ARIZONA SUPREME COURT

KIZZEN JAMES, individually, and on behalf of DENNIS McGINNIS, a statutory beneficiary, for the wrongful death of Isaiah McGinnis, a minor,	)	Case No. 1 CV-21-0125-PR
	)	Court of Appeals, Division One No. 1 CA-CV 20-0415
Plaintiffs/Appellants/Petitioners,	)	Maricopa County Superior Court No. CV2019-054635 Hon. Theodore Campagnolo
v.	)	
CITY OF PEORIA, a government entity,	)	
Defendant/Appellee/Respondent.	)	

BRIEF OF *AMICUS CURIAE* LEAGUE OF ARIZONA CITIES AND TOWNS IN SUPPORT OF THE CITY OF PEORIA

Nancy L. Davidson, Esq. (State Bar No. 029991)
General Counsel
League of Arizona Cities and Towns
1820 W. Washington Street, Phoenix, AZ 85007
(602) 258-5786 ndavidson@azleague.org
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTEREST OF AMICUS CURIAE

Pursuant to Rule 16, Ariz. R. Civ. App. P., this amicus curiae brief is submitted by the League of Arizona Cities and Towns ("**League**") in support of the City of Peoria ("**Peoria**"). This amicus curiae brief is being lodged with a Motion for Leave to File Amicus Curiae Brief in accordance with Ariz. R. Civ. App. P. 16(b).[1]

The League is a voluntary association of all the incorporated cities and towns in the State of Arizona. It includes 91 member municipalities, including Peoria, representing approximately 79% of Arizona's total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and among the cities and towns of Arizona.

The appellant in this case, Kizzen James ("**James**"), served on Peoria a letter asserting a claim against the city. It included an offer to settle the claim for a specified amount and stated that the offer was "valid for thirty (30) days from the date of this letter." This did not constitute a notice of claim that satisfies the requirements of A.R.S. § 12-821.01, because that statute requires the public entity be given 60 days within which to accept the settlement offer and resolve the claim

[1] The League is neither a party to the appeal nor controlled by any party to the appeal. No person or entity other than the League provided financial resources for the preparation or submission of this brief.

before litigation. Because she filed no valid notice of claim before the deadline, James's claim is barred.

To avoid that result, James asks this Court to hold that a claimant may file a notice of claim with a public entity and then immediately withdraw the settlement offer contained in it and file a lawsuit against the entity, without waiting 60 days for the entity to either accept or deny the offer. Such a holding would depart from all prior interpretations of the statute, render the notice of claim process a sham, and result in needless, expensive litigation that might otherwise be avoided by pre-litigation resolution of claims. Alternatively, James asks this Court to hold that, if the claimant makes a settlement offer that is set to expire earlier than the statutory period of 60 days, the public entity must cure the defect by disregarding that statutory limitation, in effect holding the claimant to an offer *they didn't actually make* in order to force compliance with the statute.[2] This, too, would be a radical departure from prior notice-of-claim cases and basic contract-law principles.

The League respectfully submits this brief in support of Peoria because either of the above outcomes would have far-reaching implications for local governments in Arizona that rely on an orderly and predictable notice-of-claim

[2] Though James doesn't repeat this argument in her supplemental brief, she made it in her Petition for Review, and it can presumably be considered by the Court as an alternative way of deeming her claim to be valid. The League therefore addresses it here.

process to evaluate and address claims in a manner consistent with government budgeting and taxing restraints.

ARGUMENT

1. By providing a "deemed denied" date, A.R.S. § 12-821.01 necessarily requires the settlement offer in a valid notice of claim to remain open for 60 days, during which period the public entity can accept or reject the offer before the claimant files a lawsuit.

James notes that § 12-821.01 does not explicitly state that a claimant, to satisfy the statute, must make their settlement offer irrevocable for 60 days or that the claimant cannot file a lawsuit until the public entity affirmatively rejects the offer or the 60-day period has run. Therefore, she argues, a claimant can revoke their offer and file a lawsuit at any time after filing their claim.

Of course, James filed her lawsuit more than 60 days after she served her letter on the Peoria, so the ability of a claimant to file a lawsuit during the 60-day period following the filing of the notice of claim is not in question in this case. The question is whether a notice of claim containing a settlement offer that is set to expire in less than 60 days satisfies the requirements of § 12-821.01. Regardless, the answer to both of those questions is "no." As the Court of Appeals correctly held in this case, a settlement offer that remains open for less than 60 days is a perfectly valid settlement offer; however, it does not qualify as a valid *notice of*

claim under the statute. If it did, § 12-821.01's 60-day "deemed denied" provision would be meaningless.

Under normal contract-law principles, an offeree is under no obligation to accept or affirmatively reject an offer after it is made. *New York Life Ins. Co. v. Lawrence*, 56 Ariz. 28, 35-36 (1940**)**. This does not, however, mean the offer remains forever open and pending, because the offeror – absent an agreement to the contrary, made in exchange for consideration – can withdraw it at any time prior to affirmative acceptance by the offeree. *Richards v. Simpson*, 111 Ariz. 415, 418 (1975). The offeror can also give the offer an expiration date, as James did in this case, by stating that the offer will end automatically after some specified period of time; even then, however, the offeror can revoke the offer before the stated time.[3]

Logically, therefore, the only reason to require an offeree to either accept or reject an offer before a specified deadline is if, contrary to the usual rule, the offer is irrevocable. That is what § 12-821.01 does – it requires the claimant to make a settlement offer that it cannot revoke. The statute sets the "deemed denied" date to ensure that a public body's failure to affirmatively respond to the claim doesn't cause the offer to go into a perpetual state of limbo. Instead, the offer is deemed

[3] The revocation, to be effective, must of course be communicated to the offeree before they accept the offer and turn it into a binding contract. *Butler v. Wehrley*, 5 Ariz. App. 228, 232 (1967).

rejected after 60 days.[4] If, as James argues, the claimant can revoke the offer and sue at any time, then the "deemed denied" date in the statute does nothing *because no rejection by the public entity would ever be logically or legally necessary*.

That bears repeating. There is no reason to set a date by which an offer is "deemed denied" by the public entity if no claimant right is dependent on such a rejection. Period. Because words in a statute are presumed to be meaningful and not "mere surplusage," *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019), this means the public entity's denial of the claim must be necessary to end the offer and permit the claimant to sue.

This has long been the understanding regarding § 12-821.01's purpose and effect – it gives the public entity 60 days to evaluate the claim and, if appropriate, resolve it, before being sued. *See Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, ¶ 9 (2006) (purpose of claims statute is "to permit the possibility of settlement prior to litigation"); *Backus v. State*, 220 Ariz. 101, 104, ¶ 10 (2009) ("one of the goals of § 12–821.01" is "to encourage public entities and claimants to resolve claims without resorting to litigation."); *Drew v. Prescott Unified Sch. Dist*., 233 Ariz. 522, 526, ¶ 15 (App. 2013) ("the statute's purposes include allowing public entities and employees the opportunity to realistically and

[4] The general rule is that, after an offeree rejects an offer, the offer loses effect and may not thereafter be accepted unless it is renewed by the offeror. *Hargrave v. Heard Inv. Co*., 56 Ariz. 77, 80 (1940).

meaningfully investigate and assess a claim, and determine whether to settle and possibly avoid litigation altogether."); *Martineau v. Maricopa County*, 207 Ariz. 332, 335–36, ¶ 19 (App. 2004) (purpose of claims statute is to allow "the public entity to investigate and assess liability, to permit the possibility of settlement prior to litigation, and to assist the public entity in financial planning and budgeting"); *Crum v. Superior Court*, 186 Ariz. 351, 352 (App. 1996) (compliance with notice-of-claim statute is a "prerequisite to filing suit against a public employee or public entity").

If the statute does not do that, and the public entity need not be given any time to evaluate the merits of a claim, it is difficult to see what possible purpose the notice-of-claim requirement serves. James asserts that 60 days is not long enough to permit meaningful review of claims anyway. That is certainly true for some claims, those with complex facts and high dollar values. But just because those claims tend to end up in litigation – which means they are the ones with which plaintiffs' lawyers and courts are familiar – most claims are not of that variety. For every complex road-design case involving a multi-million-dollar claim, there are many, many claims for things like vehicle damage caused by potholes. The 60-day notice of claim period allows public entities to make informed decisions about many (if not most) of the claims they get. If they are not provided that opportunity, what point does a notice of claim serve? The offer it

contains becomes meaningless if public entities are not assured of some real opportunity to evaluate it.[5]

2. Neither the public entity who gets the purported notice of claim, nor this Court, can ignore language in the notice that limits its settlement offer to a period of less than 60 days in order to force the claim to comply with § 12-821.01.

The Court of Appeals' logic is unassailable. "[A]lthough James was at liberty to issue a general settlement offer that included a shorter window for acceptance, the resultant consequence of doing so was to render the same offer ineligible to concurrently serve as her notice of claim under the statute." (Opinion, ¶ 20.) James, however, has argued Peoria should have known she did not mean what she said and the 30-day expiration on her settlement offer was simply a legal nullity. She argues that, if a time limit on a settlement offer in a purported notice of claim means the offer doesn't comply with § 12-821.01, this Court should disregard (and should require public entities to disregard) that time limit. This is an extraordinary ask.

[5] For similar reasons, Rule 68(h), Ariz. R. Civ. P., requires an offer of judgment to remain open for specified periods of time before the offeror can use the offeree's failure to accept it as a basis for sanctions. Refusing to accept a settlement offer should not have legal consequences if the offeree hasn't been given sufficient time to make their refusal a deliberate decision.

First, it violates basic notions of contract law. On what basis can a public entity treat what the Court of Appeals rightly characterized as a legally operative settlement offer as somehow not meaning what it says? Such an approach would seem to leave public entities with a Hobson's choice. If a public entity ignores a claim that contains such a time limit, the claimant can argue that the offer should be deemed to have been open for the 60 days, despite its plain terms, and therefore they complied with § 12-821.01. On the other hand, if the public entity tries to accept the offer after expiration of the less-than-60-day time limit, the claimant can say their offer expired and then file a new claim – perhaps one that really does comply with § 12-821.01 – for more money. Would a court be prepared to *force* a claimant to honor an offer accepted after the expiration date expressly set by the claimant?

Such an approach does far more than simply read applicable law into the offer, as James asserts in her Petition for Review. As the Court of Appeals correctly observed (Opinion, ¶ 23), serving a formal claim against a public entity that contains a settlement offer that expires after less than 60 days is in neither inconsistent with nor prohibited by any Arizona statute or other law; it simply doesn't constitute a valid notice of claim under § 12-821.01. The cases cited by James are not persuasive. For example, in *Pinal County v. Hammons*, 30 Ariz. 36, 42 (1926), the court held that a bank that accepted a general deposit of tax revenue

from a county assessor, whose statutory authority was limited to making "special" deposits, accepted the funds in the role of a trustee. The assessor had no authority to transfer title of the money to the bank by making a general deposit of the funds. *Id*. at 44. Here, as noted, the offer made by James was a valid settlement offer, within the authority of the claimant to make, and wasn't prohibited by statute or other law.

The other cases cited by James are similarly distinguishable. Similar to *Hammons*, two cases concern statutory limitations on the authority of public officials. *See Wise v. First Nat. Bank*, 49 Ariz. 146, 160 (1937) (city's full faith and credit liable for payment of bonds, as provided by the statutes under which the bonds were issue, despite the fact that the contract between the city and the bondholders tried to limit repayment to a special fund); *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 11 (App. 2002) (public official's at-will status under statute could not be changed by a purported contract providing otherwise; noting that "in particular, a public entity created by the legislature is bound by the laws relating to it"). The third case, *Am. Power Prod., Inc. v. CSK Auto, Inc*., 242 Ariz. 364, 368, ¶ 15 (2017), involved the court's use of a statutory definition as an interpretive tool for a contract that used the same term, expressly incorporated the statute, and provided no alternative definition of the term. None of these opinions are remotely relevant to the instant case.

Second, this approach departs from well-established precedent holding that claimants must strictly comply with § 12-821.01 requirements. *See, e.g., Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 299 ¶ 21 (2007) (requiring strict compliance and rejecting reasonableness standard); *Falcon*, 213 Ariz. at 527 ¶ 10 (requiring strict compliance and rejecting actual notice and substantial compliance); *State v. Barnum*, 58 Ariz. 221, 231 (1941) (discussing the filing requirements); *Slaughter v. Maricopa County*, 227 Ariz. 323, 325, ¶ 8 (App. 2011) (actual notice and substantial compliance do not excuse a late filing of a claim); *Harris v. Cochise Health Systems*, 215 Ariz. 344, 351 (App. 2007) (compliance with the claims statute is a "mandatory" and "essential" prerequisite to filing a lawsuit); *Salerno v. Espinoza*, 210 Ariz. 586, 589, ¶ 11 (App. 2005); *Martineau*, 207 Ariz. at 335, ¶ 19 (actual notice and substantial compliance do not excuse failure to comply with the statutory requirements); *Spectrum Pac. W. LLC v. City of Yuma*, 507 F. Supp. 3d 1186 (D. Ariz. 2020).

The *Deer Valley* case is particularly on point. In that case, this Court held that a notice of claim did not satisfy § 12-821.01 because the claimant's "repeated use of qualifying language makes it impossible to ascertain the precise amount for which the school district could have settled her claim." 214 Ariz. at 296, ¶¶ 9-11. Just as the Court in *Deer Valley* refused to simply ignore that "qualifying language" – phrases like "approximately," "or more going forward," "similar

appropriate pay increases," and "no less than" (*id*., ¶ 7) – this Court cannot ignore the qualifying phrase in James's purported notice of claim limiting her settlement offer to 30-days' duration.

James's approach also departs from long-standing precedent making it clear that public entities are not required to cure defects in submitted notices of claim. *Yahweh v. City of Phoenix*, 243 Ariz. 21, 23, ¶ 12 (App. 2017) ("Public entities are not duty-bound to assist claimants with statutory compliance.") (citation omitted); *see also, Backus*, 220 Ariz. at 107 ¶ 28 (A public entity is not required to request additional facts when a claimant's notice of claim is deficient.). Indeed, how could a public-entity employee – whether or not a lawyer – appropriately advise a claimant about deficiencies in their notice?

CONCLUSION

The Court of Appeals in this case, as it did in *Drew*, correctly concluded that a notice of claim containing a settlement offer that expires sooner than 60 days after the claim is served does not comply with § 12-821.01. The League respectfully asks this Court to affirm that decision and continue to require strict compliance with that statute.

RESPECTFULLY SUBMITTED this 20th day of October 2021 by:

/s/ Nancy L. Davidson
Nancy L. Davidson, Esq. (029991)
General Counsel
League of Arizona Cities and Towns
1820 W. Washington Street, Phoenix, AZ 85007
(602) 258-5786
ndavidson@azleague.org
Attorney for Amicus Curiae

Certificate of Compliance

This certificate of compliance concerns an Amicus Curiae Brief and is submitted under Rules 14 and 16 of Arizona Rules of Civil Appellate Procedure. I certify that the Amicus Curiae Brief to which this Certificate is attached uses Times New Roman of at least 14 points, is double-spaced, and contains 3,589 words. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14.

DATED this 20th day of October 2021

/s/ Nancy L. Davidson
Nancy L. Davidson, Esq. (029991)
General Counsel
League of Arizona Cities and Towns
1820 W. Washington Street, Phoenix, AZ 85007
(602) 258-5786
ndavidson@azleague.org
Attorney for Amiusi Curiae

Certificate of Service

The undersigned certifies that on October 20, 2021, the foregoing Amicus Curiae Brief was electronically filed with the Clerk of the Arizona Supreme Court and copies were also delivered on October 20, 2021, by email to the following:

David L. Abney, Esq. (009001)
Ahwatukee Legal Office, P.C.
Post Office Box 50351
Phoenix, Arizona 85076
(480) 734-8652
abneymaturin@aol.com
Appellate Counsel for Plaintiffs/Appellants/Petitioners

Abdoukadir 'Abdul' Jaiteh, Esq. (029833)
Elizabeth M. Gonzalez, Esq. (030781)
AJ Law, PLC
7201 North Seventh Street
Phoenix, Arizona 85020
(602) 237-5277 abdul@ajlawplc.com
Attorneys for Plaintiffs/Appellants/Petitioners

Amanda C. Sheridan, Esq.
Senior Assistant City Attorney
Saman J. Golestan, Esq., Assistant City Attorney
Office of the City Attorney, City of Peoria
8401 W. Monroe St., Room 280
Peoria, AZ 85345
(623) 773-7330
amanda.sheridan@peoriaaz.gov
caofiling@peoriaaz.gov
Attorneys for Defendant- Appellee City of Peoria

DATED this 20th day of October 2021

/s/ Nancy L. Davidson
Nancy L. Davidson, Esq. (029991)
General Counsel
League of Arizona Cities and Towns
1820 W. Washington St.
Phoenix, AZ 85007
(602) 258-5786 ndavidson@azleague.org
Attorney for Amicus Curiae