasonable jurors could conclude that only someone who had
17 the direct object of injuring the firefighters would act so spitefully.
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- 19 • At about 3:58 p.m. on June 30, 2013, Air Tactical Group Supervisor Rory Collins left
20 the firefighting effort without explanation or a proper turn-over and went back to his
21 Deer Valley home. Collins had been in charge of the aerial water and retardant drops
22 desperately needed to fight the fire and to protect the Granite Mountain Interagency
23 Hotshot Crew. The abandonment of his post left the firefighters without their final
24 protection against death. *McKee Complaint* at ¶¶ 207-10. Reasonable jurors could
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1 conclude that intentionally abandoning such a critically important post could only be
2 done by someone who had the direct object of injuring the firefighters.

3 Courts have repeatedly recognized that a defendant's "mental state must necessarily be
4 ascertained by inference from all relevant surrounding circumstances." *In re William G.*, 192
5 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997). A person acts with intent to produce a certain
6 consequence if "the person acts knowing that the consequence is substantially certain to follow."
7 *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 1(b) (2010). Here, a
8 reasonable jury could find intent to injure.
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11 **(2)(c) Marcia McKee could not receive workers' compensation's benefits.**

12 Even if the purported IGA were valid—which it is not—when the State negligently killed
13 Grant McKee on June 30, 2013, Grant was 21 years old. Grant was an adult and not a dependent
14 of his mother, Marcia McKee. In turn, Marcia was an adult and was not Grant's dependent. That
15 matters because of A.R.S. § 23-1046(A)(4), which provides, in relevant part:
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- 18 A. In case of an injury causing death, the compensation therefor shall be known
19 as a death benefit and shall be payable in the amount, for the period, and to
20 and for the benefit of the following: . . .
- 21 4. *To a parent*, if there is no surviving husband, wife or child under the age of
22 eighteen years, *if wholly dependent for support upon the deceased*
23 *employee at the time of his death*, twenty-five per cent of the average
24 monthly wage of the deceased during dependency, with an added
25 allowance of fifteen per cent if two dependent parents survive, and, *if*
26 *neither parent is wholly dependent, but one or both partly dependent*,
27 fifteen per cent divided between them share and share alike.

28 Because Marcia McKee was neither partly nor wholly dependent on Grant, she never had
any entitlement to any workers' compensation benefits.

1 It is the right to elect to receive benefits that supports immunity. Thus, as far as Marcia is
2 concerned, giving immunity to the State is not simply unjust, it makes no sense. Neither Grant nor
3 Marcia McKee ever had any right to elect to direct or accept workers' compensation benefits for
4 Marcia. As a result of that inability to elect, there cannot be immunity.
5

6 **(2)(d) Marcia McKee did not waive her right to sue the State.**

7 Even if the purported IGA were valid—which it is not—the right to recover compensation
8 under the workers' compensation chapter must be read in the context of A.R.S. § 23-1024(A),
9 which provides for waiving the right to sue the employer. A.R.S. § 23-1024(A)'s waiver
10 provision states that: "An employee, or his legal representative in event death results, who accepts
11 compensation waives the right to exercise any option to institute proceedings in court against his
12 employer." Only one act will trigger waiver—"accepting compensation." *AAA Cab Service, Inc.*
13 *v. Industrial Commission*, 213 Ariz. 342, 343-44 ¶ 5, 141 P.3d 822, 823-24 ¶ 5 (App. 2006). And
14 the only entities capable of waiving are the employee *and* the employee's legal representative.
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18 Because "legal representative" is a term with a specific legal meaning, courts must apply
19 that legal meaning. *See* A.R.S. § 1-213. The specific legal meaning of "legal representative" is "a
20 personal representative or conservator." A.R.S. § 14-9101(8). But here, the "legal representative"
21 is not suing. Instead, a statutory survivor is suing. The statutory survivor is *not* bound by the
22 waiver provision of A.R.S. § 23-1024(A), which only binds the employee and the employee's
23 "legal representative." The statutory survivors may thus bring a wrongful-death action against the
24 State. That interpretation is consistent with several important, longstanding principles:
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- 27 • *First*, there "are two independent and separate rights of recovery, although
28 based on the same accident; the one of the workman during his lifetime, and

1 the other of his dependents after his death.” *Kay v. Hillside Mines*, 54 Ariz. 36,
2 43, 91 P.2d 867, 870 (1939).

- 3 • *Second*, a wrongful-death cause of action “is not one which ever belonged to
4 the decedent.” *Estate of Decamacho ex rel. Guthrie v. La Solana Care and*
5 *Rehab, Inc.*, 234 Ariz. 18, 24 ¶ 26, 316 P.3d 607, 613 ¶ 26 (App. 2014). After
6 all, the wrongful death act confers an original and distinct claim that “is not
7 derived from nor is it a continuation of claims which formerly existed in a
8 decedent.” *Huebner v. Deuchle*, 109 Ariz. 549, 550, 514 P.2d 470, 471 (1973).
- 9 • *Third*, courts must construe the “workers’ compensation law broadly so as to
10 effectuate its remedial purpose.” *Young v. Industrial Comm’n*, 204 Ariz. 267,
11 270 ¶ 14, 63 P.3d 298, 301 ¶ 14 (App. 2003).
- 12 • *Fourth*, when a statute’s words “are plain and unambiguous, courts will not go
13 outside the language itself for interpretation.” *Employment Sec. Comm’n of*
14 *Ariz. v. Fish*, 92 Ariz. 140, 142, 375 P.2d 20, 22 (1962).

15 Since Marcia McKee is neither an employee nor the legal representative of the employee,
16 she could not and has not waived her right to sue the State.

17 **3. The firefighter’s rule does not apply.**

18 The firefighter’s rule negates liability to a firefighter for one whose negligence causes or
19 contributes to causing the fire that in turn causes the firefighter’s injury or death. *Grable v.*
20 *Varela*, 115 Ariz. 222, 223, 564 P.2d 911, 912 (App. 1977). The rule’s policy justification is that
21 it would be too burdensome to charge those ““who carelessly cause or fail to prevent fires with
22 the injuries suffered by the expert retained with public funds to deal with those inevitable,
23 although negligently created, occurrences.”” *Read v. Keyfauver*, 233 Ariz. 32, 36 ¶ 9, 308 P.3d
24 1183, 1186 ¶ 9 (App. 2013) (quoting *Varela*, 115 Ariz. at 223, 564 P.2d at 912)). Although the
25 State ineptly tried to suppress the fire, negligently tried to protect Yarnell, and botched the
26 evacuation, the State did not cause, contribute to causing, or fail to prevent the Yarnell Hill Fire.
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1 Thus, the firefighter’s rule cannot apply.

2 **4. The facts and the law support Marcia McKee’s emotional-distress claims.**

3 A claim for emotional distress based on extreme and outrageous conduct does not require
4 bodily harm to the victim or the victim’s presence in any zone of danger. *Restatement (Third) of*
5 *Torts: Physical & Emotional Harm* § 46 (2012) provides that:

7 An actor who by extreme and outrageous conduct intentionally or recklessly
8 causes severe emotional harm to another is subject to liability for that emotional harm
9 and, if the emotional harm causes bodily harm, also for the bodily harm.

10 *Restatement (Second) of Torts* § 46(1) (1965) similarly provides that:

11 An actor who by extreme and outrageous conduct intentionally or recklessly
12 causes severe emotional harm to another is subject to liability for that emotional harm
13 and, if the emotional harm causes bodily harm, also for the bodily harm.

14 The Complaint alleged Forestry committed the tort of intentional infliction of emotional
15 distress against Marcia McKee because reasonable jurors could conclude that (1) its misconduct
16 was extreme and outrageous; (2) it recklessly disregarded the near certainty that emotional
17 distress to her would result from its misconduct; and (3) severe emotional distress resulted from
18 that misconduct. *Complaint* at ¶¶ 308, 311-12. Those elements match what a plaintiff must prove
19 to establish a claim for intentional infliction of emotional distress. “Intentional Torts 16,”
20 *Intentional Infliction of Emotional Distress (Elements of Claim)*, RAJI (5th ed. 2005).

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23 The State acted recklessly because it knew there was a risk of severe emotional harm to
24 Marcia McKee if it failed to protect her son—and failed to take any reasonable precautions to
25 eliminate or reduce that risk. The State did that although the burden to protect her son was slight
26 relative to the magnitude of the risk. *Complaint* at ¶ 309. Indeed, the Complaint also alleged that
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1 the State had *negligently* inflicted emotional distress because it had failed to protect and safeguard
2 Grant McKee from becoming hopelessly trapped in a box canyon and from suffering severe
3 emotional and physical pain and suffering before he died. *Complaint* at ¶¶ 310-13. The State's
4 negligence killed Grant McKee, giving Marcia McKee separate claims: (1) one for the wrongful
5 death of her beloved son and (2) another for her severe emotional distress.
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7 The State continued its extreme and outrageous conduct even after Grant McKee died, by
8 negligently, carelessly, and intentionally misrepresenting its conduct to avoid any blame for
9 causing Grant's death. *Complaint* at ¶ 314. The State's misrepresentations and cover-up about the
10 cause of his death violated the public trust and multiplied Marcia's "emotional devastation."
11 *Complaint* at ¶ 315. Marcia trusted the State with her son's life. *Complaint* at ¶ 316. The State's
12 betrayal of her trust, misrepresentations, and cover-up caused her to suffer severe emotional
13 distress and depression—when she was at her life's lowest point. *Complaint* at ¶¶ 316-17.
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16 A cover-up concerning how a loved one died is extreme and outrageous conduct that
17 would naturally inflict extreme emotional distress on a decedent's survivors. For instance, in
18 *Thomas v. Hospital Board of Directors of Lee County*, 42 So.3d 246 (Fla. App. 2010), a nurse and
19 a doctor tried to protect themselves from being sued by lying about the cause of their patient's
20 death. Based on that cover-up, the Florida Court of Appeals upheld a claim for severe emotional
21 distress, explaining that: "We believe that in a situation where a person's loved one has died, it
22 would be apparent to anyone that the person would be susceptible to emotional distress and,
23 therefore, that the action of providing false information concerning the loved one's cause of death
24 meets the standard for a claim of outrage (intentional infliction of emotional distress)." *Id.* at 256.
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1 Here, the State's outrageous, extreme conduct in misrepresenting and covering up its negligence
2 in causing Grant McKee's death is actionable because it has caused Marcia McKee to suffer
3 extreme emotional distress.

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5 **5. The Arizona State Forestry Division ("Forestry") is a jural entity subject to suit.**

6 Under the Arizona Tort Claims Act, any public entity served with a notice of claim can be
7 sued. A.R.S. § 12-820(7) defines "public "entity" as including "this state." A.R.S. § 12-820(8)
8 adds that "state" "means this state and any state agency, board, commission, or department."
9 Forestry is thus a "public entity." Under A.R.S. § 12-821.01(A), any person who has a claim
10 against a "public entity" may file a notice of claim with it.

11
12 Marcia McKee filed a notice of claim against Forestry. Once it was denied, Marcia had the
13 right to sue Forestry. *Owens v. City of Phoenix*, 180 Ariz. 402, 407 n. 6, 884 P.2d 1100, 1105 n. 6
14 (App. 1994). A.R.S. § 12-821 provides that: "All actions against any public entity . . . shall be
15 brought within one year after the cause of action accrues and not afterward." The word "actions"
16 must refer to civil court actions. *See, e.g.*, A.R.S. § 1-215(1) (defining "action").

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19 The term "any public entity" necessarily includes *all* public entities served with a notice of
20 claim, including those that might be considered non-jural entities outside the notice-of-claim
21 context. The Arizona Legislature has declared it is Arizona's public policy that "public entities
22 are liable for acts and omissions of employees in accordance with the statutes and common law of
23 this state. All of the provisions of this act should be construed with a view to carry out the above
24 legislative purpose." Ariz. Sess. Laws 1984, ch. 285, § 1. All "public entities" are liable and
25 suable for their wrongful acts and omissions. That includes Forestry.
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Conclusion

This Court should deny the motion to dismiss because:

- (1) The purported intergovernmental agreement (“IGA”) between the State and the City of Prescott is a nullity. Thus, the State was not Grant McKee’s employer—and A.R.S. § 23-1022(A)’s “exclusive remedy” clause gives it no immunity.
- (2) Even if the purported IGA were valid—which it is not:
 - (a) The State’s “willful misconduct” caused Grant McKee’s death.
 - (b) Whether the State committed “willful misconduct” is a fact question.
 - (c) Marcia McKee could not receive workers’ compensation benefits.
 - (d) Marcia McKee did not waive her right to sue the State.
- (3) The firefighter’s rule does not apply.
- (4) The facts and the law support Marcia McKee’s emotional-distress claims.
- (5) The Arizona State Forestry Division is a jural entity subject to suit.

List of Attached Exhibits

Exhibit	Description
1	City of Prescott, “Resolution No. 2952” to purported intergovernmental agreement between the State and the City of Prescott.
2	Arizona DOSH, Citation and Notification of Penalty

DATED this 29th day of September, 2014.

KNAPP & ROBERTS, P.C.

/s/ David L. Abney, Esq.
David L. Abney
Attorneys for Plaintiffs

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Certificate of Service

The undersigned legal counsel certifies that, on this same date, he electronically filed this document and caused copies of it to be sent by first-class mail to the following:

- Hon. J. Richard Gama, **MARICOPA COUNTY SUPERIOR COURT**, 201 W. Jefferson St., Room 701, Phoenix, AZ 85003-2205, (602) 506-1245; Fax: (602) 506-0431.
- Thomas C. Horne, Esq. and Brock Heathcotte, Esq., **OFFICE OF THE ARIZONA ATTORNEY GENERAL**, 1275 W. Washington St., Phoenix, AZ 85007-2926, (602) 542-7664, Fax: (602) 542-3393, DefensePhx@azag.gov, Brock.Heathcotte@azag.gov, Attorneys for Defendants.
- Michael L. Parrish, Esq., **STINSON LEONARD STREET LLP**, 1850 N. Central Ave., Ste. 2100, Phoenix, AZ 85004-4584, (602) 279-1600, Fax: (602) 240-6925, Attorneys for Defendants.

/s/ David L. Abney, Esq.
David L. Abney

Exhibit 1

Exhibit 1

Exhibit 1

RESOLUTION NO. 2952

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT, YAVAPAI COUNTY, ARIZONA, AUTHORIZING THE CITY OF PRESCOTT TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE ARIZONA STATE LAND DEPARTMENT - FIRE MANAGEMENT DIVISION FOR A COOPERATIVE AGREEMENT FOR FIRES ON FOREST, WILD AND AGRICULTURAL LANDS, AND AUTHORIZING THE MAYOR AND STAFF TO TAKE ANY AND ALL STEPS NECESSARY TO ACCOMPLISH THE ABOVE.

WHEREAS, the parties hereto are empowered to enter into cooperative intergovernmental agreements pursuant to ARS Section 37-623(E) for the prevention and suppression of wildfires on forest, wild and agricultural lands; and

WHEREAS, the City of Prescott operates a fire department within the corporate limits of the City of Prescott, and in close proximity to forest, wild and agricultural lands; and

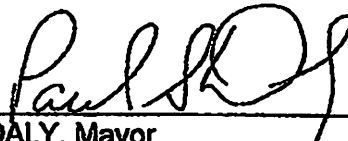
WHEREAS, it would be to the benefit of the citizens of Prescott and the citizens of the community for the City of Prescott to enter into a cooperative intergovernmental agreement for the prevention and suppression of wildfires on forest, wild and agricultural lands with the State Forester.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF PRESCOTT AS FOLLOWS:

SECTION 1. THAT, the City of Prescott hereby approves the Intergovernmental Agreement with the Arizona State Land Department - Fire Management Division for the prevention and suppression of wildfires on forest, wild and agricultural lands, attached hereto as Exhibit "A".

SECTION 2. THAT, the Mayor and Staff are hereby authorized to execute the attached Intergovernmental Agreement and to take any and all steps deemed necessary to accomplish the above.

PASSED, APPROVED AND ADOPTED by the Mayor and Council of the City of Prescott, Arizona, this 11th day of MARCH, 1997.



PAUL S. DALY, Mayor

ATTEST:


JUDY CARSON, Acting City Clerk

APPROVED AS TO FORM:


JOHN R. MOFFITT, City Attorney

Exhibit 2

Exhibit 2

Exhibit 2



INDUSTRIAL COMMISSION OF ARIZONA

Division of Occupational Safety and Health
P.O. BOX 19070
PHOENIX, AZ 85005
Phone: (602)542-5795 FAX: (602)542-1614
Tucson Office Phone: (520) 628-5478 FAX: (520)322-8008

Citation and Notification of Penalty

To:

Arizona State Forestry Division
State of Arizona
1110 W Washington St, Ste 100
Phoenix, AZ 85007

Inspection Number: L3419 - 317242683

Inspection Date(s): 07/01/2013 -12/03/2013
Issuance Date: 12/05/2013

Inspection Site:

Weaver Mountains/Yarnell Hill Fire
Yarnell, AZ 85362

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

An inspection of your workplace was recently conducted in accordance with the Arizona Occupational Safety and Health Act (Title 23, Chapter 2, Article 10). The inspection revealed conditions which we believe to be in violation of the Act. The nature of the alleged violation(s) is described in the enclosed Citation(s) with reference to applicable standards, rules and provisions of said Act. Furthermore, you are hereby notified, or will soon be notified, whether or not penalties will be assessed as a result of the cited violation(s). You must abate the violations referred to in this Citation by the dates listed and pay the penalties, unless within fifteen (15) working days (excluding weekends and legal holidays) from your receipt of this Citation and Notification of Penalty you notify, *in writing*, the Division of Occupational Safety and Health, at the address shown above, of your intent to contest.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of your operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and legal holidays), whichever is longer. **YOU MUST COMPLY WITH THESE POSTING REQUIREMENTS EVEN IF YOU CONTEST THE CITATION.** The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.

Notification of Corrective Action: - You must certify in writing to the Division that each cited violation has been corrected, in accordance with A.A.C.R20-5-627. This certification must be received within 10 calendar days following the abatement date, for those items which you do not contest. For those items contested, the certification is due immediately following any final order upholding the citation(s). The certification must contain

the following: 1) the employer's name and address; 2) the inspection number; 3) the completion date and method of abatement for each violation; 4) a statement that the information is accurate and, 5) a statement that all affected employees and their representatives have been informed of the completed abatement. This certification is required for all citations - including those classified as non-serious - except those citations marked as "abated on site." (See note below). The *Abatement Certification Form* accompanying this notice may be used to assist with this requirement. In addition to this certification, for those items classified as **serious, willful or repeat**, documentation (photos, copies of receipts, training records, etc.) demonstrating that abatement is complete must accompany the certification. For those violations having an abatement date of more than ninety days, abatement plans and progress reports must be submitted to the Division if so indicated on the violation.

Note: Abatement certification and documentation are not required for those violations the inspector observed you or your representative correct during the inspection and which are marked as "Abated on site" within this citation.

A follow-up inspection may be made for the purpose of ascertaining that you have posted the citation(s) as required by the Act and corrected the alleged violations. **Failure to correct an alleged violation within the abatement period may result in further penalties of up to \$7000 for each day each alleged violation has not been corrected. Timely correction of an alleged violation does not affect the initial penalty.**

Note: The Act provides that anyone who knowingly gives false information is guilty of a class 2 misdemeanor.

Informal Conference - Before deciding whether to file a "Notice of Contest", you may request an informal conference with the section supervisor to discuss the Citation and Notification of Penalty. You may use this opportunity to:

- Obtain a better explanation of the violations cited;
- Obtain a more complete understanding of the specific standards that apply;
- Discuss ways to correct the violations;
- Discuss problems with the abatement dates;
- Discuss problems concerning employee safety practices;
- Resolve disputed citation(s) and penalties;
- Present any evidence or views that you believe would support an adjustment to the citations and/or penalties;
- Negotiate and enter into an Informal Settlement Agreement; and
- Obtain answers to any other questions you might have.

An informal conference is not required. However, you are encouraged to take advantage of the opportunity to have a conference if you foresee any difficulties in complying with any part of the citation. If an informal conference is held, be sure to bring with you any and all supporting documentation of existing conditions, as well as any abatement steps taken thus far. If conditions warrant, we can enter into an Informal Settlement Agreement which amicably resolves this matter without litigation or formal contest.

If you are considering a request for an informal conference, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. For this reason, an informal conference should be held within the 15 working day contest period (see following section). **The running of this contest period is not interrupted by an informal conference.**

Right to Contest - You have the right to contest this Citation and Notification of Penalty pursuant to A.R.S. Section 23-417. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. To contest, you must notify the Director, in writing, within 15 working days after receipt of the Citation and Notification of Penalty. **Unless you inform the Director in writing that you intend to contest the citation(s) and/or penalty(ies) within the 15 working day period**

provided by law, the citation(s) and the penalty(ies) shall be deemed a final order of the Commission and not subject to review by any court or agency.

Note: "Notify[ing] the Director" means that ADOSH must receive your written notice of contest prior to the close of business on the 15th working day following receipt of the citations.

If you contest the citation(s), the abatement period specified therein does not begin to run until the date of the Commission's final order in the case provided you have initiated this contest in good faith and not solely for delay or avoidance of penalties.

Penalty Payment - Penalties are due within 15 working days of receipt of this notification unless contested. Please make your check or money order payable to "Industrial Commission of Arizona" and indicate on your remittance the Inspection Number found on Page 1 of this notification. ADOSH does not agree to any restrictions, conditions or endorsements put on any check or money order and will cash the check or money order as if these restrictions, conditions or endorsements do not exist.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 calendar days after the discrimination occurred with the Division of Occupational Safety and Health at the address shown above.

Notice to Employees - The law gives you or your representative the opportunity to object to any abatement date set for a violation if you believe the date to be unreasonable. The contest must be mailed to the Division Director, P. O. Box 19070, Phoenix, Arizona, 85005-9070 within the abatement period allowed in the citation or within 15 working days from the date of receipt of the citation, whichever is shorter.

Additional Information - You should be aware that Federal OSHA publishes information on ADOSH's inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to your inspection will be available 30 calendar days after the Citation Issuance Date. You are encouraged to review the information concerning your establishment at www.osha.gov. If you have any dispute with the accuracy of the information displayed, please contact this office.

ABATEMENT CERTIFICATION

A.A.C. R20-5-627 requires employers to certify to ADOSH, in writing, the abatement of all cited conditions, with the exception of those conditions observed abated by the compliance officer during the course of the inspection. This form is provided to assist you in complying with the abatement certification requirements. Note: For violations classified as willful, repeat or serious, abatement documentation (i.e. photographs, invoices, training records, etc.) must also accompany this certification form.

Arizona State Forestry Division
State of Arizona
1110 W Washington St, Ste 100
Phoenix, AZ 85007

The hazard referenced in Inspection Number _____ for the violation identified as Citation _____ and Item _____ was corrected on _____ by _____
(Specify Action Taken) _____

The hazard referenced in Inspection Number _____ for the violation identified as Citation _____ and Item _____ was corrected on _____ by _____
(Specify Action Taken) _____

The hazard referenced in Inspection Number _____ for the violation identified as Citation _____ and Item _____ was corrected on _____ by _____
(Specify Action Taken) _____

The hazard referenced in Inspection Number _____ for the violation identified as Citation _____ and Item _____ was corrected on _____ by _____
(Specify Action Taken) _____

The hazard referenced in Inspection Number _____ for the violation identified as Citation _____ and Item _____ was corrected on _____ by _____
(Specify Action Taken) _____

I attest that the information contained in this document is accurate and that the affected employees and their representatives have been informed of the abatement activities described in this certification.

Signature

Typed or Printed Name



Citation and Notification of Penalty

Company Name: Arizona State Forestry Division, State of Arizona
Inspection Site: Weaver Mountains/Yarnell Hill Fire, Yarnell, AZ 85362

Citation 1 Item 1 Type of Violation: **Willful Serious**

A.R.S. Section 23-403(A): The employer did not furnish to each of his employees employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to their employees, in that the employer implemented suppression strategies that prioritized protection of non-defensible structures and pastureland over firefighter safety, and failed to prioritize strategies consistent with Arizona State Forestry Division - Standard Operational Guideline 701 Fire Suppression and Prescribed Fire Policy (2008). When the employer knew that suppression of extremely active chaparral fuels was ineffective and that wind would push active fire towards non-defensible structures, firefighters working downwind were not promptly removed from exposure to smoke inhalation, burns, and death:

- a) Yarnell Hill Fire, Yarnell, Arizona: On June 30, 2013, between 1230 and 1430, and after the general public had been evacuated, thirty-one members of Structure Protection Group 2, charged with protecting non-defensible structures in the vicinity of the Double Bar A Ranch, were exposed to smoke inhalation, burns, and death by wind driven wildland fire.
- b) Yarnell Hill Fire, Yarnell, Arizona: On June 30, 2013, from and after 1530, one member of the Granite Mountain Interagency Hotshot Crew that continued to serve as a lookout was exposed to smoke inhalation, burns, and death by a rapidly progressing wind driven wildland fire.
- c) Yarnell Hill Fire, Yarnell, Arizona: On June 30, 2013, from and after 1530, approximately thirty firefighters continued indirect attack activities in Division Z (Zulu) and were exposed to smoke inhalation, burns, and death by a rapidly progressing wind driven wildland fire.
- d) Yarnell Hill Fire, Yarnell, Arizona: On June 30, 2013, from and after 1530, 19 members of the Granite Mountain Interagency Hotshot Crew continued in suppression activities, until 1642 when they were entrapped by a rapidly progressing wind driven wildland fire.

Date By Which Violation Must be Abated:	12/11/2013
Assessed Penalty:	\$ 70000.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.



Citation and Notification of Penalty

Company Name: Arizona State Forestry Division, State of Arizona
Inspection Site: Weaver Mountains/Yarnell Hill Fire, Yarnell, AZ 85362

A.R.S. Section 23-418.01: An additional penalty of \$25,000 is assessed under A.R.S. section 23-418.01 for each employee that died, which shall be paid by ASFD to the following employees' dependents or the employee's estate if the employee did not have any dependents: Andrew Ashcraft, Robert Caldwell, Travis Carter, Dustin DeFord, Christopher MacKenzie, Eric Marsh, Grant McKee, Sean Misner, Scott Norris, Wade Parker, John Percin, Jr., Anthony Rose, Jesse Steed, Joe Thurston, Travis Turbyfill, William Warneke, Clayton Whitted, Kevin Woyjeck, and Garret Zuppiger. In assessing this penalty, the Commission finds that the following statutory elements of A.R.S. section 23-418.01 are met:

1. Each employee sustained death caused by the violation cited in Citation 1, Item 1 and the Commission assessed a penalty to the Arizona State Forestry Division under section 23-418, subsection A, for that violation;
2. Compensation benefits are paid under chapter six of Title 23 to the employee's dependents, or, if no dependents, would have otherwise been paid under chapter six of Title 23; and
3. The violation for which the Arizona State Forestry Division is assessed a penalty under section 23-418, subsection A, did not result from the deceased employees' disobedience to specific instructions given to the employees regarding the job condition causing the employees' death or relating to the safety standards applicable to that job condition.

The additional penalty provided by this section is not a compensation benefit under Chapter six of Title 23.

Date By Which Violation Must be Abated:	12/11/2013
Assessed Penalty:	\$ 475000.00



Citation and Notification of Penalty

Company Name: Arizona State Forestry Division, State of Arizona
Inspection Site: Weaver Mountains/Yarnell Hill Fire, Yarnell, AZ 85362

Citation 2 Item 1 Type of Violation: **Serious**

A.R.S. Section 23-403(A): The employer did not furnish to each of his employees employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to their employees, in that the employer failed to implement fire suppression plans consistent with A.R.S. Section 37-623 Suppression of wildfires and Arizona State Forestry Division - Standard Operational Guideline 701 Fire Suppression and Prescribed Fire Policy (2008) in a timely fashion during the life-threatening transition between initial attack and extended attack fire operations thereby reducing the risk of firefighter exposure to smoke inhalation, burns, and death:

- a) Yarnell Hill Fire, Yarnell, Arizona: On June 29, 2013, when the fire escaped initial attack, an incident complexity analysis was not conducted and reviewed by fire management to ensure that wildfires increasing in complexity are quickly identified and a safe transition occurs to the appropriate level incident response.
- b) Yarnell Hill Fire, Yarnell, Arizona: On June 29, 2013, when the fire escaped initial attack, an Escaped Fire Situational Analysis (EFSA) or similar Wildland Fire Situation Analysis (WFSA), Wildland Fire Decision Support System (WFDSS), or Operational Needs Assessment was not conducted by fire management to ensure a safe transition to extended attack.
- c) Yarnell Hill Fire, Yarnell, Arizona: On June 29, 2013, after the fire escaped initial attack and prior to transitioning to a more complex management team, an Incident Action Plan (IAP) containing objectives reflecting the overall incident strategy, specific tactical actions, and supporting information for the next operational period was not conducted by fire management to ensure a safe transition to extended attack.

Date By Which Violation Must be Abated:	12/11/2013
Assessed Penalty:	\$ 7000.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.



Citation and Notification of Penalty

Company Name: Arizona State Forestry Division, State of Arizona
Inspection Site: Weaver Mountains/Yarnell Hill Fire, Yarnell, AZ 85362

Citation 2 Item 2 Type of Violation: **Serious**

A.R.S. Section 23-403(A): The employer did not furnish to each of his employees employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to their employees, in that pursuant to Arizona State Fire Division Standard Operating Guideline SOG-701, transition from initial attack to an extended attack operations is extremely dangerous and critical incident management personnel necessary to support the planning and implementation of fire suppression operations arrived late or were absent from their assigned positions during the life-threatening transition thereby increasing the risk of firefighter exposure to smoke inhalation, burns, and death:

- a) Yarnell Hill Fire, Yarnell, Arizona: On or about June 30, 2013, fire management positions of Safety Officer and Planning Section Chief were unfilled and therefore unable to participate during critical fire suppression planning, transition planning, and oversight of ongoing wildfire suppression operations.
- b) Yarnell Hill Fire, Yarnell, Arizona: On June 30, 2013, at approximately 1330, Division Z Supervisor departed from his assigned position which left Division Z without supervision during ongoing wildfire suppression operations.

Date By Which Violation Must be Abated:	12/11/2013
Assessed Penalty:	\$ 7000.00

Bice Warren

Director