

KOHL V. CITY OF PHOENIX: CLARIFYING THE SCOPE OF ABSOLUTE MUNICIPAL IMMUNITY

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INTRODUCTION

In *Kohl v. City of Phoenix*, the Arizona Supreme Court considered the extent of municipal immunity under Section 12-820.01 of the Arizona Revised Statutes¹ for the “exercise of an administrative function involving the determination of fundamental government policy.”² At issue was the City of Phoenix’s (“City”) decision not to install a traffic signal at the intersection where the Plaintiffs’ thirteen-year-old son was killed while riding his bicycle.³ Writing for the majority, Justice Hurwitz concluded that the decision not to signalize that particular intersection flowed directly from an immune policymaking decision relating to the procedure used to determine appropriate intersections for signaling.⁴ In a unanimous decision, the court held that the City was entitled to absolute immunity, and thus vacated the court of appeals’ decision and affirmed the superior court’s grant of summary judgment in favor of the City.⁵

I. MUNICIPAL IMMUNITY UNDER SECTION 12-820.01

The concept of governmental immunity has its roots in the English common law notion that “the King can do no wrong.”⁶ This tradition of absolute immunity has greatly diminished and is now virtually nonexistent.⁷ Today, most states have statutes providing for absolute and/or qualified immunity only in very limited circumstances.⁸ Most, if not all, states preserve immunity, at both state and municipal levels, for administrative decisions that involve the allocation of state or

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1. ARIZ. REV. STAT. ANN. § 12-820.01 (2007).
 2. 160 P.3d 170, 172 (Ariz. 2007).
 3. *Id.* at 171.
 4. *Id.* at 175.
 5. *Id.* at 176.
 6. DAN B. DOBBS, THE LAW OF TORTS § 260 (2000).
 7. *Id.*
 8. *Id.*

municipal resources.⁹ In Arizona, this immunity is codified in Arizona Revised Statutes section 12-820.01, which reads, in pertinent part:

A. A public entity shall not be liable for acts and omissions of its employees constituting . . .

. . . .

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for any of the following:

(a) the purchase of equipment.

(b) the construction or maintenance of facilities.

. . . .

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.¹⁰

Arizona municipal immunity law is largely derived from Arizona Revised Statutes section 12-820.01 as well as the Arizona Supreme Court's interpretation of that statute. In arriving at its decision in *Kohl*, the court relied heavily upon three such cases: *Fidelity Security Life Insurance Co. v. State*¹¹, *Doe ex rel. Doe v. State*¹², and *Myers v. Tempe*.¹³

A. Fidelity Security Life Insurance Co. v. State

In *Fidelity Security Life Insurance Co. v. State*, several insurance brokers, insurance contract owners, clients, and an insurance company, all with ties to an insolvent insurer, AMS Life Insurance Company ("AMS"), brought suit against the State alleging that the State was grossly negligent for failing to adequately regulate AMS when the State knew that AMS was insolvent.¹⁴ The superior court granted the State's motion for summary judgment, finding (as described by the supreme court on appeal) that "because the defendants were conducting discretionary regulatory activities concerning the licensing of AMS to do business in Arizona, they were entitled to absolute immunity under" section 12-820.01.¹⁵ On appeal, the Arizona Supreme Court vacated the court of appeals' decision and

9. *Id.*; see also, e.g., *Whalen v. Mayor & City Council of Balt.*, 883 A.2d 228 (Md. 2005); *Anderson v. Vanderslice*, 126 So. 2d 522 (Miss. 1961); *Jones v. City of Durham*, 643 S.E.2d 631 (N.C. Ct. App. 2007).

10. ARIZ. REV. STAT. ANN. § 12-820.01 (2007). For a history of how this statutory provision came into existence, see *Doe ex rel. Doe v. State*, 24 P.3d 1269, 1270–72 (Ariz. 2001). The *Doe* opinion also noted that section 12-820.01 is consistent with the RESTATEMENT (SECOND) OF TORTS § 895B cmt. d (1979). *Doe ex rel. Doe*, 24 P.3d at 1271.

11. 954 P.2d 580 (Ariz. 1998).

12. 24 P.3d 1269 (Ariz. 2001).

13. 128 P.3d 751 (Ariz. 2006).

14. 954 P.2d at 582.

15. *Id.*

reversed the earlier dismissals. The court held that the State's failure to revoke the insurer's certificate of authority did not constitute a discretionary act for which immunity applies; rather, the State's actions were administrative in nature and did not warrant immunity.¹⁶

In so holding, the court distinguished between actions involving "determinations of fundamental governmental policy"¹⁷ and those involving the mere "application of preordained rules and regulations defining the matter."¹⁸ The court listed several examples of policy decisions entitled to immunity, including "whether government or its agencies should pursue one general course of action over another, whether an agency of government should construct a particular building or where the building should be located, or a decision as to the direction and focus of an entire regulatory scheme."¹⁹ Also entitled to express immunity by statute are "decisions on whether to provide resources for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel, the provision of governmental services, and the licensing and regulation of professions and occupations."²⁰ In contrast, the failure of the State to recognize that AMS was an insolvent insurer was not a discretionary decision, as it required adherence to an explicit statute, not the "determination[] of fundamental governmental policy."²¹ The court concluded that "[t]hose who promulgated the rules and regulations defining the elements of financial solvency for insurance carriers probably determined fundamental governmental policy and exercised discretion in so doing, but, except perhaps in the most extraordinary circumstances, those who apply the rules and regulations day to day do not."²²

B. Doe ex rel. Doe v. State

Building on its holding in *Fidelity Security Life*, three years later the court further delineated the difference between decisions involving fundamental government policy and those day-to-day decisions that do not warrant immunity. At issue in *Doe ex rel. Doe v. State* was the Arizona Department of Education's issuance of a teaching certificate to a teacher who later molested the plaintiff's son.²³ The plaintiff alleged, among other things, that the State negligently processed and approved the teacher's application for a teaching certificate.²⁴ In response, the State argued that it was entitled to absolute immunity under section 12-820.01 because the issuance of the license was an administrative action that

16. *Id.* at 584 (noting that section 20-219 of the Arizona Revised Statutes provides for the revocation of an insurer's certificate of authority if the insurer has insufficient assets to meet the requirements of authority).

17. *Id.* at 583.

18. *Id.* at 584.

19. *Id.* at 583.

20. *Id.* at 583–84.

21. *Id.* at 584.

22. *Id.*

23. 24 P.3d 1269, 1269 (Ariz. 2001).

24. *Id.* at 1270.

required the determination of fundamental governmental policy.²⁵ The superior court dismissed Doe's complaint, and the court of appeals affirmed the dismissal.²⁶

On appeal, the Arizona Supreme Court disagreed with the lower court's holding that the decision to certify the teacher was entitled to absolute immunity under section 12-820.01; thus, it vacated the court of appeals' decision and reversed the superior court's order.²⁷ The court found the facts of *Doe* illustrative of the distinction between fundamental governmental policy decisions and "day-to-day regulatory decisions,"²⁸ giving the following example:

By statute, teaching certificates may not be issued to persons convicted of certain listed offenses. A.R.S. § 15-534 (1991). The State could determine, as a matter of policy, that it would issue certificates to teachers convicted of any offense other than those listed in section 15-534. If the State made that decision, section 12-820.01 would afford it absolute immunity from claims asserting that the State should not issue certificates to persons convicted of an offense not listed in the statute. If, however, the State erred in its processing of a particular teaching application and issued a certificate to someone convicted of one of the listed offenses, only qualified immunity would apply.²⁹

Accordingly, the court held that the State's decision to require all teachers to be certified as well as decisions relating to certification requirements were determinations of fundamental governmental policy and entitled to absolute immunity.³⁰ The processing of particular applications, however, did not require the determination of fundamental policy, but rather the application of existing policies and, therefore, was entitled only to qualified immunity under the statute.³¹

C. Myers v. City of Tempe

In 2006, the court again addressed the issue of municipal immunity under section 12-820.01. In *Myers v. City of Tempe*, the family of Jo Ann Myers filed suit against the City of Tempe ("Tempe") alleging that the Guadalupe Fire Department ("GFD") provided improper emergency medical care to Ms. Myers resulting in her death.³² The plaintiffs alleged that because Ms. Myers was within Tempe's city limits at the time of the emergency, Tempe was liable for the negligent provision of medical services, even though Tempe's fire department did not administer the negligent medical treatment. The GFD responded to Ms. Myers' emergency as the result of a mutual aid agreement between Tempe, Guadalupe, and several other municipalities.³³ Under the aid agreement (the Automatic Aid Agreement for Fire Protection and Other Emergency Services ("AAA")) the

25. *Id.*

26. *Id.*

27. *Id.* at 1273.

28. *Id.* at 1272.

29. *Id.*

30. *Id.*

31. *Id.*

32. 128 P.3d 751 (Ariz. 2006).

33. *Id.*

emergency provider that was geographically closest to the location of the emergency responded, regardless of whether that provider had to cross jurisdictional lines to do so.³⁴

Tempe argued that section 12-820.01 protected its decision to delegate the provision of emergency services to the GFD because such delegation constituted a discretionary decision.³⁵ Agreeing with Tempe's argument, the trial court granted summary judgment in its favor. The court of appeals reversed, concluding that Tempe was not immune from liability for the negligent implementation of emergency services under the AAA and noting that Tempe could not relieve itself from liability for providing emergency services by delegating its obligation to do so to another entity.³⁶

The Arizona Supreme Court vacated the court of appeals' decision and affirmed the trial court's judgment.³⁷ The court held that Tempe's decision to enter into the AAA was a determination of fundamental governmental policy and was, therefore, entitled to absolute immunity under section 12-820.01, as the decision involved balancing risks, allocating resources, and consulting experts.³⁸ Further, the court noted that the case did not involve an implementing decision because "[t]he terms of the AAA determined, without the need for any additional implementing decision, which emergency unit would respond to Ms. Myers' call for help. . . . Tempe's participation in the AAA and the terms of that agreement, without anything more being required, caused the dispatch of GFD to Ms. Myers' emergency."³⁹

The court distinguished *Myers* from both *Fidelity* and *Doe*, noting that "[b]oth opinions, which held that implementing decisions are not entitled to absolute immunity, involved allegedly erroneous decisions that were made to implement fundamental policy decisions. . . . Myers does not and could not claim that the dispatcher erred in sending the GFD. The AAA unambiguously dictated that 'decision.'"⁴⁰ After *Myers*, the status of municipal immunity in Arizona remained largely unchanged: policymaking decisions that involve the weighing of risks and allocation of resources and assets are protected by absolute immunity, and administrative decisions that require the implementation of governmental policy are entitled only to qualified immunity or none at all. But *Myers*, like its predecessors, served to bring the distinction between these two types of decisions into sharper relief and, ultimately, to inform the court's decision in *Kohl*.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 1996, thirteen-year-old Klay Kohl, Jr. was struck and killed by an automobile while riding his bicycle through the intersection of 19th

34. *Id.*
35. *Id.* at 753.
36. *Id.*
37. *Id.* at 756.
38. *Id.* at 753.
39. *Id.* at 754.
40. *Id.*

Avenue and Wood Drive in Phoenix (“Intersection”).⁴¹ His parents brought suit against the City of Phoenix, claiming that the City’s failure to install a traffic signal at the Intersection caused Klay’s death.⁴² In response, the City argued that, pursuant to Arizona Revised Statutes section 12-820.01, it was immune from suit for its decision not to place a signal at the Intersection.⁴³

Understanding the procedure used by the City to determine which intersections to “signalize” is essential to the analysis of whether the City’s decision not to place a signal at the Intersection constitutes “the exercise of an administrative function involving the determination of fundamental governmental policy.”⁴⁴ City engineers first select 150 to 200 intersections that are candidates for signalization.⁴⁵ Information about these intersections is then entered into a computer program, SIGWAR, which analyzes six “warrants,” or threshold qualifying criteria, and ranks the intersections in order of compliance with the warrants.⁴⁶ City engineers then analyze the top twenty intersections on that list using additional factors⁴⁷ and recommend eight to ten of those intersections to the City Council for funding.⁴⁸ Although the Intersection was a previous candidate for signalization, SIGWAR never ranked the Intersection higher than seventy-first on its list and, thus, City engineers never examined the Intersection in further detail.⁴⁹ After Klay’s death, however, the City installed a traffic signal at the Intersection.⁵⁰

A. Kohl I

The superior court concluded that the City was immune from liability arising out of its decision to use the SIGWAR computer system and granted summary judgment for the City.⁵¹ The court of appeals reversed and remanded,⁵² distinguishing two claims: (1) that the City negligently adopted the SIGWAR computer program for use in its traffic planning; and (2) that the City negligently implemented that program.⁵³ The appellate court noted that the City’s decision to adopt the SIGWAR program is entitled to absolute immunity as a discretionary decision under Arizona Revised Statutes section 12-820.01.⁵⁴ Conversely, the

41. Kohl v. City of Phoenix, 160 P.3d 170, 171 (Ariz. 2007).

42. *Id.*

43. *Id.*

44. *Id.* at 172 (quoting ARIZ. REV. STAT. ANN. § 12-802.01(A)(2) (2007)).

45. *Id.*

46. *Id.* The warrants include “objective data such as traffic volumes, the proximity of school crossings, and collision history.” *Id.*

47. Additional factors include “safety, efficiency, school issues, right of way, roadside interference, utilities and obstructions, vehicle mix, drainage, alignment/profile, lighting, speed differentials, developmental growth, circulation, sight distance, adjacent development, road improvements, and jurisdictional boundaries.” *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 176 n.6.

51. *Id.* at 172–73.

52. *Id.* at 173 (citing Kohl v. City of Phoenix (*Kohl I*), 1-CA-CV 00-0105 (Ariz. Ct. App. Apr. 25, 2002) (mem.)).

53. *Id.*

54. *Id.*

negligent implementation or execution of the program is not entitled to the same immunity.⁵⁵ Thus, the court determined that the dispositive question addresses whether the challenged conduct was “‘merely the automatic product of the City’s program for allocating priorities among intersections,’ or whether the failure resulted ‘from the faulty input or collection of data regarding the intersection.’”⁵⁶

B. Kohl II

On remand, the City argued that its decision not to signalize the Intersection flowed directly out of its decision to adopt the SIGWAR program; thus, the decision was entitled immunity and summary judgment was proper.⁵⁷ The superior court again granted summary judgment in favor of the City, finding that “any failure to signalize the Intersection resulted from the adoption of the SIGWAR program, not from any ‘operational failure’”⁵⁸ Again, the court of appeals reversed and remanded.⁵⁹ It concluded that because the decision to recommend intersections for signalization was not limited only to the use of the SIGWAR program, but also included further analysis by City engineers, the decision was not the automatic result of a policy decision.⁶⁰ Thus, the signalization decision was not entitled to immunity and a question of fact remained as to whether the City had acted reasonably in deciding not to install a traffic signal at the Intersection.⁶¹

III. THE HOLDING AND ANALYSIS OF THE ARIZONA SUPREME COURT

A. Justice Hurwitz’s Majority Opinion

Justice Hurwitz delivered the opinion of the court, affirming the superior court’s holding that the City is entitled to absolute immunity under Arizona Revised Statutes section 12-820.01 and vacating the court of appeals’ decision.⁶² The court agreed with the court of appeals’ conclusion in *Kohl I*, which held that the City’s decision to use the SIGWAR program is entitled to immunity, noting that the “decision to use a computer program in selecting intersections for prioritization . . . is precisely the sort of policymaking decision protected by” section 12-820.01.⁶³ Further, the court emphasized that section 12-820.01(A)(2) “immunizes all determinations of fundamental governmental policy,” even those determinations that are negligent.⁶⁴

55. *Id.*

56. *Id.* (quoting *Kohl I*, 1-CA-CV 00-0105 at ¶ 24).

57. *Id.*

58. *Id.*

59. *Id.* (citing *Kohl v. City of Phoenix (Kohl II)*, 1-CA-CV 05-0087 (Ariz. Ct. App. Oct 3, 2006) (mem.)).

60. *Id.* (citing *Kohl II*, 1-CA-CV 05-0087 at ¶¶ 25–26).

61. *Id.* (citing *Kohl II*, 1-CA-CV 05-0087 at ¶¶ 34–35).

62. *Id.* at 176.

63. *Id.* at 173–74.

64. *Id.* at 174.

The court, however, disagreed with the court of appeals' conclusion in *Kohl II* that the City's decision not to place a signal at that intersection qualified as an "operational or implementing decision, rather than a determination of fundamental governmental policy."⁶⁵ In *Kohl II*, the court of appeals analogized the City's decision not to signalize the Intersection to the decisions in *Doe* and *Fidelity*, specifically distinguishing *Myers*.⁶⁶ The court noted that this analogy was erroneous and, instead, concluded that the City's decision not to signalize the Intersection "flowed directly" out of its decision to use the SIGWAR system,⁶⁷ implying that the facts of this case were analogous to those of *Myers*. Because the Intersection was never ranked high enough by the SIGWAR system to require further analysis by City engineers, the court reasoned that it had never entered the realm of operational decision-making.⁶⁸ Thus, the City was immune from liability for its decision not to signalize.⁶⁹ Even if the decision to analyze only the top twenty intersections on the SIGWAR list was construed as an operational decision, the court noted that the plaintiffs' claim still failed because they did not claim that an operational error of that kind caused the accident that killed their son.⁷⁰

The court limited its holding to the question of whether the decision not to signalize the Intersection is entitled to immunity and declined to rule on whether "every decision not to signalize an intersection constitutes fundamental policymaking under § 12-820.01, and is therefore immune even if based on negligent operational decisions or faulty data"—an argument proffered by the City.⁷¹

B. Chief Justice McGregor's Concurring Opinion

Chief Justice McGregor concurred in the outcome but wrote separately to argue that the majority's analysis of the case was overly complex, that a plain reading of the statute was sufficient to determine the issue of immunity, and that the three cases discussed and distinguished in the majority opinion—*Fidelity*, *Doe*, and *Myers*—did not apply to the facts of this case.⁷²

Applying the plain language of A.R.S. § 12-820.01 . . . the City engaged in a determination of "fundamental governmental policy" when it decided where to install traffic signals and concluded that it would not spend its resources to place a signal at the Intersection. That conclusion should end our analysis.⁷³

Specifically, *Myers* and *Fidelity* addressed "the effect of allegations that government employees had failed to apply policies adopted under the grant of immunity of section 12-820.01," while *Doe* examined two sections of the

65. *Id.* at 175 (quoting *Kohl II*, 1-CA-CV 05-0087 at ¶ 25).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 176 n.7.

72. *Id.* at 176–77 (McGregor, C.J., concurring).

73. *Id.* at 177.

immunity statute that address teacher licensing decisions.⁷⁴ Thus, Chief Justice McGregor argued that “[t]he situation here differs from those . . . that required additional analysis by the courts.”⁷⁵ Contrasting those three cases, Chief Justice McGregor concluded that the case at hand “presents no comparable allegation.”⁷⁶

CONCLUSION

In *Kohl v. City of Phoenix*, the Arizona Supreme Court interpreted section 12-820.01 of the Arizona Revised Statutes in the context of traffic signaling, granting absolute immunity to the City of Phoenix’s decision not to signalize an intersection where the decision stemmed directly from the adoption of procedures used to prioritize and select intersections for signalization. The court explicitly declined to extend its holding to immunize all municipal decisions regarding where to install traffic signals. Justice Hurwitz preserved the distinction between “policymaking decisions,” such as the adoption of selection procedures, which are entitled to immunity under the statute, and “operational” or “implementing” decisions, such as the application or implementation of existing procedures, which are not entitled to absolute immunity. Chief Justice McGregor, while concurring in the majority’s decision, disagreed with its overly complex analysis and asserted that a plain reading of the statute was dispositive on the issue of immunity.

74. *Id.*

75. *Id.*

76. *Id.*