



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**KLAY KOHL, SR. AND GEORGIA KOHL v. CITY OF PHOENIX**

1 CA-CV 05-0087; CV-06-0358-PR

**PARTIES AND COUNSEL:**

*Petitioner City of Phoenix (Defendant):* Eileen Dennis Gilbride, Kathleen L. Wieneke and John M. DiCaro of Jones, Skelton & Hochuli, P.L.C.

*Respondents Klay Kohl, Sr. and Georgia Kohl, parents of Klay Chris Kohl, deceased (Plaintiffs):* Terrence J. McGillicuddy of T.J. McGillicuddy, P.C., and Mark O'Connor of Herzog & O'Connor, P.C.

**FACTS:**

On December 20, 1996, Plaintiffs' 13-year old son was fatally injured when he was struck by a car as he attempted to cross 19<sup>th</sup> Avenue at West Wood Drive on his bicycle. Plaintiffs sued the City of Phoenix alleging that it was negligent for failing to install a traffic signal at this intersection. In response, the City claimed it was absolutely immune from liability under A.R.S. § 12-820.01.

According to the court of appeals, "[t]he parties' dispute regarding immunity focused on a computer program used by the City known as 'SIGWAR.'" The trial court granted summary judgment in favor of the City on the immunity issue. Plaintiffs appealed, and in a memorandum decision (1<sup>st</sup> Appeal), the court of appeals reversed and remanded for further proceedings. Based on the record at that time, the court was unable to determine the role of the computer program in the City's decision. In remanding the case, the court set forth some general principles to guide the parties and trial court. The court "explained that when a municipality adopts a traffic planning program that includes criteria that establish priorities for the allocation of funds among competing projects, the adoption of that program amounts to fundamental policy making" subject to absolute immunity. On the other hand, "if a party can trace a traffic accident not to the adoption of the program but to the fault of municipal employees in the execution or implementation of the program, such conduct would not be entitled to absolute immunity pursuant to the statute but would, instead, be entitled to qualified immunity pursuant to A.R.S. § 12-820.02."

After further discovery on remand, the City again moved for summary judgment, arguing that it had a traffic prioritization program, and that its decision not to place a signal at the intersection was the "automatic product of the City's program" and thus absolutely immune ("the immunity issue"). The City further urged that Plaintiffs had presented no evidence showing that if the City had used different data or had used the criteria the Plaintiffs' expert asserted the City should have used, the intersection would have received a signal ("the proximate cause issue").

According to the City, when an intersection comes to its attention for potential signalization,

the City enters the location and information about the location into SIGWAR. The City uses SIGWAR to analyze the data and determine whether the intersection meets certain standards adopted by the City. These standards include six “warrants,” or factors, identified in the Manual on Uniform Traffic Control Devices (“MUTCD”). According to Plaintiffs’ expert, SIGWAR employs only six of the 11 warrants identified by MUTCD. After SIGWAR computes whether and to what extent each intersection meets the warrants, SIGWAR prioritizes the intersections. After this prioritization, City staff performs quality checks and the program is re-run multiple times. City staff and management discuss the findings and rankings and select “roughly” the top 20 locations (out of, according to the City, 150-200) based on “engineering judgment and City-wide traffic operational concerns . . .,” which includes a number of factors including “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.” After further review, City staff generates a list of about 15 locations for additional study, and design and cost evaluations.

After the cost estimates are prepared, the locations are further reviewed by City staff who, in addition to reconsidering the operational concerns noted above, also consider the availability of resources and competing economic concerns. Although signal funding varies from year to year, funding has been sufficient for the City to signal eight to ten intersections per year. The City Council approves each signalization request through its budget process.

After briefing, the trial court found factual disputes on both issues and denied summary judgment. At the City’s request, the court reconsidered and clarified its decision. On the immunity issue, the court found “undisputed” that the City had a program for allocating priorities; that its selection of the criteria for that process was absolutely immune; that its “adopted procedure” for prioritizing its limited signal funds involved fundamental policy making; that the City had followed its adopted procedure in deciding which intersections to signalize; and that the subject intersection never made it high enough on the priority list to get approval.

Although the trial court found the City’s signal prioritization program and the criteria selected by the City were entitled to absolute immunity, it nevertheless found a triable issue of fact regarding what it labeled as an “operational failure” question:

The City assumed that West Wood Drive was a four-lane roadway when, according to Plaintiff’s expert, it should have been considered a two-lane roadway. Whether this issue constitutes faulty “input or collection of data” is an issue for the jury to decide.

After some legal wrangling, the trial court eventually granted the City’s renewed (third) motion for summary judgment on the proximate cause issue on the basis that “plaintiffs are not able to prove proximate cause (as it relates to absolute immunity).” The court entered judgment for the City, and Plaintiffs moved for a new trial. The court denied the motion and Plaintiffs timely appealed.

In an unpublished decision, the court of appeals reversed and remanded the trial court’s grant of summary judgment in favor of the City of Phoenix. The court held that the City’s decision

not to place a signal at the intersection was not absolutely immune because it involved “engineering judgment,” including consideration of traffic, economic and political factors. The court further held that Plaintiffs presented sufficient evidence to create genuine issues of material fact with respect to proximate cause.

#### **ISSUES PRESENTED FOR REVIEW:**

1. Is the City’s decisional process for selecting those few intersections on which to expend its limited traffic signal funds each year – and the necessary product of that process (a decision *to* signalize a few intersections and *not* to signalize the other candidate intersections) – absolutely immune?
2. Plaintiffs challenge the validity of some small criteria involved in the City’s decisional process. If Plaintiffs cannot demonstrate that using Plaintiffs’ criteria would have led the City to install a signal, is the City entitled to summary judgment on absolute immunity for lack of proximate cause? Or is the only proximate cause question whether “the City breached its duty to keep its streets reasonably safe for travel when it failed to install a signal at the . . . intersection and, if it did, whether that breach proximately caused” the accident, as the court of appeals indicated?

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