

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-091958

11/18/2015

HON. DAVID K. UDALL

CLERK OF THE COURT

K. Tiero

Deputy

JAMES MICHAEL HUMPHREY, et al.

JOHN P LEADER

v.

STATE OF ARIZONA, et al.

FRED M ZEDER

TOM HORNE

NO ADDRESS ON RECORD

CHRISTOPHER J ZACHAR

UNDER ADVISEMENT RULING

The Court took this matter under advisement after Oral Arguments were held re: Motions *In Limine*; Defendant's Motion for Partial Summary Judgment Dismissing Alleged Violation of ARS 39-121; Defendant's Motion for Summary Judgment; Plaintiffs' Motion to Dismiss ARS 12-820.01 & 12-820.03 Affirmative Defenses, "Waiver by Conduct"; and Plaintiffs' Cross Motion for Summary Judgment. The Court has considered the arguments of the parties and the pleadings. The Court makes the following findings and enters the following orders.

The Court will consider Defendant's Motion for Partial Summary Judgment Dismissing Alleged Violation of ARS 39-121.

THE COURT FINDS that Count Three of the Plaintiffs' Complaint alleges that the Defendant violated the public records act under ARS 39-121 *et seq.* The Court further finds the Plaintiffs were asked to produce any and all information with respect to the number of cross-over median deaths between Phoenix and Tucson and the number of cross-over accidents that occurred between Phoenix and Tucson. The Court further finds that the State did not keep track of that specific information. The Court further finds the State did appropriately answer Plaintiffs' inquiries to the best of their ability. The Court further finds there were over 37,000 accident reports that occurred between Phoenix and Tucson. The Court further finds the records requested by the Plaintiff did not exist and the State cannot be required to produce what it does not have. The Court further

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finds there would be no practical way for the State to obtain the information that the Plaintiffs have requested. The Court further finds there would be no genuine issue of material fact on this issue for a jury to consider.

IT IS THEREFORE ORDERED granting Defendant's Motion for Partial Summary Judgment and dismissing Count Three of Plaintiffs' Complaint in which they allege a violation of ARS 39-121, with prejudice.

The Court will now consider Plaintiffs' Motion to Dismiss ARS 12-820.01 & 12-820.03 Affirmative Defenses, "Waiver by Conduct".

The Court notes the Plaintiff has withdrawn its Motion to Dismiss with respect to all claims made under ARS 12-820.03.

With respect to Plaintiffs' Motion to Dismiss Defenses under ARS 12-820.01,

THE COURT FINDS this case is over four years old. The Court further finds that many of the issues in this case were also being litigated in the Glazer vs. the State, CV2009-001261. The Court further finds this Spring, the Arizona Supreme Court issued its ruling in that case. The Court further finds that the law was unsettled with respect to the State's affirmative defenses under ARS 12-820.03 until Spring of 2015 when the Arizona Supreme Court ruled. The Court further finds that after the ruling, the State needed an opportunity to develop its facts and opinions that would be relevant to determine whether or not the State had immunity under ARS 12-820.01. The Court further finds the State's delay does not manifest an intent to waive the State's immunity rights. The Court further finds, as a matter of law, the State did not waive its immunity rights.

IT IS THEREFORE ORDERED denying Plaintiff's Motion to Dismiss ARS 12-820.01 & 12-820.03 Affirmative Defenses, "Waiver by Conduct".

The Court will now consider Defendant's Motion for Summary Judgment and Plaintiffs' Cross Motion for Summary Judgment.

THE COURT FINDS the Arizona Supreme Court in Fleming vs. State, number CV-14-0315-pr (July 9, 2015), stated that "judicial construction of immunity provisions in statutes applicable to government entities should be restrained and narrow." The State is seeking absolute immunity under ARS 12-820.01 and Kohl vs. City of Phoenix 215 Az 291 (2006). The State argues that the median barriers complied with all applicable construction guidelines and roadway design guidelines. It is the Plaintiffs' position that there is no immunity for non-decisions or decisions by default under Kohl and ARS 12-820.01. It is their position that Arizona Department of Transportation (ADOT) never considered or firmly decided not to install a median barrier at mile post 171.

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The Court therefore finds the State does not have an absolute immunity claim under ARS 12-820.01 and that whether or not it can claim immunity under such statute would be a question for the jury, with respect to the State's claim that it has immunity under ARS 12-820.03.

The Court further finds the remaining issue after the Glazer ruling is in order for the State to assert its Defense, the State must provide a "reasonable adequate warning" of "reasonably dangerous hazards" to allow the travelers to take suitable precautions, Glazer 237 Az 160 at paragraph 13. The Court further finds the State did not provide any warnings near mile post 171. The Court further finds there are genuine issues of material fact for the jury to consider with respect to whether or not an unreasonable dangerous hazard existed at mile post 171 with respect to the width of the median and whether or not there should or should not have been a barrier. The jury can determine whether or not there could have been a reasonable adequate warning by appropriate signs that could heighten a driver's senses as to any potentially dangerous hazard that existed in that area.

With respect to Defendant's claim that this case should be dismissed because it complied with all appropriate highway designs and standards,

THE COURT FINDS there are genuine issues of material fact for the jury to consider with respect to whether the State adequately designed the highway without a median barrier and whether or not that design violated its standard of care.

With respect to Plaintiffs' Cross Motion for Summary Judgment, the Court has previously found that the Defendant has not waived its immunity defenses.

IT IS THEREFORE ORDERED denying Defendant's Motion for Summary Judgment and Plaintiffs' Cross Motion for Summary Judgment.

The Court will now consider the parties' Motions *In Limine*.

The Court has previously granted the Defendant's Motion *In Limine* to exclude any evidence of how or why Lynn Quinn died.

With respect to Defendant's Motion *In Limine* re: prejudicial photographs,

The Court has reviewed the photographs. The Court finds they are disturbing in nature, that they are very gruesome and show dismembered parts of the human body from the accident victims. The Court further finds there is little relevance to show how the accident happened. The Court further finds that any probative value is outweighed by its prejudicial effect. The Court further finds the photographs would potentially inflame a jury.

IT IS ORDERED granting Defendant's Motion *In Limine* with respect to gruesome photographs.

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IT IS FURTHER ORDERED precluding all photographs of dismembered body parts from being shown to the jury. However, the Court will allow the Plaintiffs to show those photographs to the officers on scene and allow them to describe what they personally saw at the accident scene without showing the photographs to the jury.

The Court will now consider Defendant's Motion *In Limine* to preclude the testimony of Dr. Robert Bleyl.

The Court notes that it has previously denied the Defendant's request to exclude Dr. Bleyl from testifying in this matter.

IT IS ORDERED denying Defendant's Motion *In Limine* to exclude Dr. Bleyl's testimony.

IT IS FURTHER ORDERED denying Defendant's Motion to Reconsider the Defendant's request for a Daubert hearing regarding the testimony of Dr. Bleyl.

The Court will now consider Plaintiff's Motion *In Limine* re: *res judicata*.

It is the Plaintiffs' position that the issue of negligence has already been determined in the Glazer case. It is their position that the facts in both cases are similar and that because a jury in Glazer found the State negligent that they should be found negligent in this case as well, as a matter of law.

THE COURT FINDS that in Arizona, *res judicata* requires three elements including: (1) an identity of claims in the suit in which a judgment was entered and the current litigation; (2) the final judgment on the merits and the previous litigation; and (3) the identity or privity between the parties of the two suits. The Court further finds that although the Glazer and Humphrey cases are similar in nature, there are differences between the two. The Court further finds the third prong of the *res judicata* tests, that there must be identity or privity between the parties of the two suits, is not met. The Court further finds there is no association between the Plaintiffs in the Glazer and the Humphrey cases. Therefore, the Court finds that the doctrine of *res judicata* does not apply in this case.

IT IS ORDERED denying Plaintiff's Motion *In Limine* re: *res judicata*.

The Court will now consider the Defendant's Motion to exclude any testimony or evidence regarding the Glazer case or the testimony of Diane Glazer.

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THE COURT FINDS that any references in the Glazer litigation would be irrelevant in this case, and that any of its probative value would be outweighed by any unfair prejudice. The Court further finds that having Diane Glazer relive her experiences from her accident has the potential to inflame the passions of the jury. The Court further finds that Ms. Glazer does not have any independent knowledge about the facts of the accident in this case.

IT IS THEREFORE ORDERED precluding the testimony of Diane Glazer and any reference to the Glazer case, except by stipulation of the parties.

The Court will now consider Plaintiff's Motion *In Limine* re: other insurance claims.

THE COURT FINDS that during the course of these proceedings the Quinn Plaintiffs made a claim for wrongful death against the Humphrey Plaintiffs in which the Humphrey insurance carrier settled their claim on the policy limits of \$250,000 for the wrongful death of Anne Quinn. The Court further finds that under Rule 408 of the Arizona Rules of Evidence, any reference to the settlement between the Humphreys and State Farm Insurance is precluded. The Court further finds that under Rule 403, any prohibitive value of the settlement would be outweighed by any prejudicial effect.

IT IS THEREFORE ORDERED granting Plaintiff's Motion *In Limine* re: other insurance claims and precluding the State from enlisting any evidence of the settlement between Pam Humphrey and the Quinn Plaintiffs and/or their insurance company, State Farm.

Dated this 18th day of November, 2015

/ s / HONORABLE DAVID K. UDALL

HONORABLE DAVID K. UDALL
JUDICIAL OFFICER OF THE SUPERIOR COURT