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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 10 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RUSSELL WISE, individually and on)	2 CA-CV 2010-0190
behalf of the Estate of MORGAN)	DEPARTMENT A
WISE,)	
)	<u>SUPPLEMENTAL</u>
Plaintiff/Appellant,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
CITY OF TUCSON, a municipal)	
corporation,)	
)	
Defendant/Appellee.)	
_____)	

ON MOTION FOR RECONSIDERATION

Cause No. C20090130

Honorable Kenneth Lee, Judge

DENIED

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and

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H O W A R D, Chief Judge.

¶1 Appellant Russell Wise has filed a motion for reconsideration of our October 24, 2011, memorandum decision affirming the trial court's grant of summary judgment in favor of appellee City of Tucson. *See Wise v. City of Tucson*, No. 2 CA-CV 2010-0190 (memorandum decision filed Oct. 24, 2011). That memorandum decision was based in part on Wise's concession of the city's governmental immunity, as recorded in the court's rulings. For the first time, Wise has now included the transcript of the hearing on the motion for summary judgment and argues it shows he never conceded the city's immunity. Because the transcript confirms that Wise conceded facts establishing the city was immune, we deny his motion for reconsideration.

Factual and Procedural Background

¶2 Wise filed a wrongful death action against the city, alleging it was liable for the death of his daughter based on the negligent design and maintenance of a crosswalk.¹ The city filed a motion for summary judgment, asserting in part that its statutory immunity precluded Wise's recovery. The trial court granted the city's motion for summary judgment and determined the city was immune pursuant to A.R.S. §§ 12-820.01 and 12-820.03.

¶3 The trial court noted in its minute entry rulings on the summary judgment motion that Wise had conceded the city's decision to seek funding from the Regional

¹Wise had also sued the motorcycle driver who hit his daughter and eventually settled with him.

Transportation Authority (RTA) for a HAWK traffic light at the crosswalk fell within § 12-820.01. It also stated that the decision to install the HAWK light instead of other measures fell within that statute. Wise did not include the transcript of the hearing in the record on appeal.

¶4 In our memorandum decision, we affirmed the trial court’s grant of summary judgment because “Wise conceded facts below establishing that the city was immune and because . . . the city’s policy decision was in fact immune.” Wise has filed a motion for reconsideration, claiming he had been misled by the superior court about the existence of the hearing transcript, and he has included a copy of the transcript. He contends the transcript establishes he did not concede the city was immune from suit and further asserts “a party’s concession of a legal conclusion cannot stand.” The city responds the motion for reconsideration lacks merit, but it does not contest our consideration of the transcript in resolving Wise’s motion. After considering Wise’s motion for reconsideration and the transcript, we confirm our previous decision and affirm the trial court.

Discussion

¶5 When a party concedes an issue, the trial court is never given a chance to address the argument; consequently we do not address it either. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 18, 160 P.3d 223, 228-29 (App. 2007); *see also Jett v. City of Tucson*, 180 Ariz. 115, 123-24, 882 P.2d 426, 434-35 (1994) (appellate court does not address issues trial court did not resolve). This rule is “‘established for the purpose of orderly administration and the attainment of justice’” so as not to “undermine[] ‘sound

appellate practice' [or] violate[] the interests of the party against whom the claim is newly asserted on appeal." *Harris*, 215 Ariz. 344, ¶ 17, 160 P.3d at 228, quoting *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987). Although we have discretion to hear arguments not presented to the trial court, "we rarely exercise that discretion." *Id.* Additionally, a voluntary admission, conceding the truth of a fact and made in open court, is a judicial admission and resolves the matter in the case. See *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997).

¶6 When addressing the issue of the funding for HAWK lights at the hearing on the city's motion for summary judgment, Wise conceded that "there [wa]s a decision by the city council to get funding from RTA for a whole variety of things, perhaps to which this fell into it." He further stated that "the City was in fact hoping that RTA would fund their HAWKS." The trial court asked, "So at least as to the HAWK device, there is really no theory of liability against the City based on the HAWK, because your expert says that it's not required to be there, and then you've got this immunity issue floating around, so really that's not an issue in this case, is it?" Wise responded: "I think the Court may be correct about that, yes" The court stated: "You would have avoided about ten minute[s'] worth of questioning then if you had said yeah, you're right, the HAWK is not an issue in this case." Wise responded: "Okay."

¶7 The trial court later asked whether Wise "concede[d] that the HAWK light was something that the City conscientiously thought about and decided, and did whatever they did in terms of the HAWK light." Wise responded, "They did do that And I

think that's what is very telling." The court further asked whether the decision to install a HAWK light was necessarily a decision not to install a stop sign, and Wise stated, "[T]hat would be true if they had put in the HAWK light right away." And, as we noted in our memorandum decision, in his motion for reconsideration in the trial court Wise conceded that "the only decision made by the City of Tucson was to submit the intersection to the RTA for funding of a HAWK light."

¶8 Based on this record, the trial court's minute entry correctly reflected that Wise had conceded the HAWK light was not an issue in the case and the city had considered and decided to seek funding for a HAWK light from the RTA. Wise admitted the same issue in his motion for reconsideration below. Thus, Wise conceded the factual basis necessary to establish the city's governmental immunity and cannot now dispute his judicial admission. *See Clark Equip. Co.*, 189 Ariz. at 439, 943 P.2d at 799. Furthermore, we cannot agree with Wise that his statements at the hearing are properly characterized as legal conclusions and, therefore, should not be deemed admissions. Instead, his statements were admissions of fact that permitted the trial court to reach the legal conclusion that the city was immune. Moreover, as we stated in our memorandum decision, we "would be required to affirm" the legal conclusion of immunity, supported by Wise's factual admissions, because the city's decision to seek funding for the HAWK light falls within the governmental immunity provided by § 12-820.01. *Wise*, No. 2 CA-CV 2010-0190, ¶ 17.

Conclusion

¶9 For the foregoing reasons, we deny Wise’s motion for reconsideration.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

B R A M M E R, Judge, dissenting.

¶10 Having reviewed the transcript, which I agree we should consider, I respectfully dissent from my colleagues’ decision for all the same reasons given in my original dissent. The factual “concessions” disclosed by the record, and on which the majority relies, consist of largely irrelevant and undisputed facts that fail to provide a basis for a legal finding of governmental immunity.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge