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SUPREME COURT
STATE OF ARIZONA

MARCIE NORMANDIN, a single woman, Plaintiff/Appellant/Petitioner, v. ENCANTO ADVENTURES, LLC, an Arizona corporation d/b/a ENCHANTED ISLAND AMUSEMENT PARK; CITY OF PHOENIX, a municipal corporation; et al., Defendants/Appellees/Respondents.	**Case No. _____** Arizona Court of Appeals Case No. 1 CA-CV 17-0373 Maricopa County Superior Court Case No. CV 2015-013292 Hon. Lori Horn Bustamante

PETITION FOR REVIEW

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The Main Issue Presented for Review

Does the Arizona Constitution's anti-abrogation clause bar the Legislature from granting tort immunity from common-law simple negligence to a private business—simply because that private business has a contract with a public entity arguably making the private business an "agent" of the public entity in managing the public entity's recreational land?

The Anti-Abrogation Clause and the Arizona Recreational Use Statute

The Arizona Constitution's anti-abrogation clause states that: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." Ariz. Const. art. 18, § 6.

The Arizona Recreational Use Statute provides that: "A public or private owner, easement holder, lessee, tenant, manager or occupant of premises is not liable to a recreational or educational user except on a showing that the owner, easement holder, lessee, tenant, manager or occupant was guilty of wilful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational or educational user." A.R.S. § 33-1551(A).

The qualified immunity the Arizona Recreational Use Statute purportedly grants to *private* owners, *private* easement holders, *private* lessees, *private* tenants, *private* managers, or *private* occupants violates the anti-abrogation clause, which bans abrogation of the right of action to recover damages.

The Reasons this Court Should Grant Review

The Court should grant review because the petition raises purely legal issues of first impression and of statewide importance that are sure to recur.

This case arises from severe personal injuries a mother suffered while carrying her child to a piñata event. The mother tripped and fell in a piñata area within a city park—a piñata area a private business groomed, maintained, and managed, supposedly as the city's "agent." The Court of Appeals found the private business immune from the anti-abrogation clause's protections simply because it was the city's "agent." No previous Arizona appellate decision has ever nullified the anti-abrogation clause in that way.

Since 1912, the anti-abrogation clause has protected Arizona's people by preventing the Legislature from enacting any law that would eliminate their common-law right of action to recover damages for personal injuries. The right to bring a negligence action "is a fundamental right protected by the anti-abrogation clause of the Arizona Constitution." *Baker v. University Physicians Healthcare*, 231 Ariz. 379, 388 ¶ 39 (2013).

By safeguarding the anti-abrogation clause, this Court "is protecting a constitutionally assigned and centrally important role for the Court in Arizona's government." Paul Bender, *The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years*, 44 Ariz. St. L.J. 439, 449 (Summer 2012).

Now, for the first time, an Arizona appellate court has held that the Legislature can abrogate the common-law simple-negligence right of action to recover personal-injury damages for any private business that happens to have a contract with a public entity arguably making the private business an "agent" of the public entity concerning its public recreational land.

This is an issue of first impression and of statewide importance that is sure to recur. Any private business that provides support, management, or ancillary services for a public entity in connection with its public recreational land can now assert that, as an "agent" it has immunity from common-law simple negligence.

The Statute "creates qualified immunity, leaving the landowner liable for willful, malicious, or grossly negligent conduct." Jefferson Lankford & Douglas A. Blaze, *The Law of Negligence in Arizona* § 7.10 (3rd ed. 2017). Marci, however, is solely asserting a claim for common-law simple negligence.

State, county, municipal, and other public entities own and operate thousands of facilities and millions of acres of land falling within the scope of the Arizona Recreational Use Statute. The public entities themselves may have immunity from common-law simple negligence connected with operating their recreational land under the Statute, because, before 1912, there may not have been a common-law right to sue public entities for personal injuries.

Undeniably, there was a common-law, simple-negligence right to sue a

private business for personal injuries before Arizona statehood. Making a private business a public entity's "agent" cannot immunize that private business and bar the common-law, simple-negligence right of action to recover damages against that private business.

This Court should grant review to prevent selective legislative nullification of the anti-abrogation clause through grants to "agent" private businesses of immunity from the common-law, simple-negligence right of action to recover damages for personal injuries. This Court has always held that the anti-abrogation clause "prohibits the abrogation of common law negligence actions." *Franklin v. Clemett*, 240 Ariz. 587, 594 ¶ 17 (App. 2016). As happened here, "abolition of a cause of action before injury has occurred, and thus before the action could have been brought, is abrogation." *Kenyon v. Hammer*, 142 Ariz. 69, 74 (1984).

The anti-abrogation constitutional issue here was foreshadowed in *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003). In *Dickey*, a 10-year-old boy was severely injured when sliding down a hill in winter at a park that the City of Flagstaff owned and operated. The injured child's parents sued Flagstaff. The trial court and Court of Appeals both held the Arizona Recreational Use Statute barred the right of action to recover damages against Flagstaff.

This Court held that the anti-abrogation clause "protects from legislative repeal or revocation those tort actions that 'either existed at common law or

evolved from rights recognized at common law.'" *Dickey*, 205 Ariz. at 3 ¶ 9 (quoting *Cronin v. Sheldon*, 195 Ariz. 531, 539, ¶ 39 (1999)).

Thus, for the *Dickey* parents' negligence right of action to fall within the scope of the anti-abrogation clause—like Marcia Normandin's negligence right of action—that "right of action for simple negligence against the city must have existed at the common law or have found its basis in the common law at the time the constitution was adopted." *Dickey*, 205 Ariz. at 3 ¶ 9. Since there supposedly was no common-law simple negligence right of action against a municipality engaged in a government function when the Arizona Constitution was adopted in 1912, the anti-abrogation clause did not apply. *Id*.

But before 1912, there *was* a common-law simple-negligence right of action against private businesses. *See, e.g.*, *Huachuca Water Co. v. Swain*, 4 Ariz. 113 (Terr. 1893) (tort action for personal-injury damages against a private company for injuries resulting from a fall into an open, unguarded ditch); *Southern Pacific Co. v. Hogan*, 13 Ariz. 34 (Terr. 1910) (tort action for personal-injury damages against a private company for injuries a passenger suffered in a train derailment.).

Thus, under *Dickey*, although the Arizona Recreational Use Statute might fall outside the scope of the anti-abrogation clause as far as the City of Phoenix is concerned, the anti-abrogation clause applies fully to any private business, such as Encanto Adventures. To the extent the Arizona Recreational Use Statute purports

to abrogate Marcie Normandin's common-law, simple-negligence right of action against *any* private business, the Statute violates the anti-abrogation clause, and is unconstitutional.

Saying Encanto Adventures is the City's "agent" is irrelevant. Encanto Adventures is *not* a "public entity"—defined as the "state and any political subdivision of this state," with "state" defined as "this state and any state agency, board, commission or department." A.R.S. §§ 12-820(7) & (8). Nor is it a "public employee," which means "an employee of a public entity." A.R.S. § 12-820(6). Indeed, it cannot be an Arizona Tort Claims Act "employee," because independent contractors are expressly *excluded* from that Act's definition of "employee." A.R.S. § 12-820(1). If the Legislature had wanted "agents" of public entities to have immunity, it would have tried to specify that. But it never did. In short, Encanto Adventures is a mere private business with *no* governmental immunity.

In fact, whatever the principal-agent relationship between the City and Encanto Adventures about who was in charge of grooming, maintaining, or managing the piñata area, Encanto Adventures is, as its Answer admits, merely "an Arizona limited liability corporation [sic] lawfully doing business as Enchanted Island Amusement Park." (IR-009 at ¶ 2).

The anti-abrogation clause "prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort

which trace origins to the common law." *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶ 35 (1999). The anti-abrogation clause prevents the Legislature from passing a law (such as the Arizona Recreational Use Statute) purporting to abrogate the common-law, simple-negligence right of action to sue a private business (such as Encanto Adventures) that has negligently caused injury.

Encanto Adventures is neither the City nor its proxy. It cannot evade the anti-abrogation clause by claiming to be the City's "agent" for land the City owns. Otherwise, the City and all other public entities could immunize *anyone* providing services as their "agents" at their public recreational land—from private trash collectors to maintenance companies to providers of other services of all kinds.

No one can gain immunity from Arizona constitutional rights so cheaply. "This right to recover damages, considered fundamental in Arizona," after all, "has been 'jealously protected by this court's jurisprudence from the first days of statehood.'" *Goodman v. Samaritan Health System*, 195 Ariz. 502, 506 ¶ 17 (App. 1999) (quoting *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 272 (1994)).

The anti-abrogation clause "was intended to take the right to seek justice out of executive and legislative control, preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986). Control over the right to seek justice and the ability to invoke judicial remedies for common-law torts rests *not* in

the hands of legislators subject to special-interest pressure to immunize private businesses—but in the hands of Arizona's judges and justices.

The Arizona Constitution's clear, strong safeguards and protections apply to Encanto Advesturs, which groomed, maintained, and inspected a piñata area so poorly that a hole it created, failed to fill in, and/or failed to warn about caused its customer, an unsuspecting mother carrying her child, to suffer severe injury.

The Court of Appeals Misread the 1913 *McQuillin* Treatise

One point requires emphasis: The Court of Appeals relied on a 1913 treatise for its conclusion that "municipal immunity" in performing "strictly governmental functions" for the public benefit extends to a municipality's "officers and *agents* thereunder." *Opinion* at ¶ 25 (quoting Eugene McQuillin, 6 *A Treatise on the Law of Municipal Corporations* § 2623 at Page 5398 (1913) (emphasis added in Opinion). The same treatise section was quoted in *Dickey*, 205 Ariz. at 3, ¶ 10.

But the Court of Appeals misread the treatise, which actually states that:

> ***The rule is firmly established*** in our law that where the municipal corporation is performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder, unless made liable by statute.

Id. (italics and bolding in original). We have attached a copy of the full original section from the *McQuillin* treatise, to *prove* what it actually says. *See* Exhibit 2.

The *McQuillin* treatise actually says that, when a municipal corporation is

performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions, the municipal corporation is not liable in a private action on account of injuries caused by the wrongful acts of its officers or agents. The *McQuillin* treatise simply explained the scope of municipal immunity and *did not* extend immunity to a municipality's "agents." Because the Court of Appeals read the treatise inaccurately, it incorrectly concluded that Encanto Adventures, as the City's "agent," was supposedly immune from liability for common-law simple negligence—despite the anti-abrogation clause's clear contrary terms.

The Operative Facts

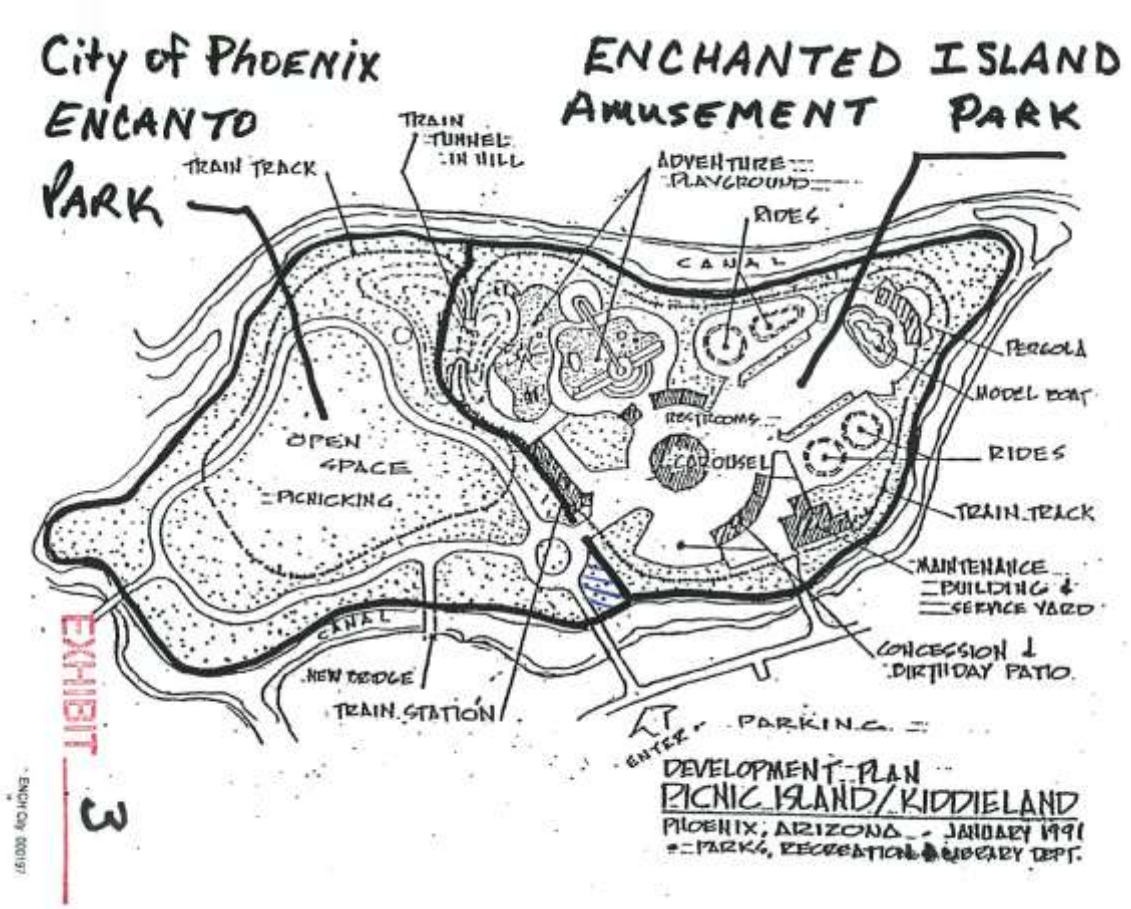
This all started with a birthday party and a piñata. Marcie Normandin paid a $287 fee to Encanto Adventures for her one-year-old daughter's birthday party, to be held at the City of Phoenix's Encanto Park on January 10, 2015. (IR-035 at 6, ¶ 47; IR-024 at 5, ¶ 26).[1] Encanto Adventures leases some parkland to conduct its operations. An unleased part of the park was used for piñata activities. Marcie paid the $287 fee to have Encanto Adventures stage the birthday party and to have its employees help with the festivities in the piñata area. (IR-035 at 5, ¶¶ 7-8).

One of Encanto Adventures' birthday-party services was setting up and conducting the piñata part of a birthday party, as long as the customer brought the piñata. (IR-035 at 6, ¶ 9). Encanto Adventures had designated an area within

[1] "Encanto Adventures" refers to Encanto Adventures, LLC, a private company doing business as Enchanted Island Amusement Park.

Encanto Park where a hook to hang piñatas was permanently affixed to a tree. (IR-035 at 6, ¶ 35). In fact, because it was too crowded in its leased area, Encanto Adventures required its customers to use the "designated piñata area" inside the park but outside the fenced-in area leased from the City. (IR-035 at 6-7, ¶¶ 11-12; IR-024 at 4, ¶ 14; IR-023 at 4:1-4).

Encanto Adventures' owner/operator testified that the piñata area, the "trapezoidal area of land, just to the west and south of the front gate is not identified within the lease." (IR-026 at 6:8-12). The area actually described as the leased premises is the area within the fence on the right. (IR-026 at 85:23 to 86:5).



Development Plan (IR-059)

The leased area within the fence is to the right of the diagram; the piñata area is the tiny cross-hatched area in the lower middle. The area to the left, including the cross-hatched piñata area, is solely City parkland. The piñata area is *outside* Encanto Adventures' leased area, according to its owner/operator. Indeed, "Enchanted Island Amusement Park," the fenced-in right-side area, is what Encanto Adventures avows it is doing business as. (IR-009 at ¶ 2).

Encanto Adventures' customers were the exclusive or nearly exclusive users of the "designated piñata area." (IR-035 at 7, ¶ 13). Customers were told that the birthday piñata "must be broken in our designated piñata area." (IR-035 at 2, ¶ 11). That was so although the company had no authority to either grant or deny access to anyone to use the "designated piñata area." (IR-035 at 8, ¶ 29). Marcie understood that, if she brought a piñata, Encanto Adventures' staff would conduct the piñata game in the company's designated piñata area. (IR-035 at 7, ¶ 14).

When Marcie and her daughter arrived at Encanto Park on January 10, 2015, Encanto Adventures had scheduled the birthday party's piñata activity for 1:15 p.m. (IR-035 at 6, ¶ 7; 7, ¶ 15; 8, ¶¶ 26-27). An Encanto Adventures staff member always brought the piñata to the designated piñata area and hanged it there for the customers. (IR-035 at 8, ¶ 28). And so, on January 10, 2015, an Encanto Adventures' employee led Marcie's birthday-party guests to the "designated piñata

area," where the hook for hanging the piñata was permanently installed in a tree limb. (IR-035 at 4, ¶ 37; 7, ¶¶ 16-17). He was to use a rope to hang the piñata and stand aside to operate it. (IR-035 at 4, ¶ 37; 7, ¶ 18) (IR-024 at 7 ¶ 37).

Marcie, while carrying her one-year-old daughter, walked across the area to get the piñata and its breaking stick. While Marcie did that, she stepped into a sprinkler-head hole, divot, or depression covered by grass, fell, broke her right ankle, and injured her right arm. (IR-035 at 7, ¶ 19; IR-24 at 7, ¶¶ 39-41; IR-023 at 7:5-11). Encanto Adventures' owner/operator testified he "personally" and "every day maintained and prepared "the specific area where [Marcie] fell while engaging in her piñata activity." (IR-024 at 4, ¶ 17). If so, he did it poorly.

Mornings, six to seven days a week, Encanto Adventures' owner/operator had supposedly patrolled "the entire area and attend[ed] to any landscaping maintenance." (IR-024 at 4, ¶ 18). The owner/operator claims he personally mowed the grass and maintained the sprinkler heads where piñata activities occurred and also supposedly was daily on the lookout for potential hazards. (IR-024 at 4, ¶ 19). Encanto Adventures claims its owner/operator had personally "groomed" and "policed" the piñata area. (IR-023 at 12:13-19). Once again, if so, he did all of that poorly.

Despite assuming a duty to inspect, prepare, and maintain the piñata area for customer use, Encanto Adventures failed to find and repair the depression, hole, or

divot in the piñata area where Marcie fell. (IR-024 at 4, ¶ 21). There is no evidence Encanto Adventures warned Marcie of the danger or took advance measures to prevent harm from the piñata area's dangerous, concealed condition.

Standard of Review

When reviewing grant of a summary judgment, this Court views the facts and reasonable inferences from them in the light most favoring the nonmovant. *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 311 ¶ 2 (2017). Review of grant of a summary-judgment motion is de novo. *Sanders v. Alger*, 242 Ariz. 246, 248 ¶ 2 (2017). Interpreting statutes is also de novo. *Gila River Indian Community v. Department of Child Safety*, 242 Ariz. 277, 280 ¶ 10 (2017).

Because the Statute limits common-law liability, courts "construe it strictly to avoid any overbroad statutory interpretation that would give unintended immunity and take away a right of action." *Armenta v. City of Casa Grande*, 205 Ariz. 367, 373 ¶ 24 (App. 2003).

Procedural Background

Marcie Normandin filed her *Complaint* on November 30, 2015 (IR-1). Defendants Encanto Adventures and the City filed a joint *Answer* on January 21, 2016 (IR-009). On September 27, 2016, Defendants moved for summary judgment based on the Arizona Recreational Use Statute (IR-023). After response (IR-034), reply (IR-057), and oral argument (IR-063), on February 9, 2017, the trial court

filed a minute entry granting the summary-judgment motion (IR-065).

On February 24, 2017, Plaintiff filed a combined Rule 59/60 motion. After a response (IR-080), and reply (IR-081), but with no oral argument, the trial court denied the motion in a minute entry filed April 24, 2017 (IR-084).

On April 27, 2017, the trial court filed a *Judgment* lacking Rule 54(c) language (IR-085). Plaintiff filed a *Notice of Appeal* on May 26, 2017 (IR-089). On June 1, 2017, the trial court filed an *Amended Judgment* with proper Rule 54(c) language (IR-090). Later that same day, Plaintiff filed a timely *First Amended Notice of Appeal* (IR-091).

The Court of Appeals filed its Opinion on June 26, 2018, and filed an Order denying Marcie Normandin's motion for reconsideration on July 10, 2018. This timely petition for review followed.

Secondary Issues Presented for Review

Status. Despite its inability to control access to the piñata area, was Encanto Adventures an "occupant" or "manager" of the piñata area under the Arizona Recreational Use Statute?

"Recreational user." When Marcie Normandin paid $287 for the birthday services, did she pay more than a "nominal fee," thus preventing her from being a "recreational user" under the Arizona Recreational Use Statute?

Violation of equal-privileges-and-immunities clause. As applied to

Encanto Adventures, does the Arizona Recreational Use Statute violate the equal-privileges-and-immunities clause, Ariz. Const. art. 2, § 13?

Violation of ban against special laws. Does the Arizona Recreational Use Statute violate Ariz. Const. art. 4, part 4, § 19(13), which prohibits special laws granting special privileges, immunities, or franchises to a corporation, or violate Ariz. Const. art. 4, part 4, § 19(20), which prohibits special laws when a general law can be made applicable?

Conclusion

This Court should grant review because the petition raises important, purely legal issues of first impression and statewide significance that are sure to recur. Nothing in Arizona common law, in the Arizona Tort Claims Act, in the Arizona Recreational Use Statute, or in any other Arizona statute gives immunity to private businesses acting as "agents" of public entities in relation to land the public entities own or operate. The Court of Appeals has created immunity where none ever existed, contrary to controlling Arizona legal doctrines.

"There is perhaps no doctrine more firmly established," in fact, "than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 392 (1963).

Public entities entitled to qualified immunity from common-law, simple

negligence under the Arizona Recreational Use Statute cannot gift that qualified immunity to "agents," when those agents are merely private businesses with which the public entities have contracts for recreational-land-related services. No Arizona appellate court has ever undercut the anti-abrogation clause's unique protections by extending government immunity to a public entity's contractual "agent."

Marcia Normandin therefore asks this Court to grant review, to order supplemental briefs, and to set this matter for oral argument.

DATED this 25th day of July, 2018.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney
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Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 3,474 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

The undersigned lawyer certifies that this document was electronically filed with the Clerk of the Arizona Supreme Court and that a copy was then electronically delivered to:

- Joseph L. Brownlee, Esq., **MOYES SELLLERS & HENDRICKS.**, 1850 N. Central Ave., Ste. 1100, Phoenix, AZ 85004, JBrownlee@law-msh.com, (602) 604-2141, Attorneys for Defendants/Appellees/Respondents Encanto Adventures and the City of Phoenix.

The undersigned lawyer further certifies that, in accordance with A.R.S. §

12-1841, he caused this document to be mailed to:

- Ariz. Atty. Gen. Mark Brnovich, **OFFICE OF THE ATTORNEY GENERAL**, 1275 W. Washington St., Phoenix, AZ 85007-2926, (602) 542-5025.
- Steve Yarbrough, Pres., **ARIZONA STATE SENATE**, Ariz. State Capitol Complex, 1700 W. Washington St., Room 205, Phoenix, AZ 85007, (602) 926-5863.
- Javan D. Mesnard, Speaker, **ARIZONA HOUSE OF REPRESENTATIVE**, Ariz. State Capitol Complex, 1700 W. Washington St., Room 223, Phoenix, AZ 85007, (602) 926-5158.

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

Exhibit 1

Exhibit 1

Exhibit 1

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MARCIE NORMANDIN, *Plaintiff/Appellant*,

v.

ENCANTO ADVENTURES LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0373
FILED 6-26-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-013292
The Honorable Lori Horn Bustamante, Judge

AFFIRMED

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OPINION

Judge Paul J. McMurdie delivered the opinion of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Marcie Normandin appeals from the superior court's grant of summary judgment in favor of Encanto Adventures, LLC, d/b/a Enchanted Island Amusement Park ("Encanto") and the City of Phoenix ("City"), which resolved Normandin's premises-liability negligence claim. We affirm the superior court's ruling and hold that: (1) Encanto was a "manager" within the meaning of Arizona Revised Statutes ("A.R.S.") section 33-1551 because Encanto administered and directed the maintenance of the area in question pursuant to an agreement with the City; (2) Normandin was a recreational user under § 33-1551(C)(5) because no part of the fee she paid to Encanto was paid to enter the area of the park where the injury occurred; and (3) the statute is constitutional as applied to Encanto.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1991, the City and Encanto's predecessor executed an agreement to establish a children's amusement park within Encanto Park ("Park") in "an area . . . known as Picnic Island" ("Concession Premises"). In the agreement, the City licensed certain exclusive rights to construct, maintain, and operate children's rides in a fenced-in area of the Concession Premises ("Enchanted Island"), which also allowed Encanto's predecessor to use the remainder of the Concession Premises ("Agreement"). Encanto's owner, Kraig Lyon, testified that for 25 years he personally maintained the Concession Premises, including an area neighboring Enchanted Island where piñata games were often played ("piñata area"). Normandin acknowledges that Encanto regularly patrolled, maintained, inspected, prepared, and groomed the piñata area.

¶3 Normandin paid $287 to Encanto for her one-year-old daughter's birthday party ("Pete's Package") to be held at the Enchanted Island. Pete's Package included "thirty all day ride wristbands . . . , ten tables . . . [,] a private shaded area (by trees only) for 4 hours, [a special

appearance by] Pete the Parrot, [and a] T-Shirt for the Birthday Boy/Girl." Pete's Package explicitly excluded a piñata, and provided no part of Normandin's payment for the package would have been refunded had Normandin decided not to bring her own piñata or declined to participate in a piñata activity.

¶4 Encanto allows its customers to bring a piñata and play the game during their birthday celebrations. However, Encanto requires that any piñata be broken outside of the fenced-in area of Enchanted Island. Encanto recommends customers use the piñata area near the birthday party venue, but outside of Enchanted Island. Normandin fell in the piñata area while assisting her daughter in breaking a piñata. Normandin broke her right ankle and injured her right arm. She alleged she fell because she stepped into a sprinkler-head divot or depression covered by grass in the piñata area.

¶5 In her complaint, Normandin pled a single count of premises liability, a simple negligence claim, against the City and Encanto. Encanto and the City moved for summary judgment based on the immunity provided by A.R.S. § 33-1551(A). The motion was granted, and Normandin timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶6 Normandin argues the superior court erred by granting summary judgment because: (1) Encanto was not an entity protected by § 33-1551(A), whether as an "owner, . . . lessee, . . . manager or occupant" of the premises; (2) Normandin either paid more than a nominal fee to Encanto, which excluded her from being a recreational user of the Park under § 33-1551, or the nominality of the fee paid is a question of fact to be resolved by a jury; (3) for private persons and private corporations, § 33-1551 violates the Anti-Abrogation Clause, Article 18, Section 6, of the Arizona Constitution; (4) the statute violates the Equal Privileges-and-Immunities Clause, Article 2, Section 13, of the Arizona Constitution; and (5) the statute is an unconstitutional special law.

¶7 Summary judgment is proper if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *MacKinney v. City of Tucson*, 231 Ariz. 584, 586, ¶ 6 (App. 2013). On appeal from the grant of summary judgment, we view all facts and reasonable inferences in the light most favorable to Normandin, *see Andresano v. County of Pima*, 213 Ariz. 65, 66, ¶ 2 (App.

2006), and review the superior court's decision *de novo*, *MacKinney*, 231 Ariz. at 586, ¶ 6. Whether § 33-1551 applies and whether it is constitutional are questions of law, subject to *de novo* review. *Andresano*, 213 Ariz. at 67, ¶ 6; *see also Prince v. City of Apache Junction,* 185 Ariz. 43, 45 (App. 1996) (issues of statutory interpretation are reviewed *de novo*), *superseded by statute on other grounds as recognized in MacKinney*, 231 Ariz. at 590, ¶ 18, n.5.

¶8 Because we "decide cases on nonconstitutional grounds if possible," *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 328, ¶ 10 (App. 1998), we will first address Normandin's statutory arguments, *see Herman v. City of Tucson*, 197 Ariz. 430, 432, ¶ 7 (App. 1999). "Our primary goal in interpreting a statute is to give effect to the legislature's intent, and the language of a statute is the most reliable evidence of that intent." *MacKinney*, 231 Ariz. at 587, ¶ 7.

I. Section 33-1551's Immunity Against Claims for Simple Negligence Applies to Both the City and Encanto.

¶9 "[I]n 1965, the Committee of Officials on Suggested State Legislation set forth a Model Act to encourage private landowners to open their land to the public for recreational purposes." Michael S. Carroll, Dan Connaughton & J.O. Spengler, *Recreational User Statutes and Landowner Immunity: A Comparison of State Legislation*, 17 J. of Legal Aspects of Sport 163, 164 (2007) (citing Council of State Governments, 1965). "Currently, all 50 states have recreational user statutes that limit the liability of landowners who open their lands to allow public recreational use for injuries sustained by persons using their land . . . ." *Id.* at 169. Arizona adopted its version of the model act in 1983. *See* 1983 Ariz. Sess. Laws, ch. 82, § 1. The current version of the statute reads:

> A public or private owner, easement holder, lessee, tenant, manager or occupant of premises is not liable to a recreational . . . user except on a showing that the owner, easement holder, lessee, tenant, manager or occupant was guilty of wilful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational . . . user.

A.R.S. § 33-1551(A).

¶10 Neither party disputes that Normandin's injury occurred inside the Park. Likewise, the parties recognize that the Park qualifies as a premises covered by § 33-1551(C)(3)–(4) ("'Premises' means . . . park . . . and any other similar lands, wherever located, that are available to a recreational . . . user . . . ."); *see also MacKinney*, 231 Ariz. at 589, ¶ 13 (a park

"is a parcel of property kept for recreational use that is designed and maintained for the primary purpose of allowing users to engage in an undisputedly recreational activity"). Neither party disputes that the City owns the Park or that the statute provides immunity to the City if Normandin was a recreational user. Finally, neither party disputes Normandin was engaged in a recreational activity (hanging and breaking the piñata) when the injury occurred. *See* A.R.S. § 33-1551(A), (C)(5) (protected activity includes exercising or "other outdoor recreational pursuits"). Therefore, we must resolve whether Encanto's activities were covered under § 33-1551; and, if so, whether Normandin was a recreational user under the statute.

A. Encanto Is Immune under Section 33-1551(A) as a "Manager" of the Piñata Area.

¶11 According to Normandin, Encanto does not qualify as an entity protected by the statute. Encanto claims that it was a "manager" of the Concession Premises under the statute because the Agreement required it to maintain not only the Enchanted Island, but also the picnic and piñata areas. Normandin argues that Encanto waived its right to claim manager status; and no evidence in the record demonstrates the City hired, retained, or appointed Encanto to manage the piñata area, and, therefore, Encanto's work was, thus, "voluntary, self-interested acts of preparing the piñata premises for the benefit of its paying customers."

¶12 Although Encanto did not specifically argue manager status below, the superior court considered the issue of whether Encanto was an entity protected under § 33-1551 when ruling on the motion, and expressly found Encanto fell within the statute's immunity. Contrary to Normandin's argument, the issue has not been waived. Moreover, we have discretion to consider even a waived issue if it is an issue of law, such as an interpretation of a statute, *see Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, 238, ¶ 8 (App. 2012), and its consideration "would dispose of an action on appeal and correctly explain the law," *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993) ("[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."). Both parties have extensively briefed the issue on appeal, and the record is sufficient to resolve the claim.

¶13 The term "manager" is not defined in § 33-1551. When a phrase or words are not statutorily defined, we construe the words "according to their plain and ordinary meaning." *Beatie v. Beatie*, 235 Ariz.

427, 431, ¶ 19 (App. 2014); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). A manager is "[s]omeone who *administers* or supervises *the affairs of* a business, office, or other organization." *Manager*, Black's Law Dictionary (10th ed. 2009) (emphasis added). Other dictionaries define a manager as "a person who conducts business . . . affairs," Merriam-Webster's Collegiate Dictionary 754 (11th ed. 2012), and as "[a]n individual who is *in charge of a certain group of tasks*, or a certain subset of a company," *Manager*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/manager.html (last visited June 15, 2018) (emphasis added). *See also Midwestern, Inc. v. N. Ky. Cmty. Ct.*, 736 S.W.2d 348, 350 (Ky. Ct. App. 1987) (company paid to manage and oversee the day-to-day operation of a facility is a manager under recreational use statute); *Fagerhus v. Host Marriott Corp.*, 795 A.2d 221, 232 (Md. Ct. Spec. App. 2002) (a property manager with a contractual duty to manage and maintain premises a landowner makes available for recreational use is an "owner" entitled to invoke the protections of recreational use statute); *Stanton v. Lackawanna Energy, Ltd.*, 886 A.2d 667, 676 (Pa. 2005) (easement holder entitled to protection under recreational use statute as it regularly maintained the property).

¶14 Here, the Agreement imposed a duty on Encanto to "maintain the Concession Premises in good order and repair at its own expense during the entire term of [the] Agreement . . . [and] keep the Concession Premises in a clean and sanitary condition at all times." By stating "Concessionaire shall maintain the Concession Premises," the Agreement expressly required Encanto to maintain the piñata area.[1] Encanto maintained the piñata area daily by mowing the grass, reviewing the sprinkler heads, and patrolling for potential hazards. Normandin concedes Encanto regularly

[1] The parties argue different interpretations of the contractual term "Concession Premises," specifically whether it includes the piñata area. To the extent there may have been an ambiguity when the Agreement was executed, the conduct of the City and Encanto over 25 years resolved any such ambiguity in favor of its inclusion. *See Carroll v. Lee*, 148 Ariz. 10, 13 (1986) ("[P]arties may by their course of conduct express their agreement, though no words are ever spoken. . . . An implied contract is one . . . inferred by the law as a matter of reason and justice from the acts and conduct of the parties and circumstances surrounding their transaction.") (citing Restatement (Second) of Contracts § 4; citing *Alexander v. O'Neil*, 77 Ariz. 91, 98 (1954)). The Concession Premises included the piñata area.

patrolled, maintained, inspected, prepared, and groomed the piñata area. The Agreement assigned Encanto control over the piñata area and directed it to perform that duty. Encanto, therefore, "was in charge of [the] group of tasks" required to maintain the piñata area. *See Manager,* BUSINESSDICTIONARY.COM. Encanto, thus, "administer[ed] the affairs of [its] business" as prescribed by the Agreement. *See Manager,* Black's Law Dictionary. Encanto was a "manager" within the meaning of § 33-1551.

¶15 Moreover, the legislature added the terms "manager" and "tenant" to § 33-1551 in 2011 to enlarge the group of protected entities. 2011 Ariz. Sess. Laws, ch. 123, § 1 (1st Reg. Sess.). Neither term's ordinary meaning was restricted by a legislative definition. Even when strictly construing § 33-1551, *see MacKinney*, 231 Ariz. at 587, ¶ 7, we must consider the purpose behind this statute—"to encourage landowners to open their lands to the public for recreational use . . . by 'limiting their liability toward persons entering thereon for such purposes.'" *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 2, ¶ 7 (2003) (quoting *Suggested State Legislation on Public Recreation on Private Lands,* 24 Council of St. Governments 150 (1965)). Encanto was diligently managing the Concession Premises for years, including the piñata area, and the legislation provides immunity for such managers.

¶16 Because the statute only requires Encanto to qualify under one category of a protected entity, and because we review the statute's applicability *de novo*, concluding Encanto was a "manager" within the meaning of the statute, we decline to reach Normandin's arguments that Encanto was neither an owner nor occupier of the property. *See State v. Hardwick*, 183 Ariz. 649, 657 (App. 1995) (once the court finds grounds for resolution it need not reach other issues).

B. Normandin Was a "Recreational User" within the Meaning of Section 33-1551.

¶17 Normandin argues she was a "commercial customer" and her payment of $287 for Pete's Package excluded her from being a "recreational user" under § 33-1551 because "[b]y paying that $287 fee, [Normandin] gained express or implied permission to enter the premises for the recreational pursuit of having a professionally hosted birthday party, including a piñata event . . . [,]" as the piñata area is within the premises licensed to Encanto by the Agreement. Encanto and the City counter that no part of the $287 paid for Pete's Package was an admission fee to enter the Park generally, or the piñata area specifically.

¶18 To preclude immunity under the statute, Normandin would have had to pay more than a "nominal fee" to "enter or travel across the premises" to become more than a recreational user. *See* § 33-1551(C)(5) ("'Recreational user' means a person to whom permission has been granted or implied *without the payment* of an admission fee or any other consideration *to travel across or to enter premises to* . . . engage in . . . outdoor recreational pursuits. . . . *A nominal fee* that is charged . . . to offset the cost of providing the . . . recreational premises . . . does not constitute an admission fee . . . .") (emphasis added). In *Prince*, we held an admission fee "need not be paid *solely* 'to travel across or to enter upon premises.'" 185 Ariz. at 45 (quoting A.R.S. § 33-1551(B)(3)) (emphasis in original).[2] In other words, "if an admission fee or other consideration was paid, *at least in part*, to enter upon premises to engage in any of the defined recreational activities, that is *sufficient* to exclude one from recreational user status," *id.* (emphasis added), *unless* such a partial payment would be collected as a nominal fee to offset the cost of providing the recreational premises, *see MacKinney*, 231 Ariz. at 590, ¶ 18; *see also* A.R.S. § 33-1551(C)(5).

¶19 Normandin, however, paid *no* part of the $287 fee to enter the Park, *see* § 33-1551(C)(5), to conduct her piñata activity despite her argument to the contrary.[3] Normandin testified she recognized she could have used the piñata area without paying an admission fee to the City or Encanto. Moreover, the amount she paid for Pete's Package would have been the same regardless of whether Normandin chose to break her piñata during the four hours she reserved for the birthday party, or at some other time. Normandin testified at her deposition she understood the cost of Pete's Package did not include a piñata, and that she would not receive any discount or refund had she decided to forego the piñata activity during the time she reserved with Encanto. Normandin further testified she brought her own piñata and piñata club, which Encanto required if her birthday celebration were to include breaking a piñata.

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[2] The "nominal fee" provision was added to § 33-1551 in 1998 in response to this court's 1996 opinion in *Prince. Allen v. Town of Prescott Valley*, 786 Ariz. Adv. Rep. 10, ¶¶ 9–10 (App. Mar. 13, 2018); *see also* 1998 Ariz. Sess. Laws, ch. 22, § 1 (2d Reg. Sess.).

[3] Because we conclude Normandin paid no fee to Encanto to engage in the piñata activity, we need not reach Normandin's argument associated with Encanto's payment of a "concession fee" to the City for operating the Enchanted Island. *See* A.R.S. § 33-1551(C)(5).

¶20 We conclude Normandin was a recreational user within the meaning of § 33-1551 because she paid no part of the $287 for Pete's Package to enter the piñata area, *see* § 33-1551(C)(5), to conduct her piñata activity, *see Prince*, 185 Ariz. at 45. Under the facts of this case, the City and Encanto are immune under § 33-1551 from Normandin's claim of simple negligence and the superior court's grant of summary judgment was proper if the statute, as applied, withstands the constitutional challenges raised by Normandin.

II. Constitutionality of the Arizona Recreational Use Statute.

A. As Applied to Encanto, Section 33-1551 Does Not Violate the Anti-Abrogation Clause of the Arizona Constitution.

¶21 Normandin argues § 33-1551 is unconstitutional if applied to Encanto because it would violate Article 18, Section 6, of the Arizona Constitution, depriving her of the right to bring a lawsuit for simple negligence against a private party.[4]

¶22 In determining a statute's constitutionality, we resolve any doubts in favor of its constitutionality and "will not interpret a law to deny, preempt, or abrogate common-law damage actions unless the statute's text or history shows an explicit legislative intent to reach so severe a result." *Ramirez*, 193 Ariz. at 330–31, ¶ 20 (quoting *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994)). "[T]he party asserting that a statute is unconstitutional has the burden of clearly demonstrating that it is." *Id.* at 330 (citing *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130 (1986)).

¶23 In Arizona, "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." Ariz. Const. art. 18, § 6. The anti-abrogation provision is an "'open court' guarantee intended to constitutionalize the right to obtain access to the courts . . . prevent[ing] [legislative] abrogation of all common law actions for negligence . . . and other actions in tort which . . . either existed at common law or evolved from rights recognized at common law." *Cronin v. Sheldon*, 195 Ariz. 531, 538–39, ¶¶ 35, 39 (1999) (citations omitted); *Dickey*, 205 Ariz. at 3, ¶ 9 (to be protected by the anti-abrogation provision of the Arizona Constitution, "[a] right of action for simple negligence . . . must have existed at common law

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[4] Normandin does not argue the statute violates the Anti-Abrogation Clause as applied to the City.

or have found its basis in the common law at the time the constitution was adopted").

¶24 Our supreme court held in *Dickey* that "a right of action for simple negligence, against a municipality engaged in a governmental function," did not exist at common law. *See* 205 Ariz. at 3, ¶ 9. To support its holding, the *Dickey* court explained that "[i]n 1913, a year after Arizona's statehood and three years after the Arizona Constitution was drafted, a treatise on municipal law reported that cities engaged in governmental functions were not subject to liability for negligence[.]" *Id.* at ¶ 10. Specifically, the *Dickey* court held that a city's "operation and maintenance" of a public park "open to the public for recreational use[,]" without a charge of an admission fee, was governmental in nature. *Id.* at 6, ¶¶ 22–23. The 1913 treatise on municipal law extended the municipal immunity in performing "strictly governmental functions" for the public benefit also to its "officers and *agents* thereunder." *Id.* at 3, ¶ 10 (emphasis added) (quoting 6 Eugene McQuillin, MUNICIPAL CORPORATIONS § 2623 (1913)).

¶25 Whether an agency relationship existed between Encanto and the City to maintain the piñata area, a governmental function performed for public benefit, "is a question of law for the court when the material facts from which it is to be inferred are not in dispute." *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 595, 597, ¶¶ 21, 28 (App. 2007) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.") (quoting Restatement (Third) of Agency § 1.01 (2006)).

¶26 Here, under the Agreement, the City assigned a duty to Encanto to maintain the Concession Premises, including the piñata area. *See Ruesga*, 215 Ariz. at 597, ¶ 29 ("Actual authority may be proved by direct evidence of express contract of agency between the principal and agent or by proof of facts implying such contract or the ratification thereof.") (quotation omitted). As noted above, Encanto or its predecessor maintained the Concession Premises according to the Agreement for 25 years. *See Best Choice Fund, LLC v. Low & Childers, P.C.*, 228 Ariz. 502, 511, ¶ 26 (App. 2011), *as amended* (Jan. 6, 2012) ("Actual authority includes both express authority outlined in specific language, and implied authority when the agent acts consistently with the agent's reasonable interpretation of the principal's manifestation in light of the principal's objective and other facts known to the agent.") (quotation omitted). Not only did the City expressly authorize

Encanto to maintain the Concession Premises, but it also ratified Encanto's performance.

¶27 Encanto acted as the City's agent by performing a governmental function for the public's benefit on behalf of the City. Therefore, no right of action for simple negligence against Encanto existed at common law. *See Dickey*, 205 Ariz. at 3, ¶¶ 9–10. Normandin's cause of action for simple negligence is not protected by Article 18, Section 6, as the Anti-Abrogation Clause is not implicated.

B. As Applied to Encanto, Section 33-1551 Does Not Violate the Equal Privileges-and-Immunities Clause of the Arizona Constitution.

¶28 Normandin argues § 33-1551 is unconstitutional because it does not afford equal opportunity of access to the courts to "recreational users," a class of people who now cannot pursue their "fundamental constitutional right" to bring a claim for simple negligence. Normandin also posits that by extending immunity to a select group of non-municipal entities, such as Encanto, the statute failed to equally protect "all other citizens or corporations," in violation of Article 2, Section 13, of the Arizona Constitution.[5]

¶29 The Equal Privileges Clause requires that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. art. 2, § 13. The purpose of this clause "is to secure equality of opportunity and right to all persons similarly situated." *Prescott Courier, Inc. v. Moore*, 35 Ariz. 26, 33 (1929).

1. The Class of Recreational Users Is Rationally Related to a Legitimate Governmental Interest.

¶30 Although "the right to bring and pursue [an] action is a 'fundamental right' guaranteed by Article 18, § 6 of the constitution and the [Equal Protection Clause]," *Ramirez*, 193 Ariz. at 335, ¶ 33 (alteration in original) (quoting *Kenyon v. Hammer*, 142 Ariz. 69, 83 (1984)), Normandin has no right guaranteed by the constitution to bring an action for simple negligence against an agent performing a governmental function for a

[5] Normandin does not claim the statute violates the Equal Privileges Clause as applied to the City.

municipality. We, thus, conclude § 33-1551 does not interfere with Normandin's fundamental rights, or create a suspect class, *see infra* ¶¶ 30–31, such as to require a strict scrutiny assessment of the statute's constitutionality, *see Ramirez*, 193 Ariz. at 335, ¶¶ 33–34.

¶31 The Equal Protection Clause requires that "individuals *within* a certain class be treated equally and that there exist reasonable grounds for the classification." *State v. Russo*, 219 Ariz. 223, 226, ¶ 7 (App. 2008) (emphasis added) (quoting *State v. Navarro*, 201 Ariz. 292, 298, ¶ 25 (App. 2001)). Normandin's argument she was denied equal access to the courts is unavailing as she does not contend her treatment is different from any other recreational user, but only that the class of "recreational users" is an "invidious" class. The legislature, however, may classify persons or property, as long as the classification is "predicated on some reasonable basis, which will promote a legitimate purpose of legislation." *Moore*, 35 Ariz. at 33; *Eastin v. Broomfield*, 116 Ariz. 576, 584 (1977) ("Laws operating uniformly upon all of a class, when the classification has a basis founded in reason, are not obnoxious to any constitutional provision with which we are familiar. . . . The legislative judgment in all such matters, unless palpably arbitrary, is controlling upon the courts.") (quoting *Hazas v. State*, 25 Ariz. 453, 458 (1923)).

¶32 Here, § 33-1551 creates a classification rationally related to a legitimate governmental interest. *See Russo*, 219 Ariz. at 225–26, ¶ 6 (citation omitted). The State has a legitimate interest in "encourag[ing] the use of private land for recreational use." *Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 459 (App. 1992). To accomplish the opening of private lands for recreational use, the statute "limit[ed] the liability for injury to those who used the private property." *Id.*; *see Olson v. Bismark Parks & Recreation Dist.*, 642 N.W.2d 864, 870–71 (N.D. 2002) (recreational use statutes encourage recreation that enhances physical wellbeing, have a positive effect on the economy, are an important legislative goal, and do not violate equal protection). The creation of the "recreational user" class not only promotes and furthers the legitimate governmental interest, but enables it. *See Bledsoe v. Goodfarb*, 170 Ariz. 256, 258, n.2 (1991).

2. Managers, Including Encanto, Were Not Extended Any Special Privilege by Section 33-1551.

¶33 Normandin further argues the statute unconstitutionally extends immunity to a select group of non-municipal entities to the detriment of other entities. However, *any* "public or private owner, easement holder, lessee, tenant, manager or occupant of premises," *see*

§ 33-1551(A), may avail itself of the statute's immunity, if it opens its land or manages land opened to recreational use and does not charge, or minimally charges, an admission fee for entry. The privilege belongs equally to all such entities. *See* Ariz. Const. art. 2, § 13.

¶34 Because Normandin failed to clearly show the statute's arbitrariness, and we presume the legislation is rational, § 33-1551 is constitutional as applied in this case. *See Ramirez*, 193 Ariz. at 335, ¶ 34 ("We must presume that the legislation is rational, and such presumption can be overcome only by a clear showing of arbitrariness or irrationality.") (quotation omitted).

C. Section 33-1551 Is Not an Unconstitutional Special Law as Applied to Managers of Defined Land.

¶35 Normandin next argues § 33-1551 violates Article 4, Part 2, §§ 19(13) and 19(20), of the Arizona Constitution, because it gives "exclusive privileges and immunities to a favored class of private corporations at the expense of the people that they have negligently injured."[6]

¶36 Article 4, Part 2, Section 19(13), of the Arizona Constitution, prohibits special laws that "[g]rant[] to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises." The constitution also prohibits special laws if "a general law can be made applicable." Ariz. Const. art. 4, pt. 2, § 19(20). "Special laws favor one person or group and disfavor others." *Gallardo v. State*, 236 Ariz. 84, 88, ¶ 10 (2014).

¶37 To determine whether a statute is a "special law," our supreme court implemented a three-part test and has been applying it consistently since 1990.[7] *See Gallardo*, 236 Ariz. at 88, ¶ 11. "To survive

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[6] Again, Normandin does not challenge the statute as a special law as applied to the City.

[7] Encanto argues we should not employ the three-part test because "the relevant constitutional prohibitions against local and special laws . . . contain no three-part test," but "plain constitutional terms." In our analysis, we are bound by our supreme court's decisions, and "th[at] Court alone is responsible for modifying that precedent." *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013).

scrutiny, (1) the law must have 'a rational relationship to a legitimate legislative objective,' (2) the classification the law makes must be legitimate, encompassing all members that are similarly situated, and (3) the classification must be elastic, allowing 'other individuals or entities to come within' and move out of the class." *Id.* at ¶ 11 (quoting *Republic Inv. Fund I v. Town of Surprise,* 166 Ariz. 143, 149 (1990)).

¶38 We have already concluded, *supra* ¶¶ 31, 33, that § 33-1551 is rationally related to a legitimate government interest. Section 33-1551 also creates legitimate classifications, which encompass *all* such entities with control over defined land and *all* recreational users. *See*, *e.g.*, *Newman*, 173 Ariz. at 459. Finally, the statute is elastic because it allows land owners to opt out, or fall under, the statutory immunity freely by electing to require, or not, a payment of a non-nominal fee or by withdrawing, or extending, their consent to the recreational use of their land. *See* A.R.S. § 33-1551.

¶39 The statute is not a special law because it survives the scrutiny of the three-part test enunciated in *Gallardo*. *See* 236 Ariz. at 88, ¶ 11.

III. Attorney's Fees on Appeal.

¶40 Normandin requests we award her reasonable costs incurred on appeal. The City and Encanto request we award sanctions against Normandin pursuant to Arizona Rule of Civil Procedure 68(g) (Offer of Judgment) and costs on appeal under Arizona Rule of Civil Appellate Procedure ("ARCAP") 21.

¶41 Rule 68(g) prescribes that "[a] party who rejects an offer, but does not obtain a more favorable judgment, must pay . . . a sanction: (A) the offeror's reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred after the offer date[.]" Ariz. R. Civ. P. 68(g). The amount defined by Rule 68 does not include attorney's fees. Moreover, § 12-332 defines and applies only to taxable costs incurred in the superior court. Although the City and Encanto served an Offer of Judgment on Normandin on October 27, 2016, and we now affirm the superior court's judgment, no part of Rule 68 enables the City or Encanto to recover an amount additional to their reasonable costs incurred on appeal under ARCAP 21. We award the City and Encanto reasonable costs incurred on appeal upon compliance with ARCAP 21.

CONCLUSION

¶42 For the reasons stated above, we affirm the superior court's judgment in favor of the City and Encanto.

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

Exhibit 2

Exhibit 2

Exhibit 2

A TREATISE

ON THE LAW OF

MUNICIPAL CORPORATIONS

By EUGENE McQUILLIN

AUTHOR OF MUNICIPAL ORDINANCES, AND
JUDGE OF THE EIGHTH JUDICIAL
CIRCUIT, MISSOURI

IN SIX VOLUMES

VOL. VI

CHICAGO:
CALLAGHAN & COMPANY
1913

such duties,[74] nor to impose unreasonable restrictions upon the right of injured persons to bring action against it for damages therefor.[75]

§ 2623. Liability in regard to "governmental" duties.

In the absence of statute, it has always been the law that no private action for tort will lie against the state, since negligence cannot be imputed to the sovereign.[76] So, in the various localities or local areas where the state agencies merely perform the governmental functions of the state and acquire no individual corporate existence, they stand as the state, and, therefore, to hold them responsible for negligence would be the same as holding the sovereign power answerable for its action. It is assumed that no private legal duty rests upon a city to perform governmental functions, and, moreover, "their character precludes the idea of the common law rule of responsibility, for there is no standard of reasonable care by which the acts of the government may be tested. The state, through its representatives, namely, the municipal corporation, acts in its sovereign capacity, and does not submit its actions to the judgment of the courts."[77] "The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised in their prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries."[78] But where a state agency

74. Durham v. Spokane, 27 Wash. 615, 68 Pac. 383.

75. Hose v. Seattle, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938.

76. People v. Dennison, 84 N. Y. 272; Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010, 15 Ct. Cl. 632; Shearman & Redfield on Neg., § 251.

77. Jones, Neg. of Munic. Corp., § 27.

78. Cooley on Torts (2d ed.), p. 739; Perry v. Worcester, 6 Gray. (Mass.) 544, 66 Am. Dec. 431, note.

A leading case on this subject is *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; where the foundations of the rule are con-

becomes a corporation "it thereby acquires an identity distinct from the sovereign power, and the principle stated does not prevent the incorporated body from being held liable for its own negligence."[79]

The rule is firmly established in our law that where the municipal corporation is performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder, unless made liable by statute.[80] In other words, unless

sidered at length by Chief Justice Gray and both the English and American cases reviewed in detail, and the result thereof is summed up as follows: "There is no case, in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, when it would not against a town," the nonliability of towns being conceded.

79. Jones, Neg. of Munic. Corp., § 23.

80. *Alabama.* Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Bieker v. Cullman (Ala. 1912), 59 So. 625.

Arkansas. Browne v. Bentonville, 94 Ark. 80, 126 S. W. 93; Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Gregg v. Hatcher, 94 Ark. 54, 125 S. W. 1007, 1008; Franks v. Holly Grove, 93 Ark. 250, 124 S. W. 514; Helena v. Thompson, 29 Ark. 569; Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32; Fort Smith v. York, 52 Ark. 84, 12 S. W. 157; Collier v. Fort Smith, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237; Gray v. Batesville, 74 Ark. 519, 86 S. W. 295; Dickerson v. Okolona, 98 Ark. 206, 135 S. W. 863.

California. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

Colorado. Denver v. Maurer, 47 Colo. 209, 106 Pac. 875; Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293; Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539; McAuliffe v. Victor, 15 Colo. App. 337, 62 Pac. 231.

Connecticut. Judson v. Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487; Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Daly v. New Haven, 69 Conn. 644, 38 Atl. 397; Hewison v. New Haven, 37 Conn. 475, 9 Am. Rep. 342; Mead v. New Haven, 40 Conn. 72, 16 Am. Rep. 14 (inspector of steam boilers).

Georgia. Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St.

a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for

Rep. 101; Wyatt v. Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41; Cook v. Macon, 54 Ga. 468.

Illinois. Evans v. Kankakee, 231 Ill. 223, 83 N. E. 223; Chicago v Williams, 182 Ill. 135, 55 N. E. 123; Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536; Hanrahan v. Chicago, 145 Ill. App. 38; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Craig v. Charleston, 180 Ill. 154, 54 N. E. 184; Robertson v. Marion, 97 Ill. App. 332; Blake v. Pontiac, 49 Ill. App. 543.

Indiana. Brinkmeyer v. Evansville, 29 Ind. 187.

Iowa. Saunders v. Ft. Madison, 111 Ia. 102, 82 N. W. 428; Calwell v. Boone, 51 Ia. 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas. Edson v. Olathe, 82 Kan. 4, 107 Pac. 539; Edson v. Olathe, 81 Kan. 328, 105 Pac. 521; La Clef v. Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Kentucky. Board of Park Com'rs v. Prinz, 32 Ky. L. Rep. 359, 105 S. W. 948; Morgan v. Shelbyville (Ky.), 121 S. W. 617; Pratther v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Louisiana. New Orleans v. Ker, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442; Rudolphe v. New Orleans, 11 La. Ann. 242.

Maine. Mitchell v. Rockland, 41 Me. 363, 66 Am. Dec. 252.

Maryland. County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

Massachusetts. Johnson v. Somerville, 195 Mass. 370, 81 N. E 268, 10 L. R. A. (N. S.) 715; Manners v. Haverhill, 135 Mass. 165; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Hafford v. New Bedford, 16 Gray (Mass.) 297; Barney v. Lowell, 98 Mass. 570; White v. Phillipston, 10 Met. (Mass.) 108; Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63; Bigelow v. Randolph, 14 Gray (Mass.) 541; Walcott v. Swampscott, 1 Allen (Mass.) 101; Buttrick v. Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

Michigan. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Corning v. Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; Stevens v. Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; Amperse v. Kalamazoo, 75 Mich. 228, 42 N. W. 821, 13 Am. St. Rep. 432; Hines v. Charlotte, 72 Mich. 278, 283, 40 N. W. 333, 1 L. R. A. 844; Webb v. Board of Health, 116 Mich. 516, 74 N. W. 434, 72 Am. St. Rep. 541; Gilboy v. Detroit, 115 Mich. 121, 73 N. W. 128; Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450; Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63; Leoni Tp. v. Taylor, 20 Mich. 148; O'Leary v. Board of Fire & Water Com'rs, 79 Mich. 281, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169; Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274, 16 Det. Leg. N. 222.

Minnesota. Claussen v. Luverne, 103 Minn. 491, 115 N. W. 643, 15

"neglect to perform or negligence in performing" duties which are governmental in their nature, and including

L. R. A. (N. S.) 698; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

Missouri. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168; Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Donahoe v. Kansas City, 136 Mo. 657, 664, 38 S. W. 571; Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 108, 58 Am. Rep. 108; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Armstrong v. Brunswick, 79 Mo. 319; Murtaugh v. St. Louis, 44 Mo. 479; McKenna v. St. Louis, 6 Mo. App. 320; Barree v. Cape Girardeau, 132 Mo. App. 182, 112 S. W. 724; Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682; Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372.

New Hampshire. Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32; Eastman v. Meredith, 36 N. H. 284, 298, 72 Am. Dec. 302.

New Jersey. Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344; Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649; Bisbing v. Asbury Park, 80 N. J. L 416, 78 Atl. 196; Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490; Sussex v. Strader, 18 N. J. L. 108, 121, 35 Am. Dec. 530.

New York. Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Doty v. Port Jervis, 52 N. Y. S. 57, 23 N. Y. Misc. Rep. 313; Quill v. New York, 55 N. Y. S. 889, 36 App. Div. 476; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; Higbie v. Board of Education, 107 N. Y. S. 168, 122 App. Div. 483; Martin v. Brooklyn, 1 Hill (N. Y.), 545; Morey v. Newfane, 8 Barb. (N. Y.) 645; Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120.

North Carolina. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; Harrington v. Greenville (N. C. 1912), 75 S. E. 849; McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 751.

Ohio. Bell v. Cincinnati, 80 Ohio St. 1, 88 N. E. 128, 23 L. R. A. (N. S.) 910; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Cincinnati v. Cameron, 33 Ohio St. 336; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Rose v. Toledo, 24 Ohio Cir. Ct. 540.

Oklahoma. Oklahoma City v. Hill, 6 Okl. 114, 50 Pac. 242; Lawton v. Harkins (Okla. 1912), 126 Pac. 727.

Oregon. Esberg-Gunst Cigar Co. v. Portland, 34 Oreg. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; Caspary v. Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Pennsylvania. Elliott v. Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591. Compare Taylor v. Canton, 30 Pa. Super. Ct. 305.

Rhode Island. Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35.

generally all duties existent or imposed upon them by law solely for the public benefit. Such liability may, however, be *imposed by statute or charter.*[81]

South Carolina. Heape v. Berkeley County, 80 S. C. 32, 61 S. E. 203; Gibbes v. Beaufort, 20 S. C. 213.

Tennessee. Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565; Davis v Knoxville, 90 Tenn. 599, 18 S. W. 254.

Texas. Rusher v. Dallas, 83 Tex. 151, 18 S. W. 333. Stinnett v. Sherman (Tex. Civ. App.), 43 S. W. 847; Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Bates v. Houston, 14 Tex. Civ. App. 287, 37 S. W. 383; Shanewerk v. Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918.

Utah. Sehy v. Salt Lake City (Utah, 1912), 126 Pac. 691.

Vermont. Stockwell v. Rutland, 75 Vt. 76, 53 Atl. 132; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Hyde v. Jamaica, 27 Vt. 443.

Virginia. Richmond v. Long's Adm'r, 17 Gratt. 375, 94 Am. Dec. 461.

Washington. Seattle v. Stirrat, 55 Wash. 560, 104 Pac. 834; Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; Simpson v. Whatcom, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; Wheeler v. Aberdeen, 47 Wash. 405, 92 Pac. 135; Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084.

West Virginia. Wood v. Hinton, 47 W. Va. 645, 35 S. E. 824, 826; Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817; Thomas v. Grafton, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Brown v. Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665.

Wisconsin. Hollman v. Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030.

United States. Winona v. Botzet. 169 Fed. 321, 94 C. C. A. 563; New Orleans v. Abbagnatio, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627 (closing circus on ground claimed to have been dedicated as a graveyard); Hart v. Bridgeport, Fed. Cas. No. 6,149, 13 Blatchf. 289.

Canada. Woodford v. Chatham, 37 N. Brunsw. 21; McCleave v. Moncton, 35 N. Brunsw. 296; Butler v. Toronto, 10 Ont. Wkly. Rep. 876.

In reference to such matters "they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be." Per Stayton, J., in Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

81. Where statute imposes liability on a municipal corporation for its negligence, it is no defense that the negligent act was due in the exercise of a governmental duty. Giaconi v. Astoria, 60 Ore.

Municipal corporations proper "are upon the same footing as *quasi* corporations when acting in a purely governmental capacity."[82] The supreme court of Missouri has stated the doctrine as follows: "When the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."[83] Among the *reasons* set forth for denying liability for breach of a governmental duty are the facts that the officers are usually the representatives of the injured person as well as of other taxpayers, and that it is as much his duty to select careful and prudent persons as it is that of the taxpayer who is called upon to help pay for his hurt.[84] However, the fact that a municipal officer is charged by statute with the performance of governmental duties does not relieve the municipality from liability for the negligence of such officer in the performance of duties which are not of a public, governmental character, and are purely corporate.[85]

In so far as the rule of nonliability for torts connected with the performance of governmental duties is concerned, it is immaterial that the wrongful act was intentional and not merely negligent,[86] or that the municipality may be indicted for the wrongful act.[87] This rule

12, 118 Pac. 180, rev'g 113 Pac. 855.

82. Nicholson v. Detroit, 129 Mich. 246, 259, 88 N. W. 695, 56 L. R. A. 601.

83. Murtaugh v. St. Louis, 44 Mo. 479; Donahoe v. Kansas City, 136 Mo. 657, 664, 38 S. W. 571; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Armstrong v. Brunswick, 79 Mo. 319, 321; McKenna v. St. Louis, 6 Mo. App. 320.

84. Nicholson v. Detroit, 129 Mich. 246, 249, 88 N. W. 695, 56 L. R. A. 601.

85. Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293.

86. Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715.

87. See Kehoe v. Rutherford 74 N. J. L. 659, 65 Atl. 1046.

as to nonliability for negligence in connection with governmental functions applies equally well, it is generally held, where the injured person is an employee of the municipality and the duty violated is the failure to furnish a safe place to work or safe appliances.[88] So the question whether the statute under which governmental functions are exercised is permissive or mandatory, is immaterial, so far as the rule of nonliability is concerned.[89] Furthermore, the rule of nonliability applies notwithstanding the neglect charged relates to the control of real property the title to which is in the municipality.[90]

A distinction must be drawn, however, between injuries to property rights and other injuries, since if the officers of a municipality, in the discharge of its governmental functions and police powers invade property rights, the doctrine of *respondeat superior* applies, and the corporation is liable for their acts.[91]

§ 2624. Same—rule in admiralty.

This rule of nonliability for torts where the municipality is exercising a purely governmental function does not apply to admiralty courts. It was so held by the supreme court of the United States which decided that the city of New York was liable for the collision of a fire boat owned by it, with another boat, while running to

88. Nicholson v. Detroit, 129 Mich. 246, 249, 88 N. W. 695, 56 L. R. A. 601.

§ 2620, *ante*.

89. Nicholson v. Detroit, 129 Mich. 246, 254, 88 N. W. 695, 56 L. R. A. 601.

But see § 2628, *post*.

90. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

§ 2672, *et seq.*, *post*.

91. Metz v. Asheville, 150 N. C. 748, 751, 64 S. E. 881, 22 L. R. A. (N. S.) 940.

One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal Constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.