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SCANNED  
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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF MARICOPA**

14 MARCIA McKEE, surviving mother of  
15 GRANT QUINN McKEE, deceased,

16 Plaintiff,

17 v.

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

21 Defendants.

Case No: CV2014-009070

**MOTION TO DISMISS**

(Assigned to the Honorable  
J. Richard Gama)

22 Defendants State of Arizona and non-jural entity Arizona State Forestry Division  
23 move to dismiss the Complaint with prejudice pursuant to Rules 12(b)(1) and 12(b)(6).  
24 The wrongful-death claim should be dismissed because the State was the decedent's  
25 employer, so workers' compensation is the exclusive remedy against the State. The  
26 wrongful-death claim is also barred by the firefighter's rule. The Complaint also fails to  
27 state a claim for infliction of emotional distress. Alternatively, the Complaint fails to  
28 state a claim against the Arizona State Forestry Division because it is not a jural entity.

This Motion is supported by the following Memorandum of Points and  
Authorities, the attached Affidavit of Scott Hunt, and Exhibit 1 attached to the Hunt  
Affidavit.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This action arises out of the death of Grant McKee, a firefighter who died while fighting the Yarnell Hill Fire. Plaintiff was McKee's mother. Plaintiff asserts claims for wrongful-death and emotional distress.

The wrongful-death claim should be dismissed for multiple reasons. First, McKee and the other members of the Granite Mountain Interagency Hotshot Crew were employees of the Prescott Fire Department. Pursuant to an intergovernmental agreement between the Prescott Fire Department and the Arizona State Land Department – Fire Management Division, the State was McKee's employer for purposes of A.R.S. § 23-1022, which makes workers' compensation the exclusive remedy against the State to recover compensation resulting from his death. And none of the exceptions to that exclusivity are present here.

Second, the wrongful-death claim is barred by the firefighter's rule. That rule protects a party whose negligence causes or contributes to a fire, which in turn causes the death or injury to a public firefighter, from liability to the firefighter or his decedent.

The Complaint also fails to state a claim for infliction of emotional distress. The State's alleged conduct does not qualify as extreme and outrageous conduct required for such a claim. Plaintiff was not physically present at the time of the alleged conduct. And the State did not have the intent required for the infliction-of-emotional-distress claim.

### II. SUMMARY OF THE COMPLAINT'S ALLEGATIONS

From June 28 until July 1, 2013, the Arizona State Forestry Division was in charge of the effort to fight the Yarnell Hill Fire. (Compl. ¶¶ 1, 51.) Grant McKee and 18 other firefighters who were members of the Granite Mountain Interagency Hotshot Crew died while fighting the fire on June 30. (*Id.* ¶¶ 3, 27.) Plaintiff alleges the deaths were a consequence of the State's negligence. (*Id.* ¶ 28)

1 At the time of their deaths, McKee and the other members of the Prescott Fire  
2 Department's Granite Mountain Interagency Hotshot Crew were working under the  
3 jurisdiction and control of the State, and within its jurisdictional boundaries, pursuant to  
4 an intergovernmental agreement between the Prescott Fire Department and the State. (*Id.*  
5 ¶¶ 11-27; Affidavit of Scott Hunt, ¶¶ 3-6). In that agreement, the Prescott Fire  
6 Department agreed to make manpower available to suppress fires at the State Forester's  
7 request and to accept direction and supervision by the State Forester and his  
8 representatives. (Affidavit of Scott Hunt, Exhibit 1, pp. 2-3, ¶¶ 10, 11, 13). In return, the  
9 State agreed to reimburse the Prescott Fire Department for the manpower it provided.  
10 (*Id.*, p. 2, ¶ 5).

### 11 **III. STANDARD OF REVIEW**

12 When deciding a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the  
13 pleading itself and consider the well-pled factual allegations contained therein. *Cullen v.*  
14 *Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Courts assume the  
15 truth of the well-pled factual allegations and indulge all reasonable inferences from such  
16 allegations. *Id.* Mere conclusory statements are insufficient to support a claim. *Id.* To  
17 the extent the Court treats the Motion as one for summary judgment, it should grant  
18 summary judgment as there is no genuine dispute as to any material fact and the State is  
19 entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a).

### 20 **IV. THE WRONGFUL DEATH CLAIM SHOULD BE DISMISSED**

#### 21 **A. Workers' Compensation Is the Exclusive Remedy Against the** 22 **State.**

23 Subject to limited exceptions, workers' compensation is the exclusive remedy  
24 against an employer for its employee's work-related injury or death. *See* A.R.S. § 23-  
25 1022(A) (providing that, subject to specified exceptions, the right to receive workers'  
26 compensation benefits "for injuries sustained by an employee or for the death of an  
27 employee is the exclusive remedy against the employer or any co-employee acting in the  
28 scope of employment"). Thus, unless one of the limited exceptions applies, the superior

1 court lacks subject matter jurisdiction over an action against an employer for work-  
2 related injury suffered by its employee or for the wrongful death of its employee who  
3 died from a work-related injury. *See Mitchell v. Gamble*, 207 Ariz. 364, 367, 86 P.3d  
4 944, 947 (App. 2004) (where § 23-1022(A)'s exclusivity provision applies, the trial court  
5 lacks subject matter jurisdiction and the case should be dismissed.). Where a defendant  
6 files a motion to dismiss accompanied by supporting exhibits on the grounds that the  
7 exclusive remedy was workers' compensation, the plaintiff has the burden to show that  
8 the court has subject matter jurisdiction. *Ringling Bros. & Barnum & Bailey Combined*  
9 *Shows, Inc. v. Superior Court In & For Pima Cnty.*, 140 Ariz. 38, 42, 680 P.2d 174, 178  
10 (Ct. App. 1983).

11 **1. McKee Was an Employee of the State for the Purposes of**  
12 **Workers' Compensation.**

13 Section 23-1022 further provides that an employee of a public agency shall be  
14 deemed an employee of more than one public agency under the following circumstances:

15 An employee of a public agency, as defined in § 11-951, who works under  
16 the jurisdiction or control of, or within the jurisdictional boundaries of  
17 another public agency pursuant to a specific intergovernmental agreement  
18 or contract entered into between the public agencies as provided in § 11-  
19 952 is deemed to be an employee of both public agencies for the purposes  
20 of this section. The primary employer shall be solely liable for the payment  
21 of workers' compensation benefits for the purposes of this section.

22 A.R.S. § 23-1022(D).

23 This language is unambiguous. *Callan v. Bernini*, 213 Ariz. 257, 260, 141 P.3d  
24 737, 740 (App. 2006). Where two public agencies enter into an intergovernmental  
25 agreement, and the employee of one agency "works under the jurisdiction or control of,  
26 or within the jurisdictional boundaries of [the other] public agency," the employee "is  
27 expressly deemed to be an employee of both agencies—the employer and the public  
28 agency under or within whose jurisdiction the employee work[ed]." *Id.* The effect of  
this language is that where "an employee of a party to an IGA" is injured or dies, no  
common law or wrongful-death action may be brought against "another party to the IGA

1 under or within whose jurisdiction the employee was working” at the time of the injury  
2 or death. *Id.*

3 Decedent McKee was an employee of the City of Prescott Fire Department, which  
4 is a public agency. *See* A.R.S. § 11-951 (defining a “public agency” to include “this  
5 state, all other states, all departments, agencies, boards and commissions of this state or  
6 any other state, counties, school districts, fire districts, cities, towns, all municipal  
7 corporations, and any other political subdivision of this state”). As provided in A.R.S.  
8 § 11-952, the Prescott Fire Department entered into an intergovernmental agreement  
9 with the Arizona State Land Department – Fire Management Division. (Affidavit of  
10 Scott Hunt, Exhibit 1).<sup>1</sup>

11 As set forth in that IGA, the Prescott Fire Department agreed, among other things,  
12 “to respond and engage in fire suppression activities upon lands under the jurisdiction of  
13 the State Forester located outside the [Prescott Fire Department’s] boundary or service  
14 area as set forth in the attached Appendix A at such time and with equipment and  
15 manpower available as requested by the State Forester.” (*Id.*, p. 2, ¶ 10). The Prescott  
16 Fire Department also agreed to “make available for use at the request of the State  
17 Forester manpower and equipment.” (*Id.*, p. 3, ¶ 11). And it agreed to “accept direction  
18 and supervision by the State Forester or his duly authorized representatives while  
19 engaged in suppression activities at the State Forester’s request.” (*Id.*, p. 3, ¶ 13).

20 In return, the State Forester agreed, among other things, to pay the City of  
21 Prescott Fire Department for the manpower it provided. (*Id.*, p. 2, ¶ 5). At the time of  
22 decedent McKee’s death, he was working under the State’s jurisdiction or control, and  
23 within its jurisdictional boundaries, pursuant to the IGA. (Affidavit of Scott Hunt, ¶ 6).  
24 Thus, McKee was an employee of the State for purposes of the exclusivity of the  
25 workers’ compensation remedy.

26  
27  
28 <sup>1</sup> Since entering into the IGA, the Fire Management Division became known as the  
Arizona State Forestry Division. (Hunt Affidavit, ¶ 4.)

1                   **2.     McKee Did Not Opt Out of Workers' Compensation**  
2                   **Benefits.**

3           An employee may "opt out" of workers' compensation coverage. *See* A.R.S. §  
4   23-906(A). But such "opt out" must precede the employee's injury. *See* A.R.S. § 23-  
5   906(C). The Complaint does not allege that McKee opted out of workers' compensation  
6   coverage. And Plaintiff herself has no right to "opt out" of workers' compensation  
7   benefits for McKee's death. *Galloway v. Vanderpool*, 205 Ariz. 252, 253-54, 69 P.3d  
8   23, 24-25 (2003) (holding that the statutory right to opt out of workers' compensation is  
9   personal to the employee and does not pass to his survivors).

10                   **3.     The State's Alleged Acts and Omissions Do Not**  
11                   **Constitute "Wilful Misconduct" Under § 23-1022.**

12           The other exception to the exclusivity of the workers' compensation remedy is  
13   where the employee's injury or death "is caused by the employer's wilful misconduct."  
14   *See* A.R.S. 23-1022(A) (providing that "if the injury is caused by the employer's wilful  
15   misconduct . . . , the injured employee may either claim [workers'] compensation or  
16   maintain an action at law for damages against the [employer] alleged to have been  
17   engaged in the wilful misconduct").

18           "Wilful misconduct" as used in [§ 23-1022] means an act done knowingly and  
19   purposely *with the direct object of injuring another.*" A.R.S. 23-1022(B) (emphasis  
20   added). "[G]ross negligence or wantonness" does not satisfy this definition. *Diaz v.*  
21   *Magna Copper Co.*, 190 Ariz. 544, 551, 950 P.2d 1165, 1172 (App. 1997). The  
22   employer's conduct "must be accompanied by the *intent to inflict injury*" on the  
23   employee. *Id.* (emphasis added) (holding that employer's acts did not constitute wilful  
24   misconduct under § 23-1022, even though the employer ignored safety hazards and  
25   delayed the access of paramedics to the employee, because there was no evidence that  
26   the employer's objective was to injure the employee). *See also Johnson v. Kerr-McGee*  
27   *Oil Industries, Inc.*, 129, Ariz. 393, 398, 631 P.2d 548, 553 (App. 1981) (holding that  
28   intentional failure to warn did not amount to an "actual intent to injure" the employee);  
   *Serna v. Statewide Contractors, Inc.*, 6 Ariz. App 12, 16, 429 P.2d 504, 508 (1967)

1 (holding that employer's refusal to comply with safety recommendations, despite  
2 repeated warnings by state safety inspectors, does not satisfy the requirement that the  
3 employer acted "knowingly and purposely with the direct object of injuring another").

4 Because the statutory definition of "wilful misconduct" requires that the "direct  
5 object" of the employer's actions must have been to "injur[e] another," A.R.S. § 23-  
6 1022(B), it generally:

7 cannot ... be stretched to include accidental injuries caused by the gross,  
8 wanton, wilful, deliberate, intentional, reckless, culpable, or malicious  
9 negligence, breach of statute, or other misconduct of the employer short of  
a conscious and deliberate intent directed to the purpose of inflicting an  
injury.

10 Even if the alleged conduct goes beyond aggravated negligence, and  
11 includes such elements as knowingly permitting a hazardous work  
12 condition to exist, knowingly ordering employees to perform an extremely  
13 dangerous job, wilfully failing to furnish a safe place to work, wilfully  
14 violating a safety statute, ... or withholding information about worksite  
hazards, the conduct still falls short of the kind of actual intention to injure  
that robs the injury of accidental character.

15 *Gamez v. Brush Wellman, Inc.*, 201 Ariz. 266, 269, 34 P.3d 375, 378 (App. 2001)  
16 (quoting 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*  
17 (hereafter "*Larson's Workers' Compensation Laws*" § 103.03 at 103-07) (2001)  
18 (footnotes omitted)) (alteration in *Gamez*).

19 The Complaint's well-pled factual allegations do not support any reasonable  
20 inference that the State *intended* to inflict injury upon decedent McKee. To the contrary,  
21 the Complaint repeatedly alleges that the State acted *negligently*:

- 22 • "Because of the [State's] *negligence*, 19 firefighters  
23 died preventable deaths";
- 24 • "The [State] committed extreme *negligence* by  
25 entrusting management" of the Fire to an "exhausted,  
26 negligent, situationally unaware, inadequately  
27 experienced, and overwhelmed" Type 4 Incident  
Commander;
- 28 • "The [State] committed extreme *negligence* by  
keeping" that incident commander on the job on June

29 and 30, “when it was clear that he was exhausted, [and] was not thinking clearly”;

- “The [State] *negligently* failed to use [the] space, time, and opportunity to create any effective firebreaks, cleared areas, burnouts, or other protections”;
- “The [State] *negligently* took no effective steps to reduce that risk or the risks posed to the firefighters”;
- The State “*negligently* failed to exploit” the change in wind direction;
- “[T]wo *negligent* aerial drops . . . disrupted and nullified the burnout operations that would have helped protect the firefighters”; and
- “The [State] *negligently* and proximately caused the death of Grant McKee and other firefighters.”

(Compl. ¶¶ 2, 61-62, 92, 94, 132, 149, 247).

Finally, the Complaint’s allegations—that the Industrial Commission of Arizona (i) determined that the State knew that suppression was ineffective and that the State failed to “promptly remove[ ]” the firefighters “from exposure to” injury and death, and (ii) charged that such conduct was “willful” (*id.* ¶¶ 235, 236)—does not supply the necessary intent. In the context of the Industrial Commission’s charges, a “willful” violation is one involving “voluntary action by an employer done either with an ‘intentional disregard’ or ‘plain indifference’ to the governing safety regulation.” *Division of Occupational Safety and Health of Indus. Comm’n of Arizona v. Ball, Ball and Brosamer, Inc.*, 172 Ariz. 372, 375, 837 P.2d 174, 177 (App. 1992).

But as explained above, anything “short of a conscious and deliberate intent directed to the purpose of inflicting an injury” does not satisfy the intent requirement to avoid the exclusivity of the workers’ compensation remedy. *Gamez*, 201 Ariz. at 269, 34 P.3d at 378 (quoting *Larson’s Workers’ Compensation Laws* § 103.03 at 103-07). Thus, “knowingly permitting a hazardous work condition to exist,” or “wilfully violating a



1 safety statute” does not satisfy the intent requirement of “wilful misconduct” as defined  
2 in § 23-1022(B). *Id.* The Industrial Commission’s (unadjudicated) assertion that the  
3 State’s failure to promptly remove the firefighters from exposure to harm was “willful”  
4 and serious therefore does not support in any way a reasonable inference that the State  
5 acted “knowingly and purposely with the direct object of injuring another.” A.R.S. § 23-  
6 1022(B).

7 **B. The Firefighter’s Rule Bars the Wrongful-Death Claim.**

8 Arizona has adopted the firefighter’s rule. *See Espinoza v. Schulenburg*, 212  
9 Ariz. 215, 218, 129 P.3d 937, 940 (2006); *Grable v. Varela*, 115 Ariz. 222, 223, 564  
10 P.2d 911, 912 (App. 1977). This rule “negates liability to a fire[fighter] by one whose  
11 negligence causes *or contributes to the fire* which in turn causes the death or injury to the  
12 fire[fighter].” *Grable*, 115 Ariz. at 223, 564 P.2d at 912 (emphasis added). It only  
13 applies when the firefighter’s presence at the scene “results from the firefighter’s on-duty  
14 obligations as a firefighter.” *Espinoza*, 212 Ariz. at 218, 129 P.3d at 940.

15 At the time of his death on June 30, decedent McKee was on the scene of the  
16 Yarnell Hill Fire because of his on-duty obligations as a firefighter. (Compl. ¶¶ 12, 21,  
17 26.) He died on June 30 fighting the Fire. (*Id.* ¶¶ 3, 26.) And according to the  
18 Complaint, the State was negligent and its negligence contributed to the Fire. The  
19 allegations that the State’s alleged negligence contributed to the Fire, which caused  
20 McKee’s death include:

- 21 • “On June 30, 2013, when the Yarnell Hill Fire was  
22 small, the [State] negligently took no measures to  
23 contain or suppress it”;
- 24 • “The [State] therefore negligently just let the Yarnell  
25 Hill Fire burn and grow unchecked in a dry windy,  
26 fuel-filled area with an exceptionally high fire-spread  
27 potential”;
- 28 • “On June 29, 2013, the [State] again failed to use its  
ground and aerial resources to contain and suppress  
the Yarnell Hill Fire, failed to summon additional  
resources, and actually sent away key ground and  
aerial resources under the unfounded belief that the

Yarnell Hill Fire was dying out”;

- “Between 5:30 p.m. and 7:24 p.m. on June 29, 2013, the fire behavior and complexity of the Yarnell Hill Fire continued to escalate”;
- “In that same period, [the State] requested the dispatch of three hotshot crews,” including “the Granite Mountain Interagency Hotshot Crew”;
- The “Granite Mountain Interagency Hotshot Crew” later “arrived on scene to help control the Yarnell Hill Fire”;
- “[T]he Yarnell Hill Fire continued to expand” on June 30;
- In the late afternoon of June 30, the Yarnell Hill Fire “overwhelmed” the area where McKee and the other Granite Mountain Interagency Hotshot Crew members were, causing their deaths.

(Compl. ¶¶ 6, 7, 54, 83, 88, 184, 229.)

Because the State’s allegedly negligent failure to suppress the Fire on June 28 and 29 allegedly contributed to the spread of the Fire, which in turn resulted in McKee’s presence at the scene when he died on June 30, the firefighter’s rule bars the wrongful-death claim.

#### **V. THE INFLICTION-OF-EMOTIONAL-DISTRESS CLAIM SHOULD BE DISMISSED**

The Complaint asserts a separate claim for infliction of emotional distress. *See* Compl. Count II, ¶¶ 304-317. Specifically, it asserts that the State “committed the tort of intentional infliction of emotional distress.” (*Id.* ¶ 308.)

The Complaint appears to allege two forms of conduct by the State as the basis for the intentional-infliction-of-emotional-distress claim. One is the State’s alleged conduct in “mishandling” the Yarnell Hill Fire and thereby “failing to protect and safeguard” the decedent. (*Id.* ¶¶ 311-313.) The other is that, “from June 30, 2013 forward,” the State “negligently, carelessly, and intentionally misrepresented the facts in an effort to avoid any blame for the causing (sic) the death of Grant McKee” and the other firefighters who died. (*Id.* ¶ 314.) According to the Complaint, the

1 “misrepresentations and cover-up violated the public trust” and caused Plaintiff “to  
2 experience enhanced and severe emotional pain... and extreme distress.” (*Id.* ¶ 315,  
3 317.)

4 Arizona has adopted the elements set forth in the Restatement (Second) of Torts  
5 § 46(1) for the tort of intentional infliction of emotional distress. *See Ford v. Revlon,*  
6 *Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987). They are: (1) the defendant’s conduct  
7 “must be ‘extreme’ and ‘outrageous’”; (2) the defendant “must either intend to cause  
8 emotional distress or recklessly disregard the near certainty that such distress will result  
9 from his conduct”; and (3) “severe emotional distress must indeed occur as a result of  
10 defendant’s conduct.” *Id.*

11 Furthermore, although Arizona courts have yet to address an intentional-  
12 infliction-of-emotional distress claim where the defendant’s conduct is directed at a third  
13 person, instead of the plaintiff, section 46 of the Restatement imposes additional  
14 elements in that situation:

15 (2) Where [an actor’s extreme and outrageous] conduct is directed at a  
16 third person the actor is subject to liability if he intentionally or recklessly  
17 causes severe emotional distress

18 (a) to a member of such person’s immediate family who is  
19 present at the time, whether or not such distress results in bodily  
20 harm, or

21 (b) to any other person who is present at the time if such distress  
22 results from bodily harm.

23 Restatement (Second) of Torts § 46(2).

24 Thus, where a defendant’s extreme and outrageous conduct is directed at a third  
25 person, the plaintiff must also prove that he was present for the defendant’s conduct. *Id.*  
26 Specifically, in addition to the three elements under § 46(1) identified in *Ford*, the  
27 plaintiff must prove (a) that he is a member of that third person’s immediate family, *and*  
28 that he was present at the time of defendant’s conduct, or (b) that he was present at the  
time of defendant’s conduct, and that the emotional distress resulted in bodily harm.

1 Restatement (Second) Torts § 46(2). For several reasons, the Complaint fails to state an  
2 intentional-infliction-of-emotional-distress claim.

3       *First*, the conduct required for intentional infliction of emotional distress must be  
4 so outrageous in character, and so extreme in degree, as to go beyond all possible bounds  
5 of decency, and to be regarded as atrocious, and utterly intolerable in a civilized  
6 community. *Ford*, 153 Ariz. at 43, 734 P.2d at 585. The Court determines in the first  
7 instance whether the acts complained of can be considered as extreme and outrageous  
8 conduct in order to state a claim for relief. *Davis v. First Nat. Bank of Arizona*, 124 Ariz.  
9 458, 462, 605 P.2d 37, 41 (App. 1979). As a matter of law, the State’s conduct, even as  
10 spun in the Complaint, does not rise to the level of extreme and outrageous conduct.

11       *Second*, the intent element is satisfied only if the defendant “desire[d] to inflict  
12 severe emotional distress,” or knew that such distress was substantially certain, or  
13 disregarded “a high degree of probability that such emotional distress [would] follow.”  
14 Restatement (Second) of Torts § 46, *cmt. i*. The Complaint’s well-pled facts do not  
15 permit a reasonable inference that the State intended to inflict severe emotional distress,  
16 or knew that such distress was reasonably certain, or disregarded a high probability that  
17 such distress would follow, either from its alleged mishandling of the Fire or from its  
18 alleged misrepresentations in an effort to avoid blame for the firefighters’ deaths.  
19 Indeed, the severe emotional distress would not even logically result from the State’s  
20 alleged misrepresentations to avoid blame—let alone be highly probable.

21       *Third*, none of the State’s alleged conduct—neither the alleged mishandling of the  
22 Fire nor the alleged misrepresentation of facts in an effort to avoid blame for the  
23 firefighters’ deaths—was directed at Plaintiff. Thus, Plaintiff cannot recover unless she  
24 was physically present at the time of that alleged conduct. *See* Restatement (Second) of  
25 Torts § 46(2). The Complaint contains no such allegation.

26       In addition, the alleged misrepresentation of facts in an effort to avoid blame for  
27 the firefighters’ deaths is not conduct *directed at* any particular person. And conduct that  
28 is directed only at the community at large cannot support a claim of intentional infliction

1 of emotional distress, even where the plaintiff is present for the conduct. *E.g., Dornfield*  
2 *v. Oberg*, 503 N.W.2d 115, 119 (Minn. 1993) (holding that defendant's act of driving  
3 while intoxicated that resulted in accident that killed plaintiff's spouse in plaintiff's  
4 presence was "directed, if at all, only at the driving community generally rather than at a  
5 particular individual," and thus could not support a claim of intentional or reckless  
6 infliction of emotional distress). Similarly, the State's alleged misrepresentations were  
7 directed, if at all, at the public generally, not at Plaintiff. Thus, even if Plaintiff were  
8 present at the time of that conduct (and he wasn't), it could not support Plaintiff's claim.  
9 For this additional reason, the intentional-infliction-of-emotional-distress claim fails as a  
10 matter of law.

11 Finally, damages for *negligent* infliction of emotional distress are recoverable in  
12 Arizona. But the Complaint does not purport to assert that claim. Nor could it because  
13 the law requires that the emotional distress inflicted must manifest as a physical injury,  
14 and the plaintiff must personally have been in the zone of danger so that the negligent  
15 defendant created an unreasonable risk of bodily harm to Plaintiff. *Rowland v. Union*  
16 *Hills Country Club*, 157 Ariz. 301, 304, 757 P.2d 105, 108 (App. 1988). No such  
17 inferences can be drawn from the Complaint.

18 For all these reasons, the infliction-of-emotional-distress claim should be  
19 dismissed.

## 20 VI. THE STATE FORESTRY DIVISION IS NOT A JURAL ENTITY.

21 Alternatively, the Complaint should be dismissed for failure to state a claim  
22 against the State Forestry Division because it is a non-jural entity incapable of being  
23 sued in its own name. Governmental entities have no inherent power, and possess only  
24 those powers and duties delegated to them by their enabling statutes. *Schwartz v.*  
25 *Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996). The Legislature  
26 has not given the Forestry Division the power to sue or be sued.

27 The absence of enabling legislation empowering an agency to sue or be sued in its  
28 own name renders the agency a "non-jural entity," which is incapable of being sued in

1 civil damages cases such as the present case. *See, Grande v. Casson*, 50 Ariz. 397, 409-  
2 410, 72 P.2d 676, 681 (1937) (action arising under State Highway Code had to be  
3 brought against the State itself, not against the Highway Commission, since the Highway  
4 Commission had no right to sue or be sued under Arizona law). A court has no  
5 jurisdiction until a party is brought before it that legally exists and is legally capable of  
6 being sued. *Yamamoto v. Santa Cruz County Board of Supervisors*, 124 Ariz. 538, 539,  
7 606 P.2d 28, 29 (App. 1979) (an action cannot be brought against a state agency that  
8 lacks the authority to sue or be sued in its own name); *See also, Kimball v. Shofstall*, 17  
9 Ariz. App. 11, 13, 494 P.2d 1357; 1359 (app. 1972) (Agency must be authorized by  
10 statute to sue or be sued.); accord, *Braillard v. Maricopa County*, 224 Ariz. 481, 487,  
11 232 P.3d 1263, 1269 (App. 2010).

12 In cases where a party mistakenly sues the wrong governmental entity but serves  
13 the associated jural entity, the remedy is generally not dismissal but is amendment of the  
14 complaint to name the correct governmental entity. *Simon v. Maricopa Medical Center*,  
15 225 Ariz. 55, 59, 234 P.3d 623, 627 (App. 2010). In this case, the Plaintiffs have named  
16 the State of Arizona as a defendant. Thus, if the Court does not dismiss the Complaint  
17 entirely, the State Forestry Division should be dismissed and the caption amended  
18 accordingly.

## 19 VII. CONCLUSION

20 For all these reasons, the Complaint should be dismissed with prejudice.  
21

22 DATED this 29th day of August, 2014.

23 THOMAS C. HORNE  
24 Attorney General

25 By: /s/Brock Heathcotte  
26 Brock Heathcotte  
27 Assistant Attorney General  
28 *Attorney for State Defendants*

1 STINSON LEONARD STREET LLP

2 By: /s/Michael L. Parrish  
3 Michael L. Parrish  
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5 ORIGINAL e-filed via Turbo Court  
6 this 29th day of August, 2014:

7 Clerk of the Court  
8 Maricopa County Superior Court  
9 101/201 West Jefferson  
10 Phoenix, Arizona 85003

11 Copy e-delivered  
12 this 29th day of August, 2014, to:

13 The Honorable J. Richard Gama

14 Copy of the foregoing mailed  
15 this 29th day of August, 2014, to:

16 Craig A. Knapp  
17 Michael C. Sheedy  
18 David L. Abney  
19 Knapp & Roberts, PC  
20 8777 North Gainey Center Dr., Ste. 165  
21 Scottsdale, AZ 85258  
22 *Attorneys for Plaintiff*

23 Michael L. Parrish  
24 Stinson Leonard Street LLP  
25 1850 N. Central Avenue, Suite 2100  
26 Phoenix, AZ 85004-4584  
27 *Attorney for State Defendants*

28 /s/R. Fowler  
4125941

AFFIDAVIT OF SCOTT HUNT, ARIZONA STATE FORESTER

STATE OF ARIZONA     )  
                                      )  
County of Maricopa     )

Scott Hunt, being first duly sworn, deposes and states as follows:

1. I have personal knowledge of the matters stated below.
2. I have served as the Arizona State Forester since I was appointed to that position by Governor Jan Brewer on January 4, 2011. I was the Arizona State Forester during the Arizona State Forestry Division's response to the Yarnell Hill Fire in June and July of 2013, and I remain in that position today.
3. A true and complete copy of the Cooperative Intergovernmental Agreement between the Arizona State Land Department – Fire Management Division and the Prescott Fire Department, Contract No. 95-1311-LNR (the "IGA") without appendices, is attached as Exhibit 1 to my affidavit. The IGA has been in effect during the entire time that I have served as State Forester, including throughout June and July 2013.
4. Pursuant to Executive Order 2004-21, amended by Executive Order 2007-18, the Arizona State Land Department – Fire Management Division became known as the Arizona State Forestry Division.
5. Pursuant to the IGA, on June 30, 2013, the members of the City of Prescott Fire Department's Granite Mountain Interagency Hotshot Crew were deployed to respond to the Yarnell Hill Fire under the control and direction of employees of the Arizona State Forestry Division.
6. All members of the City of Prescott Fire Department's Granite Mountain Interagency Hotshot Crew who died on June 30, 2013, were working within the jurisdictional boundaries of the State of Arizona and the Arizona State Forestry Division, and under the jurisdiction and control of the Arizona State Forestry Division, at the time of their deaths.
7. The Arizona State Forestry Division reimbursed the City of Prescott Fire Department for the wages earned by the Prescott Fire Department's Granite Mountain Interagency Hotshot Crew for their service on the Yarnell Hill Fire.



8. The Arizona State Forestry Division has on file certificates of insurance indicating that the City of Prescott maintained in force workers' compensation insurance as required by the IGA, and that the effective dates of such insurance included July 1, 2012 through June 30, 2013 and July 1, 2013 through June 30, 2014.

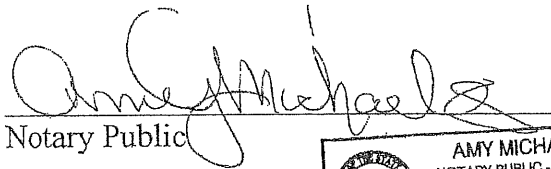
AFFIANT FURTHER SAYETH NOT.

DATED this 27 day of August, 2014.

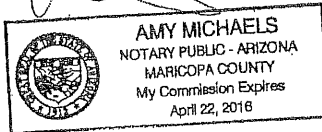


Scott Hunt, Arizona State Forester

SUBSCRIBED AND SWORN to before me this 27 day of August, 2014.

  
Notary Public

My Commission Expires:



# EXHIBIT 1

ARIZONA STATE LAND DEPARTMENT - FIRE MANAGEMENT DIVISION  
COOPERATIVE INTERGOVERNMENTAL AGREEMENT

This Cooperative Agreement is made by and between the Prescott Fire Department, hereinafter referred to as the Cooperator, and the State Forester.

WITNESSETH:

WHEREAS the Cooperator did on March 11, 1997 enter into a Cooperative Agreement with the State Forester for the protection of its forests and wildlands as authorized under A.R.S. Section 37-623(E), as amended and; the protection of forest, wild and agricultural lands, and rural structures as provided for within the Cooperative Forestry Assistance Act, 16 U.S.C. Section 2106; and

WHEREAS it is in the best interest of the State of Arizona to have wildland fires detected and suppressed quickly before they become large and more difficult to control; and

WHEREAS the Cooperator may have the capability to respond and suppress fires under the jurisdiction of the State Forester on a more timely and effective basis than any other assets or resources in the state; and

WHEREAS the Cooperator can more adequately carry out this function if additional equipment and technical assistance is available; and

WHEREAS the State Forester may have a limited number of units of firefighting equipment that can be made available to fire associations, fire districts, and incorporated fire departments involved in fire suppression; and

WHEREAS the Cooperator represents that it is a duly constituted fire department, fire district, or non-profit association or political subdivision of the State authorized to provide fire protection within the boundaries of the map attached hereto and by reference made a part hereof (Appendix A); and

WHEREAS it has been determined to be advantageous to the State Forester in the proper discharge of his responsibilities to make certain equipment available to the Cooperator; and

WHEREAS the Cooperator may also have a limited number of units of firefighting equipment that can be made available to the State Forester for fire suppression work.

NOW THEREFORE, the parties to this agreement do hereby agree as follows:

THE STATE FORESTER AGREES:

1. To make available organization and training technical assistance and other expertise as available on his staff;
2. To provide State Forester's and wildland firefighting resources inside the Cooperator's boundary when deemed available by the State Forester, and when the Cooperator has exhausted its own resources and has declared need to the State Forester. Payment for the State's resources will be negotiated after each incident based upon the resources furnished and the actual cost of those resources to the State Forester;
3. To make available such firefighting equipment as can be obtained and is suitable for the use of the Cooperator in fire management work;

4. That title to all accessories, tools, equipment, sirens, etc., which the Cooperator adds or attaches to state equipment provided by the State Forester will remain the property of the Cooperator and the Cooperator shall remove same prior to returning same equipment to the State Forester;
5. To pay and reimburse the Cooperator for fire suppression activities, equipment and manpower at the rates established per the Emergency Equipment Rental Agreement (Finance-100) on file with the State Forester; provided, however, that payment shall be made only for such activities on lands outside the Cooperator's city limits when requested by the State Forester;
6. That no reimbursement for loss, damage or destruction of equipment due to ordinary wear and tear will be made;
7. To provide necessary forms as needed by the Cooperator in executing his responsibilities to the State Forester;
8. That the Cooperator may refuse to furnish manpower and equipment when requested by the State Forester if by so doing it would reduce the Cooperator's resources to a level where he could no longer maintain an adequate level of fire protection on lands within his boundary or service area;
9. The Cooperator may purchase wildland firefighting equipment and supplies through the State Forester's procurement system.

THE COOPERATOR AGREES:

1. To accept and use equipment obtained from the State Forester pursuant to this agreement ("Assigned Equipment");
2. To maintain the Assigned Equipment in operable condition and state of readiness, and promptly report any loss or damage of such equipment to the State Forester;
3. To obtain prior approval for any planned alterations of the Assigned Equipment from the State Forester;
4. Upon request, the Cooperator will promptly provide the State Forester with a report of the condition of Assigned Equipment;
5. To provide adequate shelter from the weather elements for the Assigned Equipment;
6. That the Assigned Equipment may not be sold, transferred, loaned or otherwise disposed of, or traded, but must be returned to the State Forester;
7. To provide the State Forester with a summary report on all known wildland fires inside their jurisdiction on a calendar year basis by February 1st of each year;
8. To submit a State Forester's Arizona Individual Wildland Fire Report (Wild-RPT-1) within 15 days, for each wildland fire that the Cooperator responds to outside their jurisdiction;
9. To respond to all wildland fires on State and Private lands within their boundary or service area at the Cooperator's expense;
10. To respond and engage in fire suppression activities upon lands under the jurisdiction of the State Forester located outside the Cooperator's boundary or service area as set forth in attached Appendix A at such time and with equipment and manpower available as requested by the State Forester; provided, however, that Cooperator shall not be required to respond when doing so would reduce Cooperator's resources to a level where it could no longer maintain an adequate level

of fire protection on lands within his boundary or service area;

11. To maintain and make available for use at the request of the State Forester manpower and equipment subject to the provisions of Emergency Equipment Rental Agreement (Finance-100);
12. To participate to the extent possible in fire prevention activities within their boundary or service area as requested by the State Forester;
13. To accept direction and supervision by the State Forester or his duly authorized representatives while engaged in suppression activities at the State Forester's request;
14. To submit claims for reimbursement to the State Forester within ninety (90) days after release of its manpower and/or equipment in the manner and form prescribed by the State Forester;
15. To maintain wildland fire training qualifications as set forth by the State Forester;
16. To provide a certificate of self-insurance to the State Forester upon execution of this agreement and thereafter upon request of the State Forester. In the event Cooperator discontinues self-insurance, Cooperator shall purchase and maintain the following minimum insurance requirements with a carrier authorized to conduct business with the State of Arizona:
  - a. Workers' Compensation:  
Statutory for State of Arizona
  - b. Employers' Liability:  
\$100,000 each accident;  
\$100,000 each employee disease; and  
\$500,000 policy limit disease
  - c. Commercial general liability limits of \$1,000,000 per occurrence and general aggregate limit. The policy shall contain a serviceability of interest provision, amount shall include coverage for:
    1. bodily injury;
    2. property damage;
    3. previous liability;
    4. personal injury; and
    5. medical payments.
  - d. Commercial automobile liability insurance of \$1,000,000 combined single limit for each occurrence for all owned, hired or non-owned vehicles, applicable to claims arising from bodily injury or death or any person or property damage arising out of the ownership, maintenance or use of any vehicle.
  - e. Annual Certificate of Insurance shall be issued for the State Forester as evidence that policies providing the required coverage and limits are in full force and effect.
17. a. To the fullest extent permitted by law, the Cooperator shall to defend, indemnify and hold harmless the State from any claim, demand, suit, liability, judgment and expense (including attorney's fees and other costs of litigation) arising out of or relating to injury, disease, or death of persons or damage to or loss of property resulting from or in connection with the negligent performance of this contract by the Cooperator, its agents, employees, and subcontractors or anyone for whom the Cooperator may be responsible.

b. To the extent not permitted by A.R.S. Section 41-621 et seq. or A.R.S. Section 35-154, the provisions of paragraph "A" of this section shall not apply.

1. That the Cooperator will be hired and reimbursed as set forth in an "Emergency Equipment Rental Agreement" (Finance-100) attached hereto as Exhibit "B", to the State Forester;
2. The equipment issued by the State Forester will be painted and identified and marked in a manner that will indicate the cooperation between the Cooperator and the State Forester;
3. If the equipment is not used as provided by this agreement, the State Forester may remove said equipment upon written notification.
4. Amendments: This agreement may be modified only by a written amendment signed by both parties. However, if mutually agreed, the parties may enter into specific supplemental, written agreements, subject to appropriate approvals, to accomplish the goals of this agreement and to carry out its terms and conditions.
5. Dispute Resolution: In the event of a dispute, the parties agree to arbitrate the dispute to the extent required by A.R.S. Section 12-1518.
6. Inspection and Audit of Records: Pursuant to A.R.S. Sections 35-214 and -215, the Cooperator shall retain all books, accounts, reports, files and other records ("Records") relating to this agreement for a period of five years after completion of the contract. All records shall be subject to inspection and audit by the State Forester at all reasonable times. Upon request, the Cooperator shall produce the original of any and all such records at the offices of the State Forester.
7. Cancellation for Conflict of Interest: This agreement is subject to the cancellation provisions of A.R.S. § 38-511.
8. Nondiscrimination: The parties agree to comply with Arizona Governor's Executive Order 75-5 - "Prohibition of Discrimination in State."
9. Notices: All notices required by this agreement shall be in writing delivered to the person and addresses specified below or to such other persons or addresses as either party may designate to the other party by written notice.

State Forester: \_\_\_\_\_ Cooperator: \_\_\_\_\_

Darrell Willis  
 (Chief's Name) (print)  
 Prescott Fire Department  
 (Department Name)  
 1700 Iron Springs Rd.  
 (Address)  
 Prescott, AZ 86301  
 (City, State, Zip Code)  
 (520)445-5555  
 (Phone Number)

This agreement supersedes all previous Memorandums of Understanding and Cooperative Agreements and will become effective upon filing with the Secretary of State and will continue in force from year to year unless terminated by either party by thirty days written notice to the other, provided, however, that all of the provisions herein are complied with.

In WITNESS WHEREOF the parties by and through their duly qualified acting officials have hereunto set their hands.

COOPERATOR:

Darrell Willis  
(Print Name)  
Prescott, AZ 86301  
City, State, Zip  
*Darrell Willis*  
Signature  
Fire Chief  
Title  
3-14-97  
Date

1700 Iron Springs Road  
Address  
(520)445-5555  
Business Phone  
*Elizabeth L. Stowell*  
Witness  
Elizabeth L. Stowell  
Witness

STATE FORESTER:

John Hafterson  
(Print Name)  
*John Hafterson*  
Signature  
State Forester  
Title  
3-31-97  
Date

The undersigned has reviewed the foregoing Intergovernmental Agreement and determined that such Intergovernmental Agreement is within the power and authority of the State Forester and is herewith approved as to form.

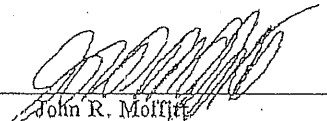
This \_\_\_\_ day of \_\_\_\_, 19 \_\_\_\_

Attorney General

By see next page  
Assistant Attorney General  
Attorney for State Forester

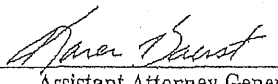
# INTERGOVERNMENTAL AGREEMENT DETERMINATION

Pursuant to A.R.S. § 11-952 (D), the foregoing agreement has been reviewed by the undersigned attorney for the City of Prescott, who has determined that the agreement is in proper form and is within the powers and authority granted under the laws of this State to the City of Prescott.

By:   
John R. Moffitt  
Prescott City Attorney

Date: 2/9/97

Pursuant to A.R.S. § 11-952 (D), the foregoing agreement has been reviewed by the undersigned assistant attorney general, who has determined that the agreement is in proper form and is within the powers and authority granted under the laws of this State to the State Land Department and the State Forester.

By:   
Assistant Attorney General  
Attorney for State Forester

Date: Jan 27, 1997



NO.	<u>21553</u>
FILED WITH SECRETARY OF STATE	
Date Filed	<u>05/15/97</u>
	<u>James A. Hull</u>
	Secretary of State
By	<u>Vicky Haenwood</u>