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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RUSSELL WISE, individually and on behalf of the Estate of MORGAN WISE, Plaintiff/Appellant, v. CITY OF TUCSON, a municipal corporation, Defendant/Appellee.	2 CA-CV 2010-0190 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20090130

Honorable Kenneth Lee, Judge

AFFIRMED

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and

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H O W A R D, Chief Judge.

¶1 Russell Wise, on behalf of the estate of his daughter M., appeals from the trial court's grant of summary judgment in favor of the City of Tucson. Wise argues a genuine issue of material fact exists regarding the city's liability for M.'s wrongful death based on expert testimony and other evidence, precluding summary judgment, and that the city was not immune from liability. Because Wise conceded facts below establishing that the city was immune and because we find that the city's policy decision was in fact immune, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). In March 2008, twelve-year-old M. was struck and killed by a motorcycle driven by Joshua Cordoso when she was crossing four-lane Rita Road at its intersection with Esmond and Rankin Loops. She was in a crosswalk designed and maintained by the city. A middle school is located on one side of that Rita Road crosswalk and a city park is on the other side. The school used crossing guards and portable warning signs at the crosswalk during school hours to assist children in crossing Rita Road, but M. was crossing on a Saturday when school was not in session. The traffic control devices at the intersection at the time of the accident were the yellow marked crosswalk, a school crosswalk warning sign on both sides of Rita Road 400 feet before the crosswalk, and a

school crosswalk warning sign on both sides of the road at the crosswalk. A broken white line demarked the traffic lanes leading up to the crosswalk. Immediately before M. was struck by Cordoso's motorcycle, one or more vehicles had changed lanes, and Cordoso did not see M. and her friend crossing the street in time to avoid hitting M.

¶3 In the fall of 2007, the city had applied for funding from the Regional Transportation Authority ("RTA") to install a HAWK traffic light at the crosswalk. The typical time period from application to installation of a HAWK light is two years. The HAWK light was not installed until after the 2008 accident.

¶4 Wise filed a wrongful death action against Cordoso and eventually settled with him. Wise also named the city as a defendant, alleging it was liable for M.'s death based on the negligent design and maintenance of the crosswalk. The city filed a motion for summary judgment, asserting there was no issue of material fact regarding its negligence, and that its statutory immunity precluded recovery.

¶5 The trial court granted the city's motion for summary judgment, finding the factual issues Wise's expert witness had raised did not support a basis for finding the city liable. The court also determined the city was immune pursuant to A.R.S. §§ 12-820.01 and 12-820.03. In its minute entry ruling on the summary judgment motion, the court stated:

> Plaintiff's counsel at the June 21, 2010 oral argument conceded that Defendant City of Tucson's decision to designate this school crosswalk as one in need of a Hawk light and its decision to fund the installation of the Hawk light through the RTA falls within the amb[i]t of A.R.S. § 12-820.01. Further, counsel agreed that Defendant City of Tucson's decision to install a Hawk light to the exclusion of

> other traffic control measures, such as flashing lights or four way stop signs, was also protected under the amb[i]t of A.R.S. § 12-820.01.

And the court's minute entry ruling on the motion for reconsideration recounted that: "The Plaintiff further concedes that Defendant City made a decision to have a Hawk light installed at this location and further decided to have the funding for the Hawk light come from the RTA." This appeal followed.

Discussion

¶6 Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review a trial court's finding of immunity de novo, *Myers v. City of Tempe*, 212 Ariz. 128, ¶ 9, 128 P.3d 751, 753 (2006), and, here, view the facts in the light most favorable to the party against whom summary judgment was granted, *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003).

¶7 Wise argues the trial court erred by granting summary judgment in favor of the city on the basis of governmental immunity to liability under § 12-820.01. When interpreting a statute we first examine its plain language and if the language is clear, we apply it and do not employ other methods of statutory construction. *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, ¶ 10, 88 P.3d 1165, 1168 (App. 2004). Under § 12-

820.01(A)(2), "[a] public entity shall not be liable for acts and omissions of its employees constituting . . . [t]he exercise of an administrative function involving the determination of fundamental governmental policy." An entity's determination of fundamental governmental policy must involve an exercise of discretion, which specifically includes "[a] determination of whether to seek or whether to provide the resources necessary for . . . [t]he purchase of equipment [or] construction or maintenance of facilities." § 12-820.01(B)(1)(a)-(b). An entity is immune when it is engaged in policymaking but not immune when making operational decisions to implement a policy. *Kohl v. City of Phoenix*, 215 Ariz. 291, ¶ 19, 160 P.3d 170, 174 (2007). And governmental immunity requires an affirmative decision to act or not act rather than the absence of a decision. *See Galati v. Lake Havasu City*, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996).

¶8 Wise conceded below that the city's decision to seek funding for the HAWK light from the RTA was immune. When a party concedes an issue, the trial court is never given a chance to address the argument; consequently we do not address it either. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 18, 160 P.3d 223, 228-29 (App. 2007); *see also Jett v. City of Tucson*, 180 Ariz. 115, 123-24, 882 P.2d 426, 434-35 (1994) (appellate court does not address issues trial court did not resolve). This rule is "'established for the purpose of orderly administration and the attainment of justice'" so as not to "undermine[] 'sound appellate practice' [or] violate[] the interests of the party against whom the claim is newly asserted on appeal." *Harris*, 215 Ariz. 344, ¶ 17, 160 P.3d at 228, *quoting Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073,

1086 (1987). Although we have discretion to hear arguments not presented to the trial court, "we rarely exercise that discretion." *Harris*, 215 Ariz. 344, ¶ 17, 160 P.3d at 228.

¶9 At oral argument before this court, Wise denied having made such concessions, but he has not included the transcript of the hearing in the record on appeal, and "[i]n the absence of a transcript, an appellate court will presume that the record supports the trial court's ruling." *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005). In fact, in his motion for reconsideration below, Wise stated: "the only decision made by the City of Tucson was to submit the intersection to the RTA for funding of a HAWK light." And Wise did not even mention the concession issue in his briefs or provide us any reason to depart from well-established precedent at oral argument. *See, e.g., Campbell v. Campbell*, 9 Ariz. App. 557, 558, 454 P.2d 875, 876 (1969) (presuming trial court ruled correctly when transcript missing). We therefore consider as established that Wise conceded the city had made the decision to seek funding from the RTA and that the city's decision was immune. Because of Wise's concessions, the trial court was not provided the opportunity to consider the issue, waiving Wise's argument on appeal. *See Harris*, 215 Ariz. 344, ¶ 18, 160 P.3d at 228-29.

¶10 Furthermore, Wise admitted below the fact that the city decided to seek funding for the HAWK light through the RTA. A voluntary admission, conceding the truth of a fact and made in open court, is a judicial admission and resolves the matter in the case. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) ("'express waiver made in court . . . by the party . . .

conceding for the purposes of the trial the truth of some alleged fact, . . . has the effect of a confessory pleading, in that the fact is therefore to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it'"), *quoting* IX John H. Wigmore, *Evidence* § 2588 (1981). Thus, Wise has admitted that the city made an affirmative decision to seek funding for the installation of a HAWK traffic signal—the factual basis required for a legal finding of governmental immunity. *See Schabel v. Deer Valley Unified Sch. Dist.*, 186 Ariz. 161, 166, 920 P.2d 41, 46 (App. 1996) (decision to construct playground and allocate funds policy, whereas type of equipment chosen operational); *cf. Galati*, 186 Ariz. at 134, 920 P.2d at 14 ("A decision to fund street construction or improvements is a legislative act."). Even without considering the admitted legal conclusion that this decision was covered by the immunity statutes, the factual admission brings this situation within those statutes. Therefore, the court did not err in its grant of summary judgment in favor of the city, as the determination of governmental immunity is dispositive, leaving no issues of material fact. *See* Ariz. R. Civ. P. 56(c)(1).

¶11 Also at oral argument in this court, Wise contended the city's application for funding for a HAWK light had been rejected by the RTA in December 2007 and, thus, its governmental immunity did not continue until March 2008 when the accident occurred. In his opening brief, Wise claims the RTA denied funding in November of 2007. But he cites to an exhibit attached to his motion for reconsideration filed after the trial court granted the city's summary judgment motion. New facts submitted in conjunction with a motion for reconsideration are too late to avoid summary judgment.

See Tilley v. Delci, 220 Ariz. 233, ¶ 17, 204 P.3d 1082, 1087 (App. 2009). Furthermore, the exhibit was not admissible because it was not supported by any affidavit and showed no foundation. *See Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr.*, 174 Ariz. 72, 82, 847 P.2d 117, 127 (App. 1992) (exhibits without foundation inadmissible hearsay). And the exhibit shows the HAWK light at this intersection was recommended for denial, not that it was denied. Finally, the only date on the exhibit is January 2008, well after the date Wise initially claimed the decision had been made. Therefore, neither the trial court nor this court has been presented any admissible evidence that the RTA denied funding in November or December 2007. *See id.*

¶12 Wise further contends the City cannot abdicate its responsibility to the RTA. But that is not what the facts showed. Rather, they demonstrate Wise conceded that the City decided to request funding for the light from the RTA, a decision within the immunity statutes.

The Dissent

¶13 The dissent contends that Wise's concessions that the City is immune should not prevent us from reaching the issue. But that contention is contrary to standard appellate practice and without basis here.

¶14 Wise conceded that the City decided to apply for RTA funding for the intersection here and the decision to seek such funding was immune.[1] The dissent admits

[1]The dissent notes that, in the motion for reconsideration, Wise disputed he had admitted that the decision to seek HAWK light funding included the decision not to install other devices. Although that is true, the trial court's minute entry ruling on that

the trial court did not reach the merits of the immunity defense, but nevertheless suggests we should abandon normal appellate requirements and address the issue. It distinguishes *Harris* on insignificant differences but does not attempt to challenge *Harris*'s statement that our waiver rule is essential to "'orderly administration and the attainment of justice,'" that to address belatedly urged issues "undermines 'sound appellate practice'" and violates the interests of the party against whom the claim is asserted. 215 Ariz. 344, ¶ 17, 160 P.3d at 228, *quoting Hawkins*, 152 Ariz. at 503, 733 P.2d at 1086.

¶15 The dissent contends that because the city argued governmental immunity before Wise's concession, we should disregard the concession because the "[trial] court was required to determine whether the city was entitled to immunity" once the city raised the argument. But the dissent provides no authority for the proposition that a court must address an issue that a party has already conceded. As in *Harris*, Wise's waiver prevented the court from deciding the immunity issue. 215 Ariz. at 350, 160 P.3d at 229. Even in his motion for reconsideration, Wise again conceded that the city decided to request funding from the RTA.

¶16 Neither the dissent nor Wise proffers any exceptional circumstance that requires us to address a waived issue here. If we turn from the waiver rule whenever an appellant claims the trial court is incorrect, we destroy the rule entirely. This is something we decline to do.

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motion clearly again states that Wise had conceded the decision to seek funding from the RTA was immune.

¶17 The above analysis is sufficient to refute the dissent and uphold the decision below. But, even were we to examine the legal conclusion behind the concession, we would be required to affirm.

¶18 The dissent criticizes our reliance on the statute, but a statute's plain language is the best indicator of its meaning. *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, ¶ 10, 88 P.3d 1165, 1168 (App. 2004). Therefore, we cite and primarily rely on § 12-820.01(B)(1), which immunizes "an administrative function involving the determination of fundamental governmental policy," § 12-820.01(A)(2), which "shall include . . . [a] determination of whether to seek or whether to provide the resources necessary for . . . [t]he purchase of equipment [or] construction or maintenance of facilities," § 12-820.01(B)(1). The statute provides governmental immunity not only for an entity's decision to provide resources but also for the decision to seek resources to fund the purchase of equipment or the construction of facilities. § 12-820.01(B)(1)(a)-(b). The statute does not nullify immunity merely because the outcome of a city's decision to seek funding is uncertain. § 12-820.01(B)(1). Thus, the city's decision to "seek" funding from the RTA for the HAWK light is a determination of fundamental governmental policy under the plain language of the statute. *See Nordstrom, Inc.*, 207 Ariz. 553, ¶ 10, 88 P.3d at 1168-69.

¶19 The dissent also compares the city's decision to engineering decisions in *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, 217 P.3d 1220 (App. 2009). In that case, the court held "the District's decision to alleviate flooding to properties located upstream from the Gillespie Dam was undoubtedly a policymaking

decision, involving the expenditure of significant funds and also coordination" with other agencies. *A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 68, 217 P.3d at 1242. But the "implementation of [an] overall flood-control plan was operational in that it involved the exercise of professional engineering judgment." *Id.* The city's decision about which intersections to protect with a HAWK light here is more akin to the decision in *A Tumbling-T Ranches* concerning which properties to protect, which the court found immune. *See id.*

¶20 The dissent mischaracterizes the issue by stating "the determination whether an intersection needs enhanced safety features and the selection of those features necessarily requires the exercise of professional engineering judgment, and thus properly is characterized as an operational decision." But Wise's own expert agreed that the choice of a HAWK light for the intersection was appropriate. The real issue is whether the delay in installing the light, due to the decision to seek RTA funding, was a policy-level decision. Even if the city's decision regarding the location of the HAWK light involved engineering decisions, the city's decision to seek funding for that light from the RTA required decisions regarding resource allocation and coordination with other agencies. Had the HAWK light been installed negligently, resulting in damage, that operational-level decision would not be immune under *A Tumbling-T Ranches*. *See id.* But that is not the situation here.

¶21 The dissent also cites *Warrington ex rel. Warrington v. Tempe Elementary Sch. Dist. No. 3*, 187 Ariz. 249, 250, 928 P.2d 673, 676 (App. 1996), which concerned the placement of a school bus stop. The court specifically noted that the decision about

where to place the bus stop "did not involve District policy decisions on . . . how to spend money, or how to allocate resources," and found this distinction removed the case from the protection of § 12-820.01(B)(1). *Warrington*, 187 Ariz. at 252, 928 P.2d at 676. Here, the city's decision to seek RTA funding clearly was a decision on "how to spend money, or how to allocate resources." *See id.* Therefore, *Warrington* supports our result.

¶22 Finally, the dissent relies on *Kohl* for the proposition that the city was required to utilize an "overarching policy or program that resulted in the selection of the intersection." In *Kohl*, our supreme court decided a city was immune for its use of a computer program to select intersections for signals. 215 Ariz. 291, ¶¶ 23-24, 160 P.3d at 175. It also determined that the selection of the criteria for where to install traffic lights was immune. *Id.* ¶ 17. It distinguished these decisions from the possible negligence in their implementation. *Id.* ¶ 20. Again, the decision to seek RTA funding here is more akin to the decisions the supreme court found immune. Moreover, as discussed earlier, notwithstanding the dissent's criticism of the city's decision process, once Wise conceded that the "City of Tucson" had made the decision to seek RTA funding for the HAWK light it provided the court with the required factual basis to reach its correct decision on immunity. The city is immune under § 12-820.01.

Conclusion

¶23 Although the trial court also found the city immune under § 12-820.03, as well as not liable under the facts, we need not address those issues. For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of the city.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

B R A M M E R, Judge, dissenting.

¶24 I respectfully dissent from my colleagues' decision. In the trial court's ruling granting summary judgment to the city, it discussed Wise's negligence claim and the deficiencies in his expert's opinion, the case law and statutes regarding governmental immunity, and concessions Wise's counsel made at oral argument. It then concluded: "Based on the foregoing, the Court finds that the [city] is entitled to judgment as a matter of law." However, it is unclear upon which of the various things the court had discussed it had relied to make its final determination. Nonetheless, the majority's decision to affirm appears to rest on two alternative bases, neither of which I can support. The first is that a factual admission made by Wise adequately supports the court's apparent legal conclusion that the city is immune. The second is that Wise's concessions waive appellate review of his argument the city was not immune because the trial court did not have the opportunity to address the issue. I address each in turn.

Factual Admission Does Not Support Immunity

¶25 I agree with the majority that a judicial admission may bind a party as to an issue of fact. *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433,

439, 943 P.2d 793, 799 (App. 1997). And I also agree that Wise conceded the city "made a decision to have a Hawk light installed at this location and further decided to have the funding for the Hawk light come from the RTA." Indeed, Wise never has disputed that fact, and the stipulation below therefore is irrelevant in light of similar concessions made on appeal. However, I disagree with the majority's conclusion that Wise's factual "admission" provides the "factual basis required for a legal finding of governmental immunity."[2]

¶26 Section 12-820.01, A.R.S., states in relevant part:

> A. A public entity shall not be liable for acts and omissions of its employees constituting either of the following:
>
> . . . .
>
> 2. The exercise of an administrative function involving the determination of fundamental governmental policy.
>
> B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:
>
> 1. A determination of whether to seek or whether to provide the resources necessary for any of the following:
>
> (a) The purchase of equipment.

[2]The majority also notes the trial court found Wise conceded the city's decision to fund the HAWK light "falls within the amb[i]t of A.R.S. § 12-820.01." In my judgment, this type of legal rather than factual concession cannot be considered a judicial admission or the admission of a party opponent, as admissions are limited to concessions of fact and a party cannot be bound by its counsel's opinion of the law. *See State v. Fulminante*, 193 Ariz. 485, ¶¶ 17-18, 975 P.2d 75, 82 (1999) (counsel's concession state's case insufficient to prove guilt not admission).

> (b) The construction or maintenance of facilities.
>
> . . . .
>
> 2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

The majority emphasizes its reliance on the immunity statute to conclude the city's decision to select the intersection as one that would benefit from a HAWK light and applying to have the RTA fund it is protected. Although it claims to, and indeed must, rely on the statute to support that conclusion, nowhere does the majority analyze whether the city's decision constitutes a "determination of a fundamental governmental policy" as defined by our case law, instead relying primarily on Wise's admission that the city made an "affirmative decision." Although I agree with the majority that we do not employ methods of statutory construction when the plain language of a statute is clear, we must be mindful of the ample case law interpreting the immunity statute and how our jurisprudence defines a "determination of a fundamental governmental policy." And, we are bound by the decisions of our supreme court and consider decisions of coordinate courts highly persuasive. *See White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 14, 163 P.3d 1083, 1087-88 (App. 2007).

¶27 We also are bound by the principle that "'governmental immunity is the exception and liability the rule.'" *Galati v. Lake Havasu City*, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996), *quoting City of Tucson v. Fahringer*, 164 Ariz. 599, 600 n.4, 795 P.2d 819, 820 n.4 (1990). Therefore, we should find immunity "only if it clearly applies." *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 164, 920 P.2d

41, 44 (App. 1996). Moreover, as the majority notes, we review a trial court's finding of immunity de novo, *Myers v. City of Tempe*, 212 Ariz. 128, ¶ 9, 128 P.3d 751, 753 (2006), and view the facts in the light most favorable to the party against whom summary judgment was granted, *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003).

¶28 "Operational decisions" implementing municipal policy, unlike the policymaking decisions themselves, are not immune from liability under § 12-820.01. *Kohl v. City of Phx.*, 215 Ariz. 291, ¶ 19, 160 P.3d 170, 174 (2007). A municipality's operational decisions include "routine, everyday matters" that "do not require evaluation of broad policy factors." *Warrington v. Tempe Elementary Sch. Dist. No. 3*, 187 Ariz. 249, 252, 928 P.2d 673, 676 (App. 1996), *quoting Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993). They also include decisions requiring the exercise of professional engineering judgment. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, ¶ 68, 217 P.3d 1220, 1242 (App. 2009). Section 12-820.01 immunizes a municipality's promulgation of rules and regulations, but not its operational decisions within the regulatory scheme. *Doe ex rel. Doe v. State*, 200 Ariz. 174, ¶ 6, 24 P.3d 1269, 1271 (2001). Additionally, for immunity to attach "'there must be some form of considered decision, that is, one which consciously balances risk and advantages.'" *Tostado v. City of Lake Havasu*, 220 Ariz. 195, ¶ 16, 204 P.3d 1044, 1048 (App. 2008), *quoting Goss v. City of Globe*, 180 Ariz. 229, 231, 883 P.2d 466, 468 (App. 1994).

¶29 Although the majority concludes the city is immunized by its "affirmative decision to seek funding for the installation of a HAWK traffic signal," not all municipal

decisions regarding the allocation and expenditure of resources are policy-level decisions protected by statutory immunity. *See Schabel*, 186 Ariz. at 165, 920 P.2d at 45. Indeed, the record does not reflect that any decision the city made was a policy-level decision for which it was entitled to immunity, rather than an operational-level decision. *See Kohl*, 215 Ariz. 291, ¶ 19, 160 P.3d at 174. Instead the record demonstrates that at least one city employee believed it would have been "desirable" to have HAWK lights "at every one of the 15-mile-an-hour zones on arterials and collectors," including Rita Road, and a few city employees "picked a batch" of school crossings on which to base its application for RTA funding to install HAWK lights at those places. I cannot characterize those employees' inclusion of this intersection among many, and the city's subsequent application to the RTA for funding to install a HAWK light there, as a "determination of a fundamental governmental policy" under § 12-820.01(B). *Cf. Warrington*, 187 Ariz. at 252, 928 P.2d at 676 (decision of one employee whether to put bus stop at one location or another, operational decision, not fundamental policy decision).[3]

¶30 Moreover, the determination whether an intersection needs enhanced safety features and the selection of those features necessarily requires the exercise of

[3]The majority states *Warrington* supports its result because the decision regarding the bus stop did not involve a determination of how to spend money or the allocation of resources, and thus did not fall under § 12-820.01(B). In doing so, the majority suggests *Warrington* stands for the proposition that any decision allocating resources is a determination of fundamental governmental policy. "But accepting this broad position runs counter to the recognized principle that immunity statutes are to be narrowly construed." *A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 67, 217 P.3d at 1242 (rejecting argument that decision whether and how to spend resources is by definition determination of fundamental governmental policy).

professional engineering judgment, and thus properly is characterized as an operational decision. *See A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 68, 217 P.3d at 1242 (decision involving exercise of professional engineering judgment operational). And I fail to see how the decision to install a particular device at a particular intersection, for reasons unexplained by the city, rises to the level of a "high-level policymaking decision[]" involving the exercise of "*significant* discretion" like the promulgation of rules and regulations.[4] *Id.* ¶¶ 67, 72.

¶31 And in contrast to the city's contention, *Kohl*, 215 Ariz. 291, 160 P.3d 170, provides a useful illustration of the type of decisions that qualify for statutory immunity and how those decisions differ from the city's selection of this intersection for a HAWK light and application for RTA funds to install it. In *Kohl*, our supreme court determined the city's fundamental policy decision to use a computer program for prioritizing intersections at which traffic lights should be placed was immune. *Id.* ¶ 14. However, *Kohl* also explicitly recognized the decision to use the computer program to omit intersections from a list of those to be considered for traffic lights was distinct from the subsequent choice of which intersections not excluded by the program actually would receive them, which the court assumed for the sake of argument could be an operational

[4]The majority declares the real issue here is "whether the delay in installing the light, due to the decision to seek RTA funding, was a policy-level decision." Even if the decision at issue were to be parsed into separate decisions about need, urgency, and the timing of securing funding, the city has identified no considered policy-level decision it made relating to any part of that process, and has not asserted it either recognized or considered a delay would result from seeking RTA funding for the light. *See Tostado*, 220 Ariz. 195, ¶ 16, 204 P.3d at 1048 (for immunity to apply entity must have considered decision balancing risks and advantages).

decision. *Id.* ¶ 24. Here, the city has pointed us to no comparable overarching policy or program that resulted in the selection of the intersection where M. was killed as one requiring upgrades. Instead, as discussed above, the decision to seek RTA funding for HAWK lights at "a batch" of school crossings was made by a few city employees and was not an affirmative municipal policy decision regarding whether the device either should or would be installed. And the majority fails to explain how the city employees' decision to seek RTA funding for a HAWK light here is more similar to the use of a computer program to automatically identify dangerous intersections than to the decision of what subsequent measures to take to improve safety at those intersections.

¶32 To affirm the trial court's apparent finding that the city is immune, the majority relies solely on the fact that the city sought funding for a HAWK light; from this fact it concludes the city is immune from Wise's claims for any of its acts or failures to act that may have caused or contributed to M.'s death. But Arizona case law requires more—an inquiry into how the decision was made, by whom the decision was made, and whether the decision constitutes "the determination of fundamental governmental policy." *See* § 12-820.01(A)(2). On this record I cannot conclude immunity "clearly applies" as a result of any "decision" the city made. *See Schabel*, 186 Ariz. at 164, 920 P.2d at 44 (we will find immunity only if clearly applicable).

Concessions Do Not Waive Appellate Review

¶33 I also disagree with the majority's determination that Wise's concessions[5] constitute waiver on appeal of his challenge to the city's immunity defense because the trial court was "not provided the opportunity to consider the issue." The city alleged it was immune in its motion for summary judgment and Wise contested that assertion in his response. The court's decision not to address the merits of the immunity defense because it erroneously relied on Wise's counsel's concession is different from the circumstances of *Harris v. Cochise Health Systems*, 215 Ariz. 344, ¶ 18, 160 P.3d 223, 228-29 (App. 2007), where the court was prevented from addressing the alternative argument raised on appeal because it never was raised in the trial court. As the majority repeatedly emphasizes, *Harris* discusses the reasons appellate courts generally do not consider "belatedly urged issues" where the trial court did not have "the opportunity to address [the] argument." *Id.* ¶¶ 17-18. The majority has failed to explain how the principles in *Harris* apply here where the immunity issue was not urged belatedly, but rather was raised in the initial pleadings, briefed in the summary judgment context, and argued

[5]The trial court found Wise had conceded the city's decision to fund the HAWK light "falls within the amb[i]t of A.R.S. § 12-820.01." The majority also notes the court found Wise's counsel had conceded the decision to install a HAWK light "to the exclusion of other traffic control measures" was protected under § 12-820.01. However, on Wise's motion for reconsideration the court clarified its ruling, stating that Wise had not addressed whether the decision to install one type of traffic control device constituted a rejection of competing devices. Because we have been provided no transcript of those proceedings, we are required, as the majority notes, to presume the record would support the court's characterization of Wise's concession.

below.[6] In fact, the *Harris* court distinguished *Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11, 61 P.3d 22, 25 (App. 2002), where the court reached a legal argument because the issue had been briefed and argued so "there [was] no claim of surprise." Contrary to the majority's suggestion, the trial court here was not prevented from reaching the merits of the immunity defense; the issue was raised properly below, and the court was required to determine whether the city was entitled to immunity. *See Carroll v. Robinson*, 178 Ariz. 453, 456, 874 P.2d 1010, 1013 (App. 1994) (once defense raised properly court determines if immunity applies).

¶34 Even if the issue had not been before the trial court, we would have discretion to address it, *see Harris*, 215 Ariz. 344, ¶ 17, 160 P.3d at 228, and it would be appropriate do so here where the concession of counsel the court adopted was legally incorrect. *See Lingel v. Olbin*, 198 Ariz. 249, ¶ 5, 8 P.3d 1163, 1166 (App. 2000) ("We are not bound by the trial court's legal conclusions and review those questions de novo."). "[W]hen we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result." *Evenstad*, 178 Ariz. at 582, 875 P.2d at 815 (reaching immunity issue where not argued in trial court). Further distinguishing *Liristis*, the *Harris* court noted the waived issue it chose not to address did not "exclusively involve[] pure questions of law" and therefore its decision not to address the argument "d[id] not

[6]The majority also fails to explain how the affirmative defense of immunity, which the city bore the burden to raise and prove, was "belatedly urged" by the factual concessions of another party at oral argument.

risk incorrectly interpreting a statute." *See Harris*, 215 Ariz. 344, ¶ 21, 160 P.3d at 229. Especially where immunity is the exception to the rule, *Galati,* 186 Ariz. at 134, 920 P.2d at 14, *Harris* does not support risking the incorrect interpretation of immunity statutes where the record was developed fully and the court was provided ample opportunity to address the issue below.

¶35 For these reasons, I would decide the merits of the immunity issue differently and remand to the trial court for further proceedings.[7] Because it is unclear whether the court's ruling was based on Wise's immunity concession, its own determination of immunity, or the merits of Wise's claims, I would direct the court to reconsider the issues.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[7]Because the majority neither addresses nor decides it, I need not discuss whether Wise's expert testimony provided a basis for liability.