IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

FRANCINE V. ARMENDARIZ, a single woman, *Plaintiff/Appellant*,

v.

MOHAVE COUNTY, a political subdivision of the State of Arizona,
Defendant/Appellee.

No. 1 CA-CV 15-0571
FILED 2-14-2017

Appeal from the Superior Court in Mohave County
No. S8015CV201300894
The Honorable Charles W. Gurtler, Judge

AFFIRMED

COUNSEL

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Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Patricia K. Norris joined.

M c M U R D I E, Judge:

¶1 Francine V. Armendariz appeals the superior court's grant of summary judgment in favor of Mohave County and El Paso Natural Gas Company, LLC ("El Paso"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On September 23, 2012, two motor vehicles collided at the 45-degree-angle intersection of Butch Cassidy Road ("BCR") and Pipeline Road ("PR") ("Intersection"). The Intersection has no warning signs; is located in a rural, desert area of Mohave County; and is surrounded by a natural terrain of dirt and brush. The brush surrounding the Intersection is on private property.

¶3 In Resolution 2007-168, Mohave County ("County") designated BCR a road "for the purpose of maintenance." BCR is an un-surfaced, two-lane, 60-foot-wide collector road, with an extended right-of-way beyond the actual roadway.

¶4 PR was built by El Paso, a company operating natural gas pipelines, to assist its employees in serving an underground pipeline. The United States granted El Paso a right-of-way easement to construct, operate, and maintain a natural gas pipeline in 1949. PR was created pursuant to that easement as a 25-foot wide dirt access road, lined with power line poles and markers for gas lines. It is undisputed that PR is a private easement, located on privately-owned land as it approaches BCR from the southeast. It is also undisputed that PR is used by the public.

¶5 In 2011, the County's Engineering Division ("Division") of the County's Public Works Department ("Department") conducted a traffic control study to identify potential placement of traffic control devices along

BCR (the "2011 Study").[1] The 2011 Study focused on the uncontrolled intersections of public roadways or right-of-ways with BCR that appeared to have "significant use at the time of the study" and with certain sight distance. The 2011 Study identified 18 crossroads with BCR and recommended that eight stop signs be installed. The County Traffic Safety Committee ("Committee") approved the results of the 2011 Study and presented recommendations to the County Board of Supervisors, which passed Resolution 2011-133 to install stop signs at the recommended intersections. The Department decided, through the County Public Works Director and its lead County Engineer, to exclude all intersections of BCR and private easement roads from the 2011 Study.[2] The decision was justified by the County's inability to use the Arizona Highway User Revenue Fund ("HURF") money to maintain or install traffic control devices for private easements.[3]

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[1] The County conducted a similar study in 2009. That study, however, involved assessment of only one road intersecting BCR, which was not a private easement.

[2] Prior to the 2011 Study, Steven Latoski, the Public Works Director, conveyed his decision to exclude intersections with private easement roads to Timothy Walsh, the County Engineer. In his deposition, Walsh testified the 2011 Study did not include assessment of PR, because PR was an easement and not an actual road. In his deposition, the County's Traffic Controller Gregory Whaley testified he was guided by "past precedence" and "consistency" when he excluded PR from the 2011 Study, as the County has "never" included intersections of private easement roads with County maintained roads in a study. Whaley was also guided by department policies determining Arizona Highway User Revenue Fund ("HURF") funding to be spent only on county-maintained roads.

[3] The Arizona Highway User Revenue Fund is the "primary source of revenues available to the state for highway construction, improvements, and other related expenses." ADOT, Financial Management Services, Transportation Funding, http://azdot.gov/about/FinancialManagementServices/transportation-funding. Revenues from gasoline and use-fuel taxes, motor-carrier taxes, vehicle-license taxes, motor vehicle registration fees and other fees "are deposited in the HURF and are then distributed to the cities, towns and counties and to the State Highway Fund." *Id*.

¶6 On October 13, 2011, the Committee discussed installing a sign for a private easement road not maintained by the County.[4] In its Minutes, the Committee published Latoski's comments that "State law prevents the County from using HURF funds to install traffic control devices on non-maintained roads, except if the road is declared a County Highway." Latoski further stated the County may consider installing signs on an intersection with a private easement "advising motorists of no ingress/egress easement or right of way should such I/E easement not exist," referring to a possible resident petition to extinguish the easement.

¶7 In the collision on September 23, 2012, Armendariz, who was driving on BCR, sustained serious physical injury as a result of the other driver ("Arbogast") failing to stop at the Intersection and yield the right-of-way to Armendariz. Although Arbogast saw BCR and knew he had to yield the right-of-way, he did not slow down. Arbogast was cited for failing to yield the right-of-way to Armendariz.

¶8 Armendariz brought suit in superior court against the County and other parties unrelated to this appeal, alleging the County failed to

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[4] The Mohave County Public Works department consists of several Divisions, one of which, the Engineering Division, is responsible for "perform[ing] traffic studies for road signing" and "traffic control, hydrology and speed studies." Mohave County Departments, Public Works, Engineering, www.mohavecounty.us. "The Traffic Safety Committee serves as an advisory committee to the County Engineer . . . ." Mohave County Public Works Department Policy and Procedure No. 12.1.1.1.

On August 11, 2011, the Traffic Safety Committee consisted of Steve Latoski, Public Works Director, the Engineering Manager, the Civil Engineer, the Road Superintendent, the Signing Control Supervisor, the Senior Engineering Tech, the Program Coordinator, the Committee Secretary, and Lt. Tim Sonier from the Sheriff's Department. On October 13, 2011, the Traffic Safety Committee consisted of Steve Latoski, Public Works Director, representatives from the Road Department, Sheriff's Office, Traffic Control, and the engineering Manager and APWA Coordinator.

keep its roadway, BCR, reasonably safe, causing the accident.[5] The superior court granted the County's motion for summary judgment, finding the County did not owe a duty to Armendariz and that "Administrative and Legislative Function Immunity" protected the County's decision not to place a stop sign on PR.

¶9 Armendariz timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1), and 12-2101(A)(1) (2016).[6]

DISCUSSION

¶10 In reviewing an order granting summary judgment, we view the facts favorably to Armendariz, the party against whom summary judgment was granted, and determine "*de novo* whether there are any genuine issues of material fact and whether the trial court erred in its application of the law." *Galati v. Lake Havasu City*, 186 Ariz. 131, 133 (App. 1996). We review questions of law, such as interpretation of the statute, *de novo*. *Goss v. City of Globe*, 180 Ariz. 229, 230 (App. 1994) (citations omitted). Determining whether the County is entitled to immunity is a question of law for the court. *Galati*, 186 Ariz. at 134 (citation omitted).

A. Absolute Immunity.

¶11 Armendariz argues the superior court erred by finding the County was absolutely immune from liability pursuant to A.R.S. § 12-820.01 for its decision not to install a stop sign at the Intersection, because: (1) no actual, considered decision, which would involve an affirmative exercise of discretion and conscious balancing of risks and advantages, was exercised; (2) a genuine issue of material fact existed regarding whether the County made such a decision; (3) a fundamental policy was not demonstrated to be at issue in deciding not to regulate the Intersection; (4) the qualified immunity ruling precluded resolution of absolute immunity in this case; and (5) the County's failure to adhere to its

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[5] Armendariz filed suit against Santa Fe Ranch Property Owner's Association, Inc., and Legend Land, LLC, both of whom were dismissed early in the litigation. This court dismissed the appeal against El Paso pursuant to the parties' stipulation on November 12, 2015. The appeal by Arbogast was also dismissed by this court pursuant to stipulation.

[6] Absent material revision after the relevant date, we cite a statute's current version.

2011 Study inspection criteria amounts to an operational or implementation failure, excluding application of absolute immunity.

¶12 Section 12-820.01, the absolute immunity statute, carves out "a narrow exception to the general rule that the common law applies." *Goss*, 180 Ariz. at 232. Section 12-820.01 states "[a] public entity shall not be liable for acts and omissions of its employees" in exercising "a judicial or legislative function," or "an administrative function involving the determination of fundamental governmental policy." A.R.S. § 12-820.01(A)(1) and (2). The County has absolute immunity for actions including "determination[s] of whether to *seek* or whether to *provide* the resources necessary for . . . [t]he construction or maintenance of facilities," and "determination[s] of fundamental governmental policy [including] . . . *whether . . . and how* to spend existing resources." A.R.S. § 12–820.01(B)(1)(b), (A)(2), (B)(2) (emphasis added); *see Myers v. City of Tempe,* 212 Ariz. 128, 130 ¶ 10 (2006) (an administrative decision which "involved weighing risks and gains, concerned the distribution of assets, and required consulting the city's subject matter experts" was immune under § 12–820.01); *see also Kohl v. City of Phoenix*, 215 Ariz. 291, 294-95, ¶ 15 (2007) (the City's decision to use a computer program in prioritizing potentially dangerous intersections for placing signs, rather than placing signs everywhere or using a different method of prioritization, was absolutely immune).

1. Legislative Function.

¶13 "The County exercises its legislative function by creating, defining, or regulating rights." *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 603, ¶ 35 (App. 2010).

¶14 It is undisputed the County passed Resolution 2011-133, in which it approved the 2011 Study results to install certain stop signs along BCR. The County exercised a legislative function when its Board of Supervisors passed Resolution 2011-133. The County is absolutely immune from liability for this decision because the Resolution is an exercise of legislative function based on an actual decision.

2. Administrative Function Involving Determination of Fundamental Governmental Policy.

¶15 Armendariz argues no fundamental policy decision existed in the absence of written policies, instructions, directives, or discussion by the County Board of Supervisors or the Committee. Armendariz fails to

address why the decision to exclude the Intersection from the 2011 Study was not an action of fundamental governmental policy.

¶16 "Section 12-820.01(A)(2) immunizes all determinations of fundamental governmental policy, even those that can be shown to fall below a standard of reasonable care." *Kohl*, 215 Ariz. at 295, ¶ 16. The immunity statute was designed to allow a government to exercise its judgment freely. *Goss*, 180 Ariz. at 232.

¶17 In *Kohl*, the City decided to use a computer program to select the intersections most in need of a warning sign. The supreme court held the decision was absolutely immune, including the "selection of the six warrants as criteria for [the computer program's] evaluation." *Kohl*, 215 Ariz. at 295, ¶ 17. Moreover, a decision "follow[ing] automatically" from an immune policy decision is also immune. *Myers,* 212 Ariz. at 130, ¶ 12 (City's decision to dispatch a particular unit flowed directly from its immune decision to enter into an intergovernmental agreement, and was therefore also immune).

¶18 The record before us indicates the County had an informal policy that it would not place signs on easements within the County. The Department's Director Steven Latoski followed this informal policy when he determined that easements along BR would not be considered for signage in the 2011 study. The decision to exclude private easements for signage pursuant to the County's informal policy was a protected decision as it flowed automatically and directly from the County's informal policy. *See Myers*, 212 Ariz. at 131, ¶ 12 ("The terms of the [intergovernmental agreement] determined, without the need for any additional implementing decision, which emergency unit would respond to [Appellant's] call for help.").

¶19 At oral argument, counsel for Armendariz conceded the existence of the informal policy, and that the County had strictly applied the policy. The record supports that concession, as both the County Engineer and Traffic Controller testified that the Department never

assessed for signing or actually signed a private easement.[7] There is no evidence the County has ever signed a private easement.

¶20 Armendariz neither disputes the existence of Latoski's decision to spend only HURF monies on BCR's maintenance, nor the decision to exclude private easement roads from its traffic control studies and from applying HURF monies to them. *See Evenstad v. State*, 178 Ariz. 578, 584 (App. 1993) ("Promulgating rules and regulations governing *internal agency policy*, unless merely adopting specific statutory criteria, *necessarily* involves a policy decision, consciously balancing risks and advantages.") (quotation omitted) (emphasis added). Armendariz points to no specific statutory criteria the County was adopting in removing private easement roads from consideration in its traffic control studies.

¶21 Armendariz argues, however, the informal policy was not immune because it lacked the hallmarks of a formal, written policy or procedure, and was not discussed with other members of the County government. Nothing in the statute or appellate precedent supports Armendariz's suggestion that the determinations protected by the immunity statute must be formally enacted decisions of a municipal body. County government leaders have discretion in making policy decisions. *See Myers*, 212 Ariz. at 131, ¶ 14.

¶22 Armendariz further contends the County could have used sources of funding other than the HURF funds to place a stop sign at the Intersection, and the decision, thus, was wrong. But Armendariz fails to address why Latoski's decision to apply the informal policy to the 2011 Study was not a fundamental policy determination. Moreover, in *Evenstad*, we refused to "second-guess discretionary fundamental governmental policy decisions made by State departments at the administrative level."

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[7] The Traffic Committee Minutes dated October 13, 2011, discuss the informal policy in relation to California Drive, a private easement road at that time. However, the October 2011 discussion of a resident's inquiry about the County placing a sign on California Drive does not indicate the county amended or changed the informal policy because California Drive lost its private easement status prior to the County installing a sign on it.

178 Ariz. at 585. We shall refrain again from interfering in the government's policy making.[8]

¶23 Other policy considerations further support the Director's decision. As the County contends, placing a stop sign on the Intersection could be seen as establishing precedent toward the required placement of signage on all private easements and alleys crossing public roadways. Marking the Intersection could also signal to the public that PR, a private easement built for a narrow purpose, was available for public travel, condoning misuse of the easement.

3. Actual Decision.

¶24 Armendariz argues no actual decision reflecting conscious weighing of risks and benefits preceded the County's exclusion of PR from the 2011 Study, rendering the result a decision by default.

¶25 "[A] public entity is entitled to immunity if it makes an actual decision or affirmative act. An actual decision is made when deciding to do something or deciding not to do something." *Tostado v. City of Lake Havasu,* 220 Ariz. 195, 199, ¶ 16 (App. 2008). Although the immunity statute "is designed to give the government the room it needs to govern, allowing judgment and discretion to be exercised freely without concern that decisions will be second-guessed by judges or juries," the immunity was not meant to apply "where no actual decision-making has occurred." *Goss*, 180 Ariz. at 232.

¶26 In *Goss*, the City failed to make an actual decision not to spend funds on guardrails or sidewalks. *Id*. at 231. By not allocating funds for the construction of safeguards, the City decided by default not to allocate funds

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[8] Moreover, the Department Director's decision to implement the informal policy was supported by the Manual on Uniform Traffic Control Devices ("MUTCD"), adopted by the County Board of Supervisors' Resolution No. 2002-397, amended by Resolution No. 2010-016. The MUTCD is the national standard for all traffic control devices, and in a section devoted to traffic control devices for low-volume roads it suggests an installation of stop- or yield-signs be based on engineering judgment or a study. MUTCD, 5B.02. Additionally, A.R.S. § 28-643 authorizes local authorities to "place and maintain the traffic control devices . . . under their jurisdiction as they deem necessary." Article 9, Section 14, of the Arizona Constitution also supports the County policy.

for the specific guardrail. *Id.; see also Galati*, 186 Ariz. at 136 (City was not entitled to legislative immunity without presenting evidence it made affirmative decision not to fund improvement).

¶27 Here, the Department Director specifically decided not to include intersections involving private easement roads in the 2011 Study. *See Tostado,* 220 Ariz. at 199, ¶ 16. The Department Director told the County Engineer to exclude these intersections before the Engineer started the 2011 Study. The Director considered the County's funding and assets and explained his position in the Committee meeting of October 2011. The decision was protected.

4. Implementation Failure.

¶28 Armendariz argues the Intersection showed significant use and should, thus, have been included in the 2011 Study. By failing to follow its own criteria, Armendariz asserts, the County should not be afforded absolute immunity, because the exclusion of PR was an operational and implementation failure.

¶29 Our supreme court gave "great weight to the statute's limiting phrase 'determination of fundamental governmental policy,' and has not extended absolute immunity to actions that merely implement a fundamental policy, even when those actions are themselves decisions involving some level of discretion." *Myers*, 212 Ariz. at 131, ¶ 12; *see Fidelity Sec. Life Ins. Co. v. Dep't of Ins.*, 191 Ariz. 222, 225-26, ¶¶ 11-12 (1998) (the City was not absolutely immune for negligent implementation of its certification policy); *see also Doe ex rel. Doe v. State*, 200 Ariz. 174, 175, ¶¶ 6, 9-10 (2001) (distinguished an operational decision within the regulatory scheme from a decision applying criteria the department had previously selected).

¶30 In this case, no implementation failure occurred as PR was properly excluded from the 2011 Study as a private easement, pursuant to the County's informal policy.

CONCLUSION

¶31 For the reasons stated above, we affirm the superior court's grant of summary judgment in favor of the County.

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