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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

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

Plaintiff,

v.

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

Defendants.

Case No. CV2014-009070

REPLY IN SUPPORT OF MOTION TO DISMISS

(Assigned to the Honorable J. Richard Gama)

(Oral Argument Requested)

Plaintiff offers a variety of arguments to try to convince the Court that the exclusivity of the workers' compensation scheme does not require dismissal of her wrongful-death claim. None have merit. The inter-governmental agreement between the State and the City of Prescott is not a nullity. It is indisputable that the agreement expressly sets forth its duration, and that the City's governing body formally approved the agreement. Thus, as required by the statute, the City's governing body necessarily approved the agreement's duration. Nor does this case present an exception to the exclusivity of the workers' compensation scheme; as a

matter of law, the State's alleged conduct does not constitute "willful misconduct." And it is irrelevant whether Plaintiff could not personally receive workers' compensation benefits, or that she did not personally waive anything.

But the wrongful-death claim is also barred by the firefighter's rule. That rule negates liability of anyone whose negligence causes or contributes to the fire which in turn causes the firefighter's death. Plaintiff unquestionably alleges that the State's negligence contributed to the Yarnell Hill Fire—causing it to grow unchecked from a small fire to a complex and much larger fire—that caused decedent McKee's death. Plaintiff's one-paragraph response on the firefighter's rule ignores the law and her own allegations.

Plaintiff also fails to state a claim for intentional or reckless infliction of emotional distress. The alleged conduct is not extreme and outrageous. And Plaintiff was not present for, and did not contemporaneously perceive, the harm to the decedent.

I. THE WRONGFUL DEATH CLAIM SHOULD BE DISMISSED.

A. Workers' Compensation Is the Exclusive Remedy.

1. The IGA Is Not a Nullity.

Where two public agencies enter into an intergovernmental agreement, and the employee of one agency "works under the jurisdiction or control of, or within the jurisdictional boundaries of [the other] public agency," the employee "is expressly deemed to be an employee of both agencies—the employer and the public agency under or within whose jurisdiction the employee work[ed]." *Callan v. Bernini*, 213 Ariz. 257, 260, 141 P.3d 737, 740 (App. 2006). 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 under or within whose jurisdiction the employee was working" at the time of the injury or death. *Id.*

Plaintiff does not dispute: (1) that decedent McKee was employed by the City of Prescott Fire Department; (2) that the Prescott Fire Department entered into the IGA with the State; or (3) that the IGA provides that the Prescott Fire Department agreed to provide manpower to the State, and to accept direction and supervision by the State Forester while

engaged in fire suppression at the State's request.

Instead, Plaintiff's principal argument is that the IGA is a nullity. This argument rests on the premise that Resolution No. 2592 "does *not* approve *or* extend the purported IGA's duration." (Response to Motion to Dismiss at 3:10) (original emphasis). Based on that premise, Plaintiff contends that the IGA was *never effective* because A.R.S. § 11-952(F) provides: "Appropriate action by ordinance or resolution . . . *approving* or extending the *duration* of the agreement or contract shall be necessary before any such agreement, contract or extension may be filed or become effective." A.R.S. § 11-952(F) (emphasis added).

Plaintiff is wrong because her argument is based on a false premise. In fact, Resolution No. 2952 *does approve* the IGA's duration. Specifically, the duration of the IGA between the State and the Prescott Fire Department is expressly set forth in its last paragraph, which provides that the agreement "will continue in force from year to year unless terminated by either party" upon 30 days written notice. (Agreement attached to Motion to Dismiss at p. 5.) Resolution No. 2952 expressly approves the IGA at issue, which was attached as Exhibit A to the Resolution. (*See* Ex. 1 to Plaintiff's Response to Motion to Dismiss, stating "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.'") By approving the IGA itself—which sets forth the IGA's duration—Resolution No. 2952 necessarily approves "the duration of the agreement." A.R.S. § 11-952(F).

Plaintiff ignores this. Her argument that the duration was not approved rests on the notion that the statute requires "a *separate action*" approving the contract's duration that cannot be accomplished by a resolution approving the contract itself where, as here, the contract expressly sets forth its duration. (Response at 5:19) (emphasis added). But § 11-952 says no such thing. To the contrary, § 11-952 provides that two or more public agencies may contract with each other for services or the exercise of powers if "authorized by their legislative or governing bodies," A.R.S. § 11-952(A), and that appropriate action by resolution

or otherwise approving the agreement's duration shall be necessary before such agreement may become effective. A.R.S. § 11-952(F). Thus, the statute does not require that a public agency's governing body approve by resolution the entire agreement, as well as the agreement's duration. It requires that the public agency be authorized by its public body to contract for the services at issue, and that the governing body approve the agreement's duration. But even if § 11-952 could be read to require the governing body to approve the entire agreement, as well as the agreement's duration, the statute cannot possibly be read to require two separate resolutions.

Because the statute plainly does *not* require here a resolution approving an IGA *and* a *separate* resolution approving the IGA's duration, it's irrelevant whether such a requirement would make any sense. In any event, such a requirement would make no sense whatsoever. Indeed, according to Plaintiff, the purpose of a separate action approving "an IGA's duration is to require a public entity to set a specific time limit for the proposed IGA, so it and its employees are not bound to an unfairly long duration." (Response at 5:19-22.) Resolution No. 2952, which approved the IGA itself—which in turn provided that the IGA will continue in force from year to year *unless terminated by either party*—accomplished that purpose.

The IGA is not a nullity.[1]

2. As a Matter of Law, the State's Alleged Conduct Does Not Constitute "Wilful Misconduct."

Plaintiff argues that ADOSH's issuance of a Citation and Notification of Penalty against the Arizona State Forestry Division, which charged that the State committed "willful serious" misconduct is entitled to res judicata effect, thereby establishing that the State engaged in "wilful misconduct" within the meaning of A.R.S. § 23-1022(B). This argument is wrong for two reasons.

First, the case Plaintiff relies on for her res judicata argument is *A. Miner Contracting,*

[1] And even if it were, the Court should find as a matter of law that McKee was a lent employee, making workers' compensation the exclusive remedy. *See Avila v. Northup King Co.*, 179 Ariz. 497, 499, 880 P.2d 717, 719 (App. 1994).

Inc. v. Toho-Tolani County Imp. Dist., 233 Ariz. 249, 311 P.3d 1062 (App. 2013). But that case makes clear that res judicata only attaches to an "adjudicative determination by administrative tribunal" that "entail[s] the essential elements of adjudication," including the right to present evidence and argument, and finality in the form of a determination that is final and conclusive. *Id.* at 255-56, 311 P.3d at 1065-66. The Complaint doesn't allege, and Plaintiff doesn't argue, that ADOSH's Citation was the result of an adjudicative determination that included a final and conclusive determination. In fact, the Citation itself, which is attached to Plaintiff's Response, says on page 2 that the Forestry Division has the right to contest it. And the Forestry Division is contesting it. *See Division of Occupational Safety and Health Indus. Comm'n of Arizona v. Ariz. State Forestry Division*, No. L3419-317242683.

Second, as we explained in the Motion to Dismiss, a "willful" violation in the context of the Industrial Commission's charges 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). By contrast, nothing "short of a conscious and deliberate intent directed to the purpose of inflicting an injury" satisfies the intent requirement of "wilful misconduct" to avoid the exclusivity of the workers' compensation remedy. *Gamez v. Brush Wellman, Inc.*, 201 Ariz. 266, 269, 34 P.3d 375, 378 (App. 2001). Thus, the Industrial Commission's assertion that the State's failure to promptly remove the firefighters from exposure to harm was "willful" and serious does not even support a reasonable inference that the State acted "knowingly and purposely with the direct object of injuring another." A.R.S. § 23-1022(B). Plaintiff completely ignores this.

Plaintiff alternatively argues that a jury could find that the State acted knowingly and purposely with the direct object of injuring the decedent. This argument completely ignores Plaintiff's own allegations that the State acted *negligently,* including:

- "Because of the [State's] *negligence*, 19 firefighters died preventable deaths";

- "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] speace, 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 . . ."

(Comp. ¶¶ 2, 61-62, 94, 246) (emphasis added).

And contrary to Plaintiff's argument (Response at 7), the allegations that two supervisors abandoned their posts on June 30 do not support a reasonable inference that the State acted "knowingly and purposely with the direct object of injuring" the decedent. A.R.S. § 23-1022(B). Furthermore, Plaintiff is bound by the allegations in her Complaint that the two supervisors' abandonment of their posts was *negligent*. *See* Compl. ¶¶ 167, 168, 207, 210.

3. It Is Irrelevant that Plaintiff Could Not Personally Waive Anything or Receive Workers' Compensation Benefits.

Plaintiff argues that her claim for decedent McKee's wrongful death is not barred because she is eligible to receive workers' compensation benefits for his death. Unsurprisingly, she does not cite a single statute or case to support such an exception: there is no such exception. *See* A.R.S. § 23-1022(A) (providing that, subject to the specified exceptions, the right to receive workers' compensation benefits "for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of employment"). Indeed, Arizona courts have squarely held

that this exclusivity bars all such wrongful-death claims against the decedent's employers, regardless of whether the plaintiff was eligible to receive workers' compensation benefits. *See, e.g., Diaz v. Magna Copper Co.*, 190 Ariz. 544, 548-550, 950 P.2d 1165, 1168-70 (App. 1997) (holding that nondependent family members of deceased employee cannot pursue wrongful-death suit against employer notwithstanding that they were ineligible to receive workers' compensation benefits.)

Plaintiff also argues that she didn't personally *waive* her right to sue the State (decedent McKee's employer) for the decedent's death. For this argument, Plaintiff relies on a different statute, A.R.S. § 23-1024(A), which provides: "An employee, or his legal representative in the event death results, who accepts compensation waives the right to exercise any option to institute proceedings in court against his employer." Plaintiff submits that because she is not the decedent's legal representative, she is not barred by the statute's waiver provision. And Plaintiff argues that she has not personally effected a waiver under § 23-1024(A) because she personally received no workers' compensation benefits.

Plaintiff's argument is a red hearing. The statute on which Plaintiff relies for her argument, § 23-1024(A), addresses the situation where an employee, or his legal representative in the event of death, *has an option* to institute an action in court against the employer. For example, in a case where an employee is injured on the job by the employer's "wilful misconduct" as defined by § 23-1022(B), an employee has an option to recover damages in court provided that he has not waived that option. But there is no such option here because, as provided in § 23-1022(A), workers' compensation *is* the exclusive remedy for decedent McKee's death.

B. The Firefighter's Rule Applies.

We explained in the Motion to Dismiss that even if the exclusivity of the workers' compensation scheme didn't bar the wrongful-death claim (and it does), the firefighter's rule requires dismissal. Plaintiff does not dispute that if the firefighter's rule applies to this case, it bars the wrongful-death claim. Her argument in a single paragraph is that the firefighter's rule

"cannot apply" because "the State did not cause, contribute to causing, or fail to prevent the Yarnell Hill Fire." (Response at 10.)

Although Plaintiff doesn't explain her perfunctory argument, she apparently means that the State didn't cause the Fire to *start*, and didn't contribute to the *starting* of the Fire, and didn't fail to prevent the Fire from *starting*.

But the firefighter's rule is not so narrow. The firefighter's rule "negates liability to a fire[fighter] by one whose negligence causes or *contributes to the fire* which in turn causes the death or injury of the fire[fighter]." *Grable v. Varela*, 115 Ariz. 222, 223, 564 P.2d 911, 912 (App. 1977) (emphasis added). Thus, the issue is not whether the State's alleged negligence contributed to starting the Fire. The issue is whether the State's alleged negligence contributed to the fire which in turn cause[d] the death" of the firefighter. *Grable*, 115 Ariz. at 223, 564 P.2d at 912. And Plaintiff does allege that the State's negligence contributed to the fire, which in turn caused the decedent's death. (Compl. ¶¶ 6, 7, 55, 86, 92, 182, 184, 229.)

II. THE EMOTIONAL-DISTRESS CLAIM SHOULD BE DISMISSED.

The Court determines in the first instance whether the acts complained of can be considered as extreme and outrageous conduct in order to state a claim for relief. *Davis v. First Nat. Bank of Arizona*, 124 Ariz. 458, 462, 605 P.2d 37, 41 (App. 1979). We explained in the Motion to Dismiss that the State's alleged conduct in "mishandling" the Yarnell Hill Fire and thereby "failing to protect and safeguard" the decedent (Compl. ¶¶ 311-313), does not qualify as extreme and outrageous conduct to state such a claim. Plaintiff's only response is to insist, without explanation, that it does. In so doing, she ignores the standard: conduct required for intentional infliction of emotional distress must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987). As a matter of law, the State's alleged conduct in failing to protect decedent McKee does not rise to that level. Plaintiff alleges a case of negligence.

Plaintiff also argues that a "claim for emotional distress based on extreme and

outrageous conduct does not require bodily harm to the victim or the victim's presence in any zone of danger." (Response at 11 citing Restatement (Second) of Torts § 46(1) and Restatement (Third) of Torts § 46.) We address the two Restatements below.

First, Plaintiff's reliance on subsection (1) of § 46 of the Restatement (Second) is misplaced in the context of the claim for emotional distress based on the State's alleged conduct in failing to protect decedent McKee. As we explained in the Motion, subsection (1) of § 46 of the Restatement (Second) deals with an intentional/outrageous infliction of emotional distress claim where the conduct was directed at the person who suffered the emotional harm; it is subsection (2) of § 46 of the Restatement (Second) that addresses a claim for emotional distress resulting from extreme and outrageous conduct directed at a third person. *See* Motion to Dismiss at 11:6-12:3; 13:1-12.

Thus, Plaintiff's claim for her emotional distress resulting from the State's failure to protect decedent McKee is properly analyzed under subsection (2) of § 46 the Restatement (Second), not under subsection (1). And as we explained in the Motion, subsection (2) imposes an additional element—the plaintiff must have been present for the extreme and outrageous conduct directed at a third person. Restatement (Second) of Torts § 46(2). Plaintiff cannot state such a claim because there is no allegation that she was present for the State's conduct in failing to protect decedent McKee.

The Restatement (Third) takes a slightly different approach, although the result here is no different. Comment m under § 46 of the Restatement (Third), titled "Emotional harm caused by harm to a third person," addresses a claim like Plaintiff's for emotional harm based on allegedly extreme and outrageous conduct resulting from harm to a third person. Under the Restatement (Third), such a claim requires the additional element of "contemporaneous perception of the event." Restatement (Third) of Torts § 46, cmt. m. Thus, liability for emotional harm (to Plaintiff) resulting from harm to a third person (i.e., decedent McKee) is limited "to cases in which the person seeking recovery contemporaneously perceived the event, as distinguished from those who discovered what has occurred later." *Id.* There is no

allegation that Plaintiff contemporaneously perceived the harm to decedent McKee or his death.

Plaintiff also bases her emotional-distress claim on the allegation that the State "negligently, carelessly, and intentionally misrepresented the facts in an effort to avoid any blame" for causing decedent McKee's death. (Compl. ¶ 314.) But mere misrepresentations, even intentional ones, do not constitute "the type of extreme and outrageous conduct needed to state a claim for relief" for intentional/reckless infliction of emotional distress. *Knoell v. Cerkvenik-Anderson Travel, Inc.*, 181 Ariz. 394, 404, 891 P.2d 861, 871 (App. 1994*) vacated on other grounds*, 185 Ariz. 546, 97 P.2d 689 (1996) (holding that misrepresentation about the amount of supervision on a trip, and the concealment of alcohol that tended to occur on the trips, did not constitute extreme and outrageous conduct). Furthermore, in contrast to egregious facts in the Florida case on which Plaintiff relies, Plaintiff does not identify a single alleged misrepresentation or allege any other facts regarding a "cover-up" that would enable the Court to determine whether the acts complained of can be considered as extreme and outrageous conduct necessary to state his claim.

Finally, because the alleged misrepresentations were not directed at any particular person, they cannot support an emotional-distress claim. *See* Motion to Dismiss at 13:1-12.

III. THE FORESTRY DIVISION IS NOT SUBJECT TO SUIT.

Plaintiff's only argument is that the fact that the Forestry Division was served with a notice of claim means that it can be sued even though it is not a jural entity. Plaintiff does not and cannot cite any authority to support that argument.

IV. CONCLUSION.

The Court should dismiss this action with prejudice.

DATED this 31st day of October, 2014.

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ORIGINAL e-filed via Turbo Court
this 31st day of October, 2014:

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Copy e-delivered
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Reply: Reply in Support of Motion to Dismiss