SUPREME COURT OF ARIZONA

JACOB LAURENCE, Plaintiff/Appellant v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT, Defendant/Appellee	)	Arizona Supreme Court No. CV-21-0292-PR Court of Appeals No. 1 CA-CV 21-0100 Maricopa County Superior Court No. CV 2018-093037

BRIEF OF *AMICUS CURIAE* LEAGUE OF ARIZONA CITIES AND TOWNS, ARIZONA COUNTIES INSURANCE POOL, ARIZONA MUNICIPAL RISK RETENTION POOL, AND ARIZONA SCHOOL RISK RETENTION TRUST, INC.

[WITH CONSENT]

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 14 and Rule 16, Ariz. R. Civ. App. P, this amici curiae brief ("Brief") is submitted by the League of Arizona Cities and Towns ("League"), the Arizona Counties Insurance Pool ("ACIP"), the Arizona Municipal Risk Retention Pool ("AMRRP"), and the Arizona School Risk Retention Trust, Inc. ("ASRRT"), collectively ("Amici"). No other person or entity made a monetary contribution for the preparation or submission of this brief.

The League is a voluntary association of the 91 incorporated cities and towns in the State of Arizona, representing approximately 81.5% of Arizona's total population. These 91 municipalities employ approximately 50,878 employees (full time, part time, seasonal, and temporary). ACIP provides insurance coverage, adjudicates claims, manages risk, and provides consultation services for 13 of Arizona's 15 counties. AMRRP is a self-insurance and risk management pool, owned and operated by 77 cities and towns and covering approximately 14,000 employees. ASRRT is a non-profit risk-retention pool that provides liability coverage and related services to nearly 250 Arizona public school districts and community colleges.

Amici respectfully submit this Brief because the issues presented involve matters of fundamental importance to public entities in Arizona—the interplay between Arizona's notice-of-claim ("NOC") statute, A.R.S. § 12-821.01(A), and its

longstanding derivative-liability jurisprudence, including *DeGraff v. Smith*, 62 Ariz. 261 (1945) and its progeny.

For decades, the law was clear that the dismissal of a public employee for failure to have served them with a proper notice of claim extinguished any vicarious liability claim(s) against the public employer for the employee's alleged wrongdoing. *See e.g.*, *Howard v. Washington Elementary Sch. Dist. 6*, No. 1 CA-CV 20-0390, 2022 WL 363766, ¶ 11 (Ariz. Ct. App. Feb. 8, 2022) (affirming grant of summary judgment on vicarious liability claim against public employer based on the dismissal of claim against employee for failure to timely serve notice of claim); *Angulo v. City of Phoenix*, No. 1 CA-CV 12-0603, 2013 WL 3828778, ¶ 8 (Ariz. Ct. App. July 16, 2013) (same); *Laurence v. Salt River Project Agric. Improvement & Power Dist.*, No. 1 CA-CV 21-0100, 2021 WL 5183957, ¶ 8 (Ariz. Ct. App. Nov. 9, 2021) (same); *see also* Ariz. R. Civ. P. 41(b) (providing that an involuntary dismissal is an adjudication on the merits with exceptions "[u]nless the dismissal order states otherwise.").

Although the Court of Appeals in *Banner University Medical Center Tucson Campus, LLC v. Gordon*, 249 Ariz. 132 (App. 2020) ("*Banner I*") narrowly construed its opinion to address the specific facts, circumstances, and procedural arguments before it, many Arizona litigants and trial courts are now uncertain about the law. Leveraging that uncertainty, Petitioner Jacob Laurence ("Laurence") is

blind to the fact that his case is distinguishable from *Banner I* and asks this Court to broadly apply its *end result* for a private co-employer, regardless of its inherent limitations to that case, to wholly abolish the *DeGraff* principle—something clearly not intended by *this* Court when it issued its opinion. *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 252 Ariz. 264 (2022) ("*Banner II*"). This Court in *Banner II* stated: "Because our determination is made on a procedural and not a substantive basis, we do not address the underlying merits of whether a dismissal of an employee pursuant to A.R.S. § 12-821.01 precludes a claim of vicarious liability against an employer. 252 Ariz. at 265 ¶ 1, n. 2. The Court should decline Laurence's invitation to overturn its longstanding jurisprudence holding that when an employee has been haled into court and deemed *not* liable, no employee liability remains to impute to an employer. Therefore, as a matter of law, the employer cannot be held liable. The Court's earlier decisions are eminently logical and supported by well-accepted agency principles. *See, e.g.,* RESTATEMENT (SECOND) OF AGENCY § 217, cmt. c (1958) (stating the liability of the principal cannot exist without the liability of the agent).

In support of Laurence's plea, he petitions this Court to re-interpret Arizona Rule of Procedure 41(b). To do so would undermine the certainty and confidence provided to the public and courts by *stare decisis*. *See, e.g., Howard*, 2022 WL 363766, at ¶ 11 (a dismissal is an adjudication on the merits unless otherwise stated);

DeGraff, 62 Ariz. at 265–70 (same); *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 574 (1986) (same); *Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92, 96, ¶ 13 (App. 2007) (same).

Reinterpreting Rule 41(b), after it has been relied upon for so many years, would disrupt the state's understanding of the law in a way that would dramatically impact, among others, all public entities in the application of *DeGraff*. Such a profound sea change could result in even greater confusion and extensive litigation when plaintiffs fail to follow the simple and clear steps laid out by the legislature in A.R.S. § 12-821.01(A)—steps the legislature deemed a fair exchange for abolishing governmental immunity. *See, e.g.*, *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 293, ¶ 9 (2007) ("Compliance with this statute is not difficult . . ."). As such, Amici have a collective interest in the outcome of this case.

Permitting plaintiffs to pursue litigation against public entities, even when they fail to fully comply with the NOC statute before haling public employees into court, would upend over 77 years of derivative-liability jurisprudence and expose public employers to vicarious derivative-liability claims when the Court dismisses the underlying claim against public employees. Arizona taxpayers would be stuck paying the costs of defending such claims. It would also set the stage for other Court-driven policy exceptions that implicate public employers.

ARGUMENT

A. *DEGRAFF* AND ITS PROGENY ARE CLEAR AND CONSISTENT WITH THE NOC STATUTE AND WELL-SETTLED LAW THAT WHEN A PUBLIC EMPLOYEE HAS BEEN DISMISSED FROM A LAWSUIT, A DERIVATIVE-LIABILITY CLAIM CANNOT SURVIVE AGAINST THE PUBLIC EMPLOYER.

Laurence sued SRP, a public entity, and its employee for damages suffered in a vehicle crash. *Laurence,* 2021 WL 5183957, at ¶ 8. Laurence sued the employee for direct liability and SRP for vicarious liability; Laurence served a valid NOC on SRP, but failed to serve a NOC on the employee. *Id*. at ¶ 2. The superior court granted summary judgment in favor of SRP based on Laurence's failure to individually serve both public defendants in this case. *Id*. at ¶ 8. Since SRP could not be vicariously liable for the employee's conduct, judgment was granted in favor of the employee, and the court dismissed all claims with prejudice and entered final judgment. *Id*. at ¶ 3.

Laurence argues that the lower courts erred by concluding his claim was barred because dismissal of the employee was "based on a technicality – not on the merits." (Pet. 5; Supp. Br. 2.) Laurence is wrong for several reasons.

First, "[a] claimant who asserts that a public employee's conduct giving rise to a claim for damages was committed within the course and scope of employment must give notice of the claim to *both* the employee individually and to his employer."

Crum v. Superior Court, 186 Ariz. 351, 352 (App. 1996); *see also* A.R.S. § 12-821.01(A).

Second, the failure to file a NOC is not a mere technicality. This Court has made clear that compliance with the terms of the NOC statute is *mandatory*; any claim that does not comply is barred and "*no action* may be maintained thereon." A.R.S. § 12-821.01(A) (emphasis added); *see also James v. City of Peoria*, 253 Ariz. 301, 303, ¶ 10 (2002) ("If a notice of claim fails to comply with any requirement in § 12-821.01(A), the claimant's claims are statutorily 'barred and no action may be maintained thereon.'") (quoting A.R.S. § 12-821.01(A)); *Deer Valley Unified Sch. Dist. No. 97*, 214 Ariz. at 299, ¶ 12 ("Claims that do not comply with § 12-821.01 are statutorily barred."). Accordingly, the lower courts correctly concluded that Laurence's failure to serve the defendant public employee with a NOC was fatal to his negligence claim against the employee, and consequently, his vicarious liability claim against SRP. "[N]o action" could proceed. A.R.S. § 12-821.01(A).

Laurence is essentially asking this Court to create a special exception, allowing a vicarious-liability claim to be maintained against a public employer when a public employee has been dismissed from a lawsuit. Neither § 12-821.01 nor the case law requiring strict compliance would support this novel exception. Judgment in favor of SRP was not only appropriate, but it was also mandatory.

B. THERE IS NO VALID REASON TO ABROGATE *DEGRAFF*.

Under the doctrine of *respondeat superior*, an employer is vicariously liable for "the negligent work-related actions of its employees." *Kopp v. Physician Grp. of Ariz., Inc.*, 244 Ariz. 439, 441, ¶ 9 (2018) (quoting *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57, ¶ 9 (2012)). This vicarious liability results *solely* from the principal-agent relationship between the employer and its employee.

In *DeGraff*, this Court established the bright-line rule that a dismissal with prejudice of a direct-liability claim against an employee extinguishes the vicarious-liability claim against its employer because "the sole basis of liability is the negligence or wrongdoing of the employee imputed to the employer under the doctrine *respondeat superior*." 62 Ariz. at 266, 268, 270 (citations omitted); *see also* A.R.S. § 12-2506(D)(2) (upon entry of judgment, a defendant is only liable "for the fault of another person … if the other person was acting as an agent or servant of the [defendant]"); RESTATEMENT (SECOND) OF AGENCY § 217(b), cmt. c (1958) (stating the liability of the principal cannot exist without the liability of the agent); *see generally* RESTATEMENT (FIRST) OF TORTS § 883 (1939) and RESTATEMENT (FIRST) OF JUDGMENTS § 99 (1942).

Over the last 77 years, this Court has never overturned *DeGraff*. On the contrary, this Court has repeatedly reaffirmed it. *See, e.g., Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 574 (1986) (observing vicarious liability is synonymous

with derivative liability); *Kopp*, 244 Ariz. at 441, ¶ 9 ("[T]hose whose liability is only vicarious are fault free—someone else's fault is imputed to them by operation of law.") (quoting *Wiggs v. City of Phoenix*, 198 Ariz. 367, 371, ¶ 13 (2000)); *Jamerson v. Quintero*, 233 Ariz. 389, 390, ¶ 6 (App. 2013) (a judgment in favor of the agent bars the plaintiff's vicarious liability claim against the principal, even when the judgment is the product of a settlement); *Law*, 217 Ariz. at 96, ¶¶ 13, 15 (quoting from A.R.S. § 12-2506(D) and holding that when a judgment on the merits, including a dismissal with prejudice, is entered in favor of the "other person," there is no fault to impute, and the party potentially vicariously liable is not responsible for the fault of the other person under the *Uniform Contribution Among Tortfeasors Act*).

DeGraff is very similar to this case. Both *DeGraff* and this case arose out of an employee's car accident with a company truck. *See DeGraff*, 62 Ariz. at 262; *Laurence*, 2021 WL 5183957, at ¶ 2. The plaintiff in this case and the plaintiff in *DeGraff* filed a lawsuit with a direct-negligence claim against the employee and a vicarious-liability claim against the employer. *See id*. In both cases, the courts held that dismissal of the employee's direct-negligence claim barred the plaintiff from continuing the vicarious-liability claim against the employer. *See DeGraff*, 62 Ariz. at 270; *Laurence*, 2021 WL 5183957, at ¶ 8.

DeGraff and its progeny hold that any dismissal with prejudice is an adjudication on the merits requiring the dismissal of a vicarious-liability claim against its employer. *See DeGraff*, 62 Ariz. at 270; *Laurence*, 2021 WL 5183957, at ¶ 7. Laurence asks this Court to abrogate *DeGraff* or manufacture an exception to this settled rule when claims are dismissed for failing to comply with the notice of claim statute. Laurence contends these dismissals do not count because they are "not on the merits." (Pet. 5.) Nothing in statute or the case law would support such an exception.

Rule 41(b) provides that an involuntary dismissal is an adjudication on the merits, with exceptions that do not apply in this case, "[u]nless the dismissal order states otherwise." Ariz. R. Civ. P. 41(b). The dismissal order in this case does not state otherwise. Courts have also consistently recognized that an involuntary dismissal with prejudice is a decision "on the merits." *Howard*, 2022 WL 363766, at ¶ 11 (affirming grant of summary judgment on vicarious liability claim against public employer based on the dismissal of claim against employee for failure to timely serve notice of claim); *Angulo*, 2013 WL 3828778, at ¶ 8 (same); *Laurence*, 2021 WL 5183957, at ¶ 8 (same); *see also DeGraff*, 62 Ariz. at 265–70 (explaining that release of employee from personal liability also releases employer and that dismissal with prejudice constitutes adjudication on the merits); *Law*, 217 Ariz. at

96, ¶ 13 (same); *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274 (1971) (same). This Court has also concluded that:

> The term "adjudication" is generally used to refer both to the legal process of resolving a case and to a judgment. The term 'adjudication' thus encompasses the entry of a judgment that determines claims in a case, but "adjudication" does not necessarily mean that this determination must follow a trial or even a hearing.

4501 Northpoint *LP v. Maricopa Cnty.*, 212 Ariz. 98, 101 (2006) (referencing *Black's Law Dictionary* 45 (8th ed. 2004) and Ariz. R. Civ. P. 54(b)).

Here, the Court of Appeals correctly concluded the involuntary dismissal with prejudice of the employee and summary judgment "amounted to an adjudication on the merits in his favor." *Laurence*, 2021 WL 5183957, at ¶ 7 (citing Ariz. R. Civ. P. 41(b) and *Union Interchange, Inc. v. Van Aalsburg,* 102 Ariz. 461, 464 (1967)). Since the dismissal with prejudice was a decision on the merits, Laurence's derivative liability claim against SRP is barred.

In his Petition for Review, Laurence argued that *Banner I* is dispositive and establishes that the vicarious-liability claim against SRP is not precluded. (Pet. 12–-15.) Aside from the fact that this Court vacated that decision in *Banner II*, *Banner I* was decided on the basis of very different facts and theories. Banner is a private employer and therefore distinguishable from public entities because it is <u>not protected by the NOC statute</u>. *Banner I* explicitly distinguished that it did not involve "the straightforward situation of a public entity and its employee," but rather

addressed only "whether a private employer is shielded by a statute intended to protect state actors." 249 Ariz. at 137–38.

In addition, this Court's holding in *Banner II* did not turn on a failure to serve a NOC; it was based on the language of a dismissal order. *See id*., 252 Ariz. at 267. This Court concluded that dismissal against some, but not all, of the defendants was not a final judgment on the merits because the dismissal order was unsigned and did not contain Ariz. R. Civ. P. 54(b) or 58(b)(1) language. *Id*. The language of the dismissal order is not at issue in this case. This Court in *Banner II* found it "[e]qually problematic for the application of preclusion" that the trial court failed to consider the dismissal of the claims against the doctors an adjudication on the merits as required by Rule 41(b). *Id*. at 267 (citations omitted). This Court was also careful to state the following in a footnote: "Because our determination is made on a procedural and not a substantive basis, we do not address the *underlying merits* of whether a dismissal of an employee pursuant to A.R.S. § 12-821.01 precludes a claim of vicarious liability against an employer." *Id*. at 265, fn. 2 (emphasis added). In contrast, SRP is a public entity, and the lower courts here did consider the dismissal of the public employee as an adjudication of the merits.

Laurence cites a Maryland case, *Women First OB/GYN Assocs., L.L.C. v. Harris*, 232 Md. App. 647 (2017). (Pet. 15; Supp. Br. 5.) That case is not helpful here because it involved private parties, a voluntary dismissal, and the laws of

another state. Interestingly, the court in *Women First OB/GYN* acknowledged that several other states (like Arizona) hold that "the dismissal of a claim against a defendant is an adjudication upon the merits equal to an exoneration, so the defendant's principal cannot be held vicariously liable, even when there has been no settlement, release, or exchange of consideration." *Id*. at 669. The court even discussed the facts and holding of *Law*:

> In *Law v. Verde Valley Medical Center*, 217 Ariz. 92 (2007), the plaintiff's decedent suffered head injuries in a fall at the defendant medical center. The plaintiff sued two doctors for negligently failing to diagnose the decedent's head injuries and the medical center for vicarious liability based on the tortious conduct of the two doctors and for vicarious liability based on the tortious conduct of unnamed emergency room personnel in creating the situation in which the decedent fell. Before trial, the plaintiff voluntarily dismissed both doctors with prejudice. One was dismissed in conjunction with a settlement; the other was dismissed "in the absence of any settlement payment or release." 217 Ariz. at 96 n.2. The medical center moved for summary judgment on the vicarious liability claims that were based on the doctors' negligence, and the motion was granted. The rest of the case went to trial, and the medical center prevailed before a jury. The plaintiff appealed, arguing that the trial court erred in ruling that the dismissal with prejudice of the claims against the doctors precluded the medical center from being held vicariously liable for their negligence. The Supreme Court of Arizona affirmed, holding that because "a dismissal with prejudice" is the equivalent of "judgment on the merits[,]" there was "no fault [on the part of the doctors] to ... impute [to] the party potentially vicariously liable[,]" *i.e*., the medical center. *Id*. at 96. Most of the court's discussion was an explanation of why Arizona's [Uniform Contribution Among Tortfeasors Act[1]] was not relevant

[1] In 1984, Arizona adopted the Uniform Contribution Among Tortfeasors Act, A.R.S. §§ 12-2501 through 12-2509 ("UCATA"). UCATA did not change the law regarding vicarious liability. *Law*, 217 Ariz. at 95, ¶ 11.

> to the question of a principal's vicarious liability for the acts of its agent. The court stated that even in the absence of a release, the dismissals with prejudice "constitute[d] adjudications of non-liability on the merits" for the doctors. *Id*. (additional citation omitted).

Women First OB/GYN Assocs., L.L.C, 232 Md. App. at 669–70.

Laurence also points to *Brumbaugh v. Pet Inc*., 129 Ariz. 12, 13 (App. 1981). (Supp. Br. 5.) That case is inapplicable because it addressed the availability of interspousal immunity under the Restatement (Second) Agency § 217(b). *Id*. Immunity is not at issue here.

In short, there is no support for Laurence's arguments. To the contrary, the lower courts dutifully and correctly applied the NOC statute and binding Supreme Court precedent—*DeGraff* and its progeny—to dismiss the vicarious-liability claim against SRP. Laurence fails to validly argue otherwise.

CONCLUSION

For these additional reasons, Amici urge this Court to reaffirm *DeGraff*, hold that it applies to the facts of this case, and affirm the dismissal of the vicarious-liability claim against SRP.

RESPECTFULLY SUBMITTED this 22nd day of November 2022 by:

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 16(b)(4) of Arizona Rules of Civil Appellate Procedure, the undersigned certifies that the amicus brief to which this certificate is attached: (1) is double-spaced and uses proportionately spaced typeface for the text and footnotes (14-point in Times New Roman); (2) contains 3256 words (by computer count), which does not exceed the word limit set by Rule 14; (3) averages less than 280 words per page, including footnotes and quotations; and (4) does not exceed 20 pages.

DATED this 22nd day of November 2022,

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The undersigned lawyer certifies that, on Tuesday, November 22, 2022, she filed this document electronically with the Clerk of the Arizona Supreme Court and a copy was electronically delivered to:

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