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IN THE SUPREME COURT
STATE OF ARIZONA

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

Petitioners/Plaintiffs/Appellants,

v.

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

Respondents/Defendants/Appellees.

Case No. _____

Arizona Court of Appeals, Div. One
Case No. 1 CA-CV 15-0800

Maricopa County Superior Court
CV2014-009068, CV2014-009069 and
CV2014-009070 (consolidated)
Hon. J. Richard Gama

PETITION FOR REVIEW

The Court should grant the petition because the Court of Appeals' Opinion conflicts with a 2006 Opinion by Division Two finding *no* waiver of a widow's right to sue an employer for wrongful death of her employee husband, although the widow was entitled to workers'-compensation death benefits—and had actually applied for them. *AAA Cab Service, Inc. v. Industrial Comm'n*, 213 Ariz. 342 (App. 2006).

Second, another recurring issue of statewide importance supporting the petition's grant is Division One's approval of Intergovernmental Agreements between cities and the State *without* the required, specific city approval of the duration of the IGAs, in violation

of A.R.S. § 11-952(F)'s plain words. Third, Division One failed to allow jury resolution of the employer's "willful misconduct," a purely fact-based defense to employer immunity. Fourth, Division One has limited the intentional-infliction-of-emotional-distress tort in ways that will adversely affect tort litigants and cases across Arizona.

The Four Issues

Intergovernmental Agreement ("IGA"). An Arizona city can make an IGA with the State turning one of its firefighters into a temporary State employee. But to do that, the city must first pass an ordinance or resolution "approving" the IGA's "duration." A.R.S. § 11-952(F). If the city fails to do that, the IGA cannot even "be filed or become effective." *Id*. But Prescott passed no ordinance approving the purported IGA's duration. Thus, Grant McKee was never a State employee and the State has no employer-based immunity from suit under A.R.S. § 23-1022(A). Did the trial court and Court of Appeals err by finding the State had employer immunity under A.R.S. § 23-1022(A)?

Willful misconduct. The State's misconduct killed Grant and his 18 Hot Shot companions. Marcia McKee alleged—and the Industrial Commission of Arizona found—that the State Forestry Division had committed willful misconduct. *See* Complaint ¶¶ 232-36 and Exh. 2. Should the jury have been allowed to determine that the State's conduct was willful misconduct nullifying any A.R.S. § 23-1022(A) immunity?

Waiver. Grant McKee was an adult not dependent on his mother for support; she was not dependent on him for support. Neither asked for nor accepted any workers'

compensation benefits. Thus, no waiver occurred of Marcia's A.R.S. § 12-611 right to sue the State for causing her son's wrongful death. Did the trial court and Court of Appeals err by finding waiver and approving immunity under A.R.S. § 23-1022(A)?

Intentional infliction of emotional distress. Is Marcia McKee entitled to assert claims for intentional infliction of emotional distress arising: (1) from the State causing her son to suffer a horrendous death or (2) from the State's cover-up of its wrongdoing?

1. This Court should grant review because properly interpreting IGAs is a matter of statewide importance.

The Court of Appeals found immunity because it held that a purported IGA between Prescott and the State transformed Grant from a Prescott firefighter into a temporary State employee. After all, a public agency's employee who works under another public agency's jurisdiction or control because of an IGA is deemed to be an employee of both agencies under the workers' compensation immunity provisions. A.R.S. § 23-1022(D).

But grant of immunity to the State arose from misreading the plain words of A.R.S. § 11-952(F), which provide that:

> Appropriate action by ordinance or resolution or otherwise pursuant to the laws applicable to the governing bodies of the participating agencies 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.

Prescott did pass a resolution approving the IGA, under the IGA-approval statute, A.R.S. § 11-952(A) ("[T]wo or more public agencies . . . may enter into agreements with one another for joint or cooperative action."). This is the Prescott resolution:

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

But although Prescott approved the IGA, it *never* passed any ordinance or resolution "approving or extending the duration of the agreement." A.R.S. § 11-952(F). Thus, the IGA could not be "filed or become effective." *Id*.

Despite the statute's actual words, the Court of Appeals held that "approving or extending the duration of the agreement" did not mean approving the duration of the agreement or extending the duration of the agreement, but instead meant "approving (1) the agreement, or (2) the duration of any extension of the agreement." *Opinion* at ¶ 12.

That rewriting of A.R.S. § 11-952(F): (1) adds more to the statute than exists within it; (2) nullifies the need for specific action approving or extending the duration of an IGA before it can be filed or become effective; (3) violates the plain-meaning rule; and (4) ignores English grammar and usage. The Court of Appeals has effectively re-drafted the statute's key phrase by adding two commas, changing the meaning of that phrase from its original "approving or extending the duration of the agreement" to "approving, or extending the duration of, the agreement."

In statutes, commas are not mere ornaments. In *Braden*, for example, this Court found the State immune from APSA claims based on one missing comma. *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶ 12 (2011) ("The absence of a comma after the phrase 'labor union' makes a difference."). "The plain meaning of a statute," after all, "will typically heed the commands of its punctuation." *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309, 311 ¶ 16 (App. 2013).

The two commas the Court of Appeals effectively added to the statute are not grammatically optional. Instead, adding them fundamentally changes the meaning. The Court of Appeals should have refused to rework the statute. *See Int'l Chiropractors Ass'n v. N.M. Bd. of Chiro. Examiners*, 323 P.3d 914, 923 (N.M. App. 2013) (Court declines invitation to "re-punctuate" a statute to add two commas that would "re-write" the statute to comport with its opinion on how the statute should be interpreted.).

After all, there *already* is a statute dealing with approving an IGA. A.R.S. § 11-952(A) ("two or more public agencies . . . may enter into agreements"). So there is no need to re-punctuate the statute dealing with approving or extending an IGA's duration to turn it into yet *another* stature dealing with approving an IGA. As this Court has instructed, every phrase, clause, and sentence of a statute must be given meaning so no part will be redundant. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295 ¶ 8 (2007). Division One's rewrite, however, creates a redundancy out of whole cloth.

This Court should grant review since a strict, narrow interpretation of A.R.S. § 11-952(F) is vital for cities and fire departments across Arizona because of the importance of the duration of IGAs. They should be as long as needed, and no longer. After all, IGAs alter the sovereign, legal, and financial rights: (1) of the State, (2) of local governing authorities with which the State is trying to make IGAs, and (3) of local employees and their families and loved ones.

The State Forestry Division, which operates what amounts to a core skeleton staff,

depends on IGAs to obtain the innumerable firefighters needed to actually handle its vital wildfire-containment efforts. Making sure there is proper approval of the duration of IGAs is thus a matter of statewide interest and importance supporting grant of this petition.

2. This Court should grant review because whether an employer engaged in "willful misconduct" is an issue reserved for Arizona juries.

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

The Opinion stated the Complaint "does not allege these acts were done knowingly and purposely with the direct object of injuring the firefighters." *Opinion* ¶ 19. But Marcia specifically alleged the State committed "willful misconduct." *Complaint* ¶ 236.

Moreover, Marcia was not alone in alleging "willful misconduct." The Industrial Commission of Arizona ("ICA") investigated this disaster and officially found—as the Complaint alleged—that the State's failure to protect the firefighters had caused their deaths and was not just "serious" misconduct, but misconduct that was *both* "serious" *and* "willful." *Complaint* ¶¶ 232-35, 246. The ICA not only found willful and serious

misconduct, it imposed an unprecedented penalty against the State Forestry Division of $25,000 for *each* firefighter it killed. A copy of the ICA's "Citation and Notice of Penalty"—a public record subject to judicial notice—is attached as Exh. 2.

As far as "willful misconduct" under A.R.S. § 23-1022(A), Marcia has the right to have the jury decide intent, which does not need to be established by direct proof, and which the jury may determine and *infer* from all the facts and evidence. *State v. Quatsling*, 24 Ariz. App. 105, 108 (1975). *See Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) (Intent "should be left to the jury."). Here, reasonable jurors could conclude just what the ICA found, that the State's conduct was "serious" and "willful." For instance:

- At about 1:00 p.m. on June 30, 2013, the Division Zulu Supervisor abandoned the Hotshots to their fate, fled to the incident command post, and never returned. *Complaint* at ¶¶ 164-68 (IR 1). Reasonable jurors could conclude that only someone who intended to injure the Hotshots would act so wantonly.
- At about 3:58 p.m. on June 30, 2013, Air Tactical Group Supervisor Rory Collins left the firefighting effort with no explanation or proper turn-over and went to his Deer Valley home. Collins had been in charge of the aerial water and retardant drops needed to fight the fire and protect the Hotshots. Abandonment of his post left the Hotshots, including Grant, confronting death with no hope of rescue or safety. *Complaint* ¶¶ 207-10 (IR 1). Reasonable jurors could find he displayed "willful misconduct."

Because Marcia McKee's case ended through a motion to dismiss, the Complaint's facts asserting a basis for finding willful misconduct must be taken as true and all reasonable inferences from them must be taken in Marcia's favor. *Steinberger v. McVey ex rel. County of Maricopa*, 234 Ariz. 125, 131 ¶ 23 (App. 2014).

Moreover, a defendant's "mental state must necessarily be ascertained by inference from all relevant surrounding circumstances." *In re William G.*, 192 Ariz. 208, 213 (App. 1997). A party is responsible for intentionally causing a harmful consequence if the party "knows or believes that the consequence is certain, or substantially certain, to result from [the party's] act." *Restatement (Second) of Torts* § 870 at 280, cmt. b (1979). Intent is evident if a person acts "knowing that the consequence is substantially certain to result." *Restatement (Third) of Torts; Physical and Emotional Harm* § 1(b) at 3 (2010). It is an old story that deliberately leaving a person in danger's path can show intent to kill. 2 *Samuel* 11:14-17 (King James 1611) (soldier deliberately left in harm's way is killed).

Here, a reasonable jury could find that State employees harbored an intent to injure amounting to "willful misconduct," since they acted knowing the deaths of some or all of the Hotshots, including Grant, were substantially certain.

3. Division One and Division Two are in direct conflict on when waiver arises when an employer's misconduct kills an employee.

Division One found waiver of the right to pursue a wrongful-death claim in a workers' compensation case under circumstances where Division Two would find no

waiver. *AAA Cab Service, Inc. v. Industrial Commission*, 213 Ariz. 342, 344 ¶ 6 (App. 2006) (Because of "the legislative history of § 23–1024(A), we conclude that, if the legislature had intended a final award to constitute an election of workers' compensation, it would have included express language to that effect. This court cannot write a term into the statute that the legislature did not include."). The importance of the waiver issue statewide—and the divisional conflict—support granting the petition for review.

The conflict between Division One and Division Two involves the workers' compensation waiver-of-immunity statute, A.R.S. § 23-1024, which provides:

> A. An employee, or his legal representative in event death results, who accepts compensation waives the right to exercise any option to institute proceedings in court against his employer or any co-employee acting within the scope of his employment, or against the employer's workers' compensation insurance carrier or administrative service representative.
>
> B. An employee, or his legal representative in event death results, who exercises any option to institute a proceeding in court against his employer waives any right to compensation.

Four principles flow from A.R.S. § 23-1024. *First*, a deceased worker's "legal representative" may bring a wrongful-death action if the estate has not accepted workers' compensation. A "legal representative" is a "personal representative or conservator." A.R.S. § 14-9101(8). There can be a wrongful-death action as long as the deceased worker's legal representative has not accepted any workers' compensation.

Second, under A.R.S. § 23-1024, the only categories of litigants expressly subject to waiver are (1) employees and (2) deceased employees' legal representatives. Either

category must have accepted workers' compensation benefits. Marcia is not suing as legal representative. A.R.S. § 14-9101(8). Instead, Marcia is directly suing in her own name as a surviving parent. She never accepted any workers' compensation benefits for her son's death; her son never accepted any benefits for his injuries. He died before that could happen. So *he* never waived *his* right to sue.

Third, since there has been no actual waiver of any right to sue, the state's claim that A.R.S. § 12-611 prevents a wrongful-death lawsuit is untenable. Because there has been no waiver (by Grant, his nonexistent legal representative, or Marcia), the State's negligence in causing Grant's death "is such, as would, if death had not ensued, have entitled" Grant "to maintain an action to recover damages." A.R.S. § 12-611.

Fourth, accepting workers' compensation benefits is the "single" legislatively-designated act creating waiver of an injured worker's right to sue the employer. *AAA Cab Service, Inc. v. Industrial Comm'n*, 213 Ariz. 342, 343 ¶ 3 (App. 2006).

In *AAA Cab Service*, a taxicab driver died on the job, allegedly because of his employer's negligence. His widow filed a wrongful-death action against the employer and then, one month later, also filed a claim for workers' compensation benefits. The ICA issued an award to the widow. The widow then withdrew her ICA claim and proceeded solely with her superior-court wrongful-death claim. An ALJ found that, under A.R.S. § 23-1024, the widow could withdraw her workers' compensation claim since she had never accepted workers' compensation benefits (like Marcia McKee). *Id*. at 343 ¶¶ 1-2.

The employer appealed, arguing the widow's original pursuit of a claim "for workers' compensation" barred her from a civil wrongful-death action. The employer, however, conceded that "the legislature designated a single act as creating a waiver of an injured worker's right to file a lawsuit against his or her employer: 'accept[ing] compensation.' § 23–1024(A)." *Id*. at 343 ¶ 3.

AAA Cab Service held that A.R.S. § 23-1024, as "the relevant statute," "designates *only one act* triggering its waiver provision—accepting compensation." *Id*. at 343-44 ¶ 5 (emphasis added). Under A.R.S. § 23-1024, "acceptance of benefits [is] the 'sole statutory test'" for deciding existence of waiver for a survivor seeking to bring a wrongful-death action. Id. at 344 ¶ 5, 141 P.3d at 824 (quoting *Southwest Cooperative Wholesale v. Superior Court*, 13 Ariz. App. 453, 459 (1970)).

Besides § 23-1024's controlling terms, neither Grant nor Marcia took *any* workers' compensation benefits. Thus, neither of them committed waiver, which is either the express, voluntary, intentional relinquishment of a known right or conduct warranting an inference of an intentional relinquishment. *Compass Bank v. Bennett*, 240 Ariz. 58, 60 ¶ 11 (App. 2016). Absent waiver, which never occurred, the State can claim no immunity.

4. This Court should grant review because a victim's physical presence at the scene and specific targeting of the victim are not essential IIED elements.

The Court of Appeals found Marcia had no IIED claim because she "failed to allege that she was present at the time of the allegedly extreme and outrageous conduct leading to

her son's death, or that any of defendants' conduct was directed at her." *Opinion* at ¶ 26. This Court should grant review because IIED claims are a key feature of many Arizona tort cases. Interpreting the IIED tort to require a victim's physical presence at the scene of the wrongdoing or specific targeting of the IIED victim unfairly limits the effective prosecution of IIED claims across Arizona.

Naturally enough, Marcia did not allege she was in the canyon where her son perished and did not allege she was in the back rooms where the State concocted the cover-up directed both at the public *and* at the firefighters' statutory beneficiaries. But physical presence is *not* an essential element to an IIED claim.

Contemporaneous perception is required for some IIED claims. *Restatement (Third) of Torts: Physical & Emotional Harm* § 46 cmt. m (2012). But as much as anyone else, given the conflagration's remote site, Marcia *was* a contemporaneous witness. She saw the dreadful images of the wildfire and heard news reports about Grant's death. Practically speaking, she contemporaneously perceived this tragedy. *Id*. *See also Croft v. Wicker*, 737 P.2d 789, 792 (Alaska 1987) (A third person "foreseeably harmed by extreme and outrageous conduct may state [an IIED] cause of action."). As much as anyone else not in on it, Marcia contemporaneously perceived the cover-up. She was thus effectively "present" during the State's extreme and outrageous cover-up. *Opinion* at ¶ 26.

Physical presence is not essential for the tort—nor should it be. After all, Section 46 only requires that: "An actor who by extreme and outrageous conduct intentionally or

recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."

Ultimately, whether conduct is extreme and outrageous depends on each case's facts, including the parties' relationship (State v. grieving mother), whether the defendant abused a position of authority (the State did), whether the victim was especially vulnerable (she was), whether the defendant knew of the vulnerability (it was obvious), and the defendant's motive (evade blame). *Id*. at § 46 cmt. d.

The Complaint alleged the State was liable for IIED because it: (1) had committed extreme and outrageous misconduct; (2) recklessly disregarded the near certainty that emotional distress to Marcia would result; and (3) caused Marcia to suffer severe emotional distress. *Complaint* ¶¶ 308, 311-12 (IR 1). Those are the standard IIED elements. Intentional Torts 16, *Intentional Infliction of Emotional Distress (Elements of Claim)*, RAJI (Civil) (5th ed. July 2013).

The State acted recklessly despite knowing the risk of severe emotional harm to relatives of firefighters combating the fire. The State did that although the burden to protect the firefighters was slight relative to the magnitude of risk. *Complaint* ¶ 309 (IR 1). The State's misconduct killed Grant horribly, giving Marcia a claim for IIED.

The State continued its extreme and outrageous conduct after Grant died by conducting a cover-up to avoid blame. *Complaint* ¶ 314 (IR 1). The State's cover-up violated the public trust and multiplied Marcia's "emotional devastation." *Complaint* ¶ 315

(IR 1). She trusted the State with her son's life during the State's firefighting efforts. *Complaint* ¶ 316 (IR 1). The State's betrayal of her trust, and its cover-up, caused her to suffer severe emotional distress and depression—just when she was most vulnerable. *Complaint* ¶¶ 316-17 (IR 1).

The IIED claim arising from the State's cover-up is *not* subject to any immunity defense. After all, the cover-up began *after* Grant died. This IIED claim is separate from Marcia's other claims. This, if all other claims fail, the IIED claim survives.

A cover-up concerning how a loved one died is extreme and outrageous conduct intentionally inflicting extreme emotional distress. For instance, in *Thomas v. Hospital Bd. of Directors of Lee County*, 41 So.3d 246 (Fla. App. 2010), a nurse and doctor tried to protect themselves from being sued by lying about the cause of their patient's death.

Based on that cover-up, the Florida Court of Appeals approved the IIED claim: "We believe that in a situation where a person's loved one has died, it would be apparent to anyone that the person would be susceptible to emotional distress and, therefore, that the action of providing false information concerning the loved one's cause of death meets the standard for a claim of outrage (intentional infliction of emotional distress)." *Id*. at 256. That reasonable and just principle should apply here as well.

Conclusion

Marcia McKee respectfully asks the Court to grant the petition for review.

DATED this 27th day of January, 2017.

KNAPP & ROBERTS, P.C.

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

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 3,492 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

On this date, the above-signing lawyer e-filed this document with the Clerk of the Arizona Supreme Court, and mailed two copies of it to each of the following:

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

Exhibit 1

Exhibit 1

Exhibit 1

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MARCIA MCKEE, the surviving mother of GRANT QUINN MCKEE, both individually and on behalf of all statutory beneficiaries of GRANT QUINN MCKEE, deceased, *Plaintiffs/Appellants*,

v.

STATE OF ARIZONA, a public entity; and the ARIZONA STATE FORESTRY DIVISION, a public entity, *Defendants/Appellees*.

No. 1 CA-CV 15-0800
FILED 12-30-16

Appeal from the Superior Court in Maricopa County
Nos. CV2014-009068, CV2014-009069 and CV2014-009070
(Consolidated)
The Honorable J. Richard Gama, Judge

AFFIRMED

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OPINION

Presiding Judge Andrew W. Gould delivered the opinion of the Court, in which Judge Peter B. Swann and Judge Patricia A. Orozco joined.

G O U L D, Judge:

¶1 Marcia McKee ("Appellant") appeals from the superior court's order dismissing her claims for wrongful death and intentional infliction of emotional distress. Appellant argues the court erred in concluding that her son was an employee of the State of Arizona and the Arizona State Forestry Division and, as a result, her claim was barred by the workers' compensation statutes' exclusive remedy provision. Appellant also contends she stated a claim for intentional infliction of emotional distress and she should be permitted to sue both the State and the State Forestry Division. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Beginning in 1997, the State Forestry Division and the Prescott Fire Department entered into a cooperative intergovernmental agreement ("IGA") whereby the two agencies agreed to collaborate their resources to provide fire protection to the Prescott community and surrounding wilderness areas. For his work as a member of the Granite Mountain Interagency Hotshot Crew, Grant McKee ("McKee") was employed by the Prescott Fire Department. However, because McKee worked within the jurisdictional boundaries of the State Forestry Division pursuant to the IGA, he was also deemed an employee of the State. Ariz. Rev. Stat. ("A.R.S.") § 23-1022(D) (West 2016).[1]

¶3 On June 30, 2013, Appellant's son, McKee, was a member of the Granite Mountain Interagency Hotshot Crew who died while bravely fighting the Yarnell Hill Fire. At the time of McKee's death, he was unmarried, had no children or dependents, and he was not contributing to the support of Appellant.

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[1] We cite to the current version of the statute absent material revisions.

¶4 Appellant filed a lawsuit against the State and the State Forestry Division seeking damages for wrongful death and intentional infliction of emotional distress.[2] The State filed a motion to dismiss Appellant's claims, arguing that her wrongful death claim was barred by the workers' compensation exclusive remedy provision and the firefighter's rule, that she failed to state a claim for intentional infliction of emotional distress, and that the State Forestry Division was a nonjural entity that could not be sued. The court granted the motion and dismissed Appellant's claims with prejudice. Appellant timely appealed.

DISCUSSION

I. Standard of Review

¶5 We review the superior court's dismissal of a complaint under Rule 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). We review issues of statutory interpretation de novo. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5 (App. 2008). In addition, whether Appellant's wrongful death claim is barred by the exclusive remedy prescribed in the Arizona workers' compensation system is a legal question subject to de novo review. *Mitchell v. Gamble*, 207 Ariz. 364, 367, ¶ 7 (App. 2004).

II. Wrongful Death

¶6 Appellant concedes that if McKee was an employee of the State at the time of his death, her ability to sue for wrongful death is limited by Arizona's workers' compensation exclusive remedy provision. However, as discussed more fully below, Appellant argues that McKee was not a State employee at the time of his death, and therefore not subject to the exclusive remedy provision.

A. Workers' Compensation: Exclusive Remedy

¶7 Generally, a plaintiff may bring a wrongful death claim as an "independent claim for damages sustained by the decedent's survivors." *Diaz v. Magma Copper Co.*, 190 Ariz. 544, 549 (App. 1997); *see also Vasquez v. State*, 220 Ariz. 304, 310, ¶ 16 (App. 2008). However, the right to bring a wrongful death action exists only if the decedent would have been able to maintain an action for damages if death had not ensued. A.R.S. § 12-611; *Diaz*, 190 Ariz. at 549 (stating that "plaintiffs must still come within the

[2] Appellant's case was consolidated with two other similar cases; however, all other plaintiffs settled their claims against the State.

terms of the wrongful death statute"). Thus, a claim filed by a plaintiff in a wrongful death case is subject to the same defenses as could have been asserted against the decedent if he had lived. *Diaz*, 190 Ariz. at 549.

¶8 In Arizona, workers' compensation is the exclusive remedy for compensation against an employer for the work-related injury or death of an employee. A.R.S. § 23-1022(A). An employee can elect to maintain an action at law for damages in lieu of receiving workers' compensation only where an employer's wilful misconduct caused the employee's injury or death. *Id.* An employee of a public agency working under the jurisdiction and control of another public agency pursuant to an IGA is considered an employee of both agencies for purposes of the exclusive remedy provision of workers' compensation. A.R.S. § 23-1022(D); *Callan v. Bernini*, 213 Ariz. 257, 260, ¶ 12 (App. 2006) ("[A]n employee of a party to an IGA who is injured in the course of employment may not seek damages in a common law tort action from another party to the IGA.").

B. Compliance with A.R.S. § 11-952

¶9 Appellant argues the IGA between the City of Prescott and the State Forestry Division was not effective because it was not approved in compliance with A.R.S. § 11-952(F). Appellant argues that McKee remained an employee of the City of Prescott, and was never an employee of the State, because the resolution purporting to approve the IGA did not comply with A.R.S. § 11-952(F). This statute provides:

> [a]ppropriate 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.

¶10 Appellant interprets A.R.S. § 11-952(F) as requiring an agency to specifically approve the duration of an IGA. Here, Appellant claims the IGA is ineffective because the City's resolution does not expressly approve the duration of the IGA. As a result, she argues McKee never became an employee of the State.

¶11 Our goal in interpreting a statute is to "ascertain the legislature's intent." *Lyons v. State Bd. of Equalization*, 209 Ariz. 497, 499, ¶ 8 (App. 2005). To do so "we look first to the [statute's] language and will ascribe plain meaning to its terms unless the legislature assigned a special meaning to one or more terms." *Id.* (internal citations omitted). "'We construe the statute as a whole, and consider its context[.]'" *People's Choice TV Corp., Inc. v. City of Tucson*, 202 Ariz. 401, 403, ¶ 7 (2002) (*quoting State ex*

rel. Ariz. Dep't of Revenue v. Phoenix Lodge No. 708, Loyal Order of Moose, Inc., 187 Ariz. 242, 247 (App. 1996)). "[W]e will not interpret a statute in such a way as to produce 'absurd results,' or 'render [any word, phrase, clause, or sentence] superfluous, void, insignificant, redundant or contradictory.'" *TDB Tucson Group, L.L.C. v. City of Tucson*, 228 Ariz. 120, 123, ¶ 9 (App. 2011) (*quoting Patterson v. Maricopa Cty. Sheriff's Office,* 177 Ariz. 153, 156 (App. 1993)).

¶12 We find no textual basis for Appellant's reading of A.R.S. § 11-952(F). Section 11-952 addresses agreements or contracts that two or more public agencies can enter for services or for joint or cooperative action. A.R.S. § 11-952(A). Under canons of statutory construction, we read the "or" separating "approving" and "extending the duration" to be disjunctive. *State v. Piotrowski*, 233 Ariz. 595, 598, ¶ 16 (App. 2014). Thus, we read the language of subsection F as simply requiring appropriate agency action approving (1) the agreement, or (2) the duration of any extension of the agreement.

¶13 This construction is also consistent with the context of the statute. In addition to duration, an IGA must specify a number of matters, including the purpose, financing/budget, and methods to be employed in accomplishing its purpose. A.R.S. § 11-952(B)(1)-(4). However, absent from subsection F is any language requiring that a public body expressly and separately approve any of these requirements. Additionally, A.R.S. § 11-952(G) provides that an IGA may be extended as many times as the public agencies wish but the "extension may not exceed the duration of the previous agreement." Reading section F and G together, the initial IGA must be approved by a public agency, and if it has a finite duration, and the agencies wish to extend the agreement beyond its initial duration, any extension must be approved in the same manner as the initial IGA.

¶14 Here, the IGA between Prescott and the State Forestry Division directs that it "will continue in force from year to year unless terminated by either party." The resolution passed by the City of Prescott approves all the terms of the IGA, including its duration. Because the IGA has a perpetual duration, there is no need for the City to pass a resolution "extending the duration of the agreement." A.R.S. § 11-952(F).

¶15 Accordingly, the resolution approving the IGA complies with A.R.S. § 11-952. The IGA is effective. Thus, McKee was an employee of the State pursuant to the IGA at the time of his death.

C. Wilful Misconduct

¶16 Appellant argues the State's actions rose to the level of wilful misconduct, and therefore her claim is not subject to the exclusive remedy provisions of workers' compensation pursuant to A.R.S. § 23-1022(A). *See* Ariz. Const., art. XVIII, § 8.

¶17 Wilful misconduct is defined as "an act done knowingly and purposely with the direct object of injuring another." A.R.S. § 23-1022(B). The courts have defined four elements that must be present to maintain a wilful misconduct action:

> (1) the employer's wilful misconduct must have been the cause of the employee's injury,
>
> (2) the wilful misconduct must have been "an act done . . . knowingly and purposely with the direct object of injuring another,"
>
> (3) the act that caused the injury must have been the personal act of the employer, and
>
> (4) the act must have reflected "a wilful disregard of the life, limb or bodily safety of employees."

Gamez v. Brush Wellman, Inc., 201 Ariz. 266, 269, ¶ 6 (App. 2001) (*quoting* Ariz. Const. art. XVIII, § 8).

¶18 Thus, wilful misconduct requires proof of deliberate, intentional misconduct; "[e]ven gross negligence or wantonness amounting to gross negligence does not constitute a 'willful act' under this definition; the negligence or wantonness must be accompanied by the intent to inflict injury upon another." *Diaz*, 190 Ariz. at 551 (*citing Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 15 (1967). There must be "deliberate intention as distinguished from some kind of intention presumed from gross negligence." *Serna*, 6 Ariz. App. at 16.

¶19 Even assuming all facts alleged in Appellant's complaint are true, Appellant fails to allege defendants intended to cause the death of McKee. *Republic Nat. Bank of New York v. Pima Cty.*, 200 Ariz. 199, 201, ¶ 2 (App. 2001). The complaint alleges a series of negligent and grossly negligent acts that, if proven, culminated in the deaths of the Granite Mountain Hotshot crew; however, it does not allege these acts were done knowingly and purposely with the direct object of injuring the firefighters.

See Serna, 6 Ariz. App. at 16 (recognizing that the death of the decedent was the direct result of refusal to follow safety recommendations of inspectors but finding no wilful misconduct). Specifically, Appellant argues the actions of the division supervisor and an air tactical supervisor in leaving their posts was a dereliction of duty causing McKee's death. However, Appellant does not allege that either of the supervisors did so with the deliberate intention of harming McKee or any member of the Granite Mountain Hotshot crew.

¶20 Thus, as a matter of law, Appellant's complaint does not allege that defendants acted with the requisite intent to constitute wilful misconduct. *See Fid. Sec. Life Ins. Co. v. State, Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4 (1998) (affirming the dismissal of a complaint if "satisfied as a matter of law that plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof").

D. Waiver

¶21 Appellant reasons that because she is not eligible to receive McKee's death benefits under workers' compensation, she is not bound by her son's election to receive workers' compensation benefits. In support of this position, she reads A.R.S. § 23-1024, which states that an employee who institutes a proceeding against his employer waives any right to compensation, to indicate that a party who cannot receive compensation cannot waive the right to sue. Thus, she concludes that because she could not waive the right to sue, she should be permitted to maintain a wrongful death action against the State.

¶22 Appellant's argument is contrary to established law. In *Diaz*, the decedent's parents, who were nondependents and ineligible to receive workers' compensation benefits, argued they could not be bound by their son's election. *Id.*, at 548. The court rejected this argument, and held that an employee's election of workers' compensation benefits "binds not only the employee's dependents, but the employee's nondependent parents as well." *Id.*, at 550-51. The court reasoned that a wrongful death action "must still come within the terms of the wrongful death statute," and the decedent's parents were "subject to the same defenses as could have been asserted against the decedent, had the decedent lived and brought an action for personal injury." *Diaz*, 190 Ariz. at 549; *see Mariscal v. American Smelting & Refining Co.*, 113 Ariz. 148, 149-50 (1976) (holding that nondependent parents of deceased worker could not bring a wrongful death action against his company because "[t]he parents' right to sue were determined by the decedent's decision to accept the provisions of the [w]orkmen's

[c]ompensation [a]ct."). *Diaz* also reasoned that allowing the nondependent parents to avoid their son's election would undermine the State's "compelling interest in the preservation and integrity of its workers' compensation system." *Id.*, at 550.

¶23 Accordingly, we conclude that Appellant's wrongful death claim is barred by operation of the exclusive remedy provision of the workers' compensation statutes.[3]

III. Intentional Infliction of Emotional Distress

¶24 The complaint alleges two factual bases for Appellant's intentional infliction of emotional distress claim. The first is that the defendants' reckless and negligent actions led to McKee's death which resulted in severe emotional harm to Appellant. The second is that the defendants negligently misrepresented facts regarding the Yarnell Fire incident in an effort to avoid blame for McKee's death which violated the public trust and caused emotional harm to Appellant. Both parties concede that these claims are factually related but separate and independent from Appellant's wrongful death claim; as a result, the exclusive remedy provisions of the workers' compensation statutes do not apply.

¶25 The tort of intentional infliction of emotional distress allows recovery where (1) the conduct by the defendant is "extreme" and "outrageous"; (2) "the defendant either intend[s] to cause emotional distress or recklessly disregard[s] the near certainty that such distress will result from his conduct"; and (3) "severe emotional distress occur[s] as a result of defendant's conduct." *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43 (1987); *Cont'l Life & Acc. Co. v. Songer*, 124 Ariz. 294, 304–05 (App. 1979). For one to recover for intentional infliction of emotional distress arising from death or injury to a family member, the plaintiff must allege she was present at the time of the extreme and outrageous conduct. Restatement (Second) of Torts § 46(2) & cmt. l (limiting liability for intentional infliction of emotional distress to plaintiffs that are present at the time of the conduct "as distinguished from those who discover later what has occurred"); *see also Ford v. Revlon*, 153 Ariz. at 43 (stating that Arizona follows the elements set out in Restatement (Second) of Torts).

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[3] Because we conclude that the exclusive remedy of the workers' compensation statutes applies to bar Appellant's wrongful death action, we do not address whether the common-law firefighter's rule would also bar Appellant's claim.

¶26 Appellant has not alleged sufficient grounds for an intentional infliction of emotional distress claim. Specifically, Appellant has failed to allege that she was present at the time of the allegedly extreme and outrageous conduct leading to her son's death, or that any of defendants' conduct was directed at her. We find no error.

IV. Nonjural Entity

¶27 Appellant argues the trial court erroneously concluded the State Forestry Division was a nonjural entity when it dismissed her claims against that party. Appellant reasons that compliance with the notice of claim statute, A.R.S. § 12-821.01, gave rise to her ability to sue the State Forestry Division.

¶28 "Governmental entities have no inherent power and possess only those powers and duties delegated to them by their enabling statutes." *Braillard v. Maricopa Cty.*, 224 Ariz. 481, 487, ¶ 12 (App. 2010). "Thus, a governmental entity may be sued only if the legislature has so provided." *Id.* The legislature will so provide in plain language in the entity's enabling statutes. *See, e.g.*, A.R.S. § 38-882(D) ("The corrections officer retirement plan is a jural entity that may sue and be sued."); A.R.S. § 23-106(A) ("The [Industrial] commission may, in its name, sue and be sued.").

¶29 Here, there is no provision in the State Forestry Division enabling statute stating that it may sue or be sued. *See* A.R.S. §§ 37-1301, -1306. As a result, the State Forestry Division is a nonjural entity.

¶30 Additionally, the notice of claim statute does not, as Appellant contends, contain language suggesting its purpose is to confer the power to sue and be sued on a nonjural entity. When a plaintiff has a claim against a public entity, the notice of claim statute requires the plaintiff to file notice with the public entity stating a factual basis and a settlement amount for the claim prior to filing the cause of action. A.R.S. § 12-821.01. However, the purpose of the notice of claim statute is limited to providing "the government entity with an opportunity to investigate the claim, assess its potential liability, reach a settlement prior to litigation, budget and plan." *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 223, ¶ 30 (App. 2008).

¶31 Finally, we must construe the notice of claim statute in harmony with the enabling statutes for the State Forestry Division. *Midland Risk Mgmt. Co. v. Watford*, 179 Ariz. 168, 171 (App. 1994) ("It is a fundamental rule of statutory construction that courts will construe conflicting statutes in harmony when possible."). Here, the more specific

statute is the enabling statute for the State Forestry Division, while the notice of claim statute is a general statute that applies to all claims against public entities; as a result, the enabling statute controls. *Watford*, 179 Ariz. at 171. The logical prerequisite to having a cause of action against a public entity is that the entity has the power to sue and be sued. *See Braillard*, 224 Ariz. at 487, ¶ 12. Thus, in instances where a nonjural entity has been served a notice of claim, the more specific enabling statutes of the agency will control regarding the question of whether the entity has the power to sue or be sued. In this case, the State Forestry Division remains a nonjural entity regardless of Appellant's compliance with A.R.S. § 12-821.01. The superior court correctly dismissed Appellant's claims against the State Forestry Division.

CONCLUSION

¶32 For the reasons discussed above, we affirm the superior court's order dismissing Appellant's complaint.

AMY M. WOOD • Clerk of the Court
FILED: JT

Exhibit 2

Exhibit 2

Exhibit 2

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
