

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED
MAY 23 2008

PHILIP G. URRY, CLERK
By _____

CITY OF PHOENIX, a municipal corporation;
CITY OF PHOENIX EMPLOYEES'
RETIREMENT SYSTEM BOARD,

Petitioners.

vs.

THE HONORABLE KENNETH L. FIELDS,
Judge of the SUPERIOR COURT OF THE
STATE OF ARIZONA, in and for the County
of Maricopa,

Respondent Judge,

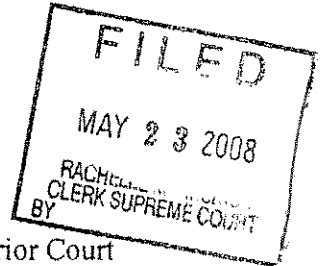
and

MARY ANN PEREZ, LOU KRAFTS,
SHERRY GILL, NAN NELSON, DOROTHY
HANSEN, EVA HERNANDEZ, NORMAL
VEACH LILLIE DYE, NEFRETARI
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ELAINE STOCKTON, GERALDINE
MARTINEZ, MARIA MONTOYA, PAULINE
HODGES, VIOLET TODD, MARTHA
MARTINEZ,

Real Parties in Interest.

CV-08-0159-PR

Court of Appeals
No. 1 CA-SA 07-0152



Maricopa County Superior Court
No. CV2002-020383

**PETITION FOR REVIEW OF A SPECIAL ACTION
DECISION OF THE COURT OF APPEALS**

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Pursuant to ARCAP 23 and RPSA 8(b), Real Parties in Interest ask the Court to accept their petition because no Arizona decision controls the important point of law in question and the Court of Appeals has incorrectly interpreted A.R.S. § 12-821.01 to effectively put an end to class actions against public entities, in a way that conflicts with this Court's precedents.

ISSUES PRESENTED

1. Are potential class claimants required to do the impossible by setting forth in their pre-suit notice of claim a specific amount for which the case can be settled, when, at the time notice was required to be given, the class has not been established, the class members have not been identified, the damages are impossible to quantify, and no court has certified the class or approved a settlement?

2. Does the Court of Appeals' decision thwart class action relief against public entities, an outcome this Court clearly found unacceptable in *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 788 P.2d 1174 (1990)?

FACTUAL BACKGROUND

Teachers, administrators and others employed by the City of Phoenix (the "City") in its Head Start program brought this action to obtain pay and benefits equal to other City employees. The future class representatives filed notices of

claim (*See* Appendix filed herewith (“App.”), exhibits C and D) (the “Notices of Claim”).¹ The potential class representatives filed suit in October, 2002 when the City did not respond. (City’s Court of Appeals Appendix (“City CA App.”) at Tab 3). The City opposed class certification; nevertheless, the class was certified a year later. (App. Exh. E, ¶2 at p.2 and ¶15 at p.4). Only then did the City begin to provide information about the potential class members. (App. Exh. E, ¶ 8 at p.3). After notice, twenty individuals opted out, leaving the class with 1,167 members. (App. Exh. E, ¶¶ 3 and 4 at pp. 2-3). Further information about the Class, its members and its potential damages were obtained through intense discovery after the suit was filed. (App. Exh. E, ¶ 9 at p.3; City’s CA App. at Tabs 6-10, 12-14). Class claimants do not have authority to settle a class action before it is filed. Civil Rule 23(e) (App. Exh. A).

After litigating the case for four and a half years, the City filed a motion for summary judgment on March 5, 2007, claiming for the first time that the 2002 Notices of Claim were deficient for failing to specify a sum-certain settlement amount for the Class. (City’s CA App. at Tab 15). The trial court denied the City’s motion, ruling that a sum-certain demand in a pre-suit notice of claim was

¹ The Notices of Claim demonstrate that Plaintiffs set forth an extensive factual background of the claims, identified the class representatives, gave a general

not possible in a class action. (App. Exh. F). The Court of Appeals accepted jurisdiction of the City's special action request and granted the relief requested, ruling that a pre-suit sum-certain settlement demand was required even in class actions. (Slip Op. dated April 22, 2008 attached ("Op.")).

REASONS THE PETITION SHOULD BE GRANTED

I. The Court of Appeals Incorrectly Decided Important Issues of State-Wide Significance.

A. The Arizona Supreme Court Should Accept This Petition

The parties stipulated below that special action jurisdiction was appropriate. The Court of Appeals agreed, determining that "[t]he question presented raises a purely legal issue of first impression and is a matter of statewide importance." (Op., ¶ 2). This Court should grant this petition for review for the same reasons. However, this Court should reverse the Court of Appeals. That Court incorrectly decided that a pre-suit notice of claim in a class action must specify a sum-certain settlement amount. The *de novo* standard of review applies. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130 ¶7, 953 P.2d 168, 170 (1998).

B. The Court of Appeals Incorrectly Decided These Important Issues

If the published decision of the Court of Appeals were to stand, class action

description of the remaining members of the potential class, made a demand for resolution and included an estimate of damages.

relief against public entities would, as a practical matter, be impossible in Arizona. This Court has previously ruled that the notice of claim statute should not thwart class action relief. *Arena*², 163, Ariz. at 426, 788 P.2d at 1177. This Court's *Deer Valley*³ decision does not control here because of the significant differences between a class action and an individual's action.

This Court has made it clear that class actions may be maintained against governmental entities in Arizona, ruling in *Arena* that class actions were authorized under Arizona's notice of claim statute. 163 Ariz. at 426, 788 P.2d at 1177. In adopting Judge Grant's dissent from *Evans v. Arizona Dept. of Corrections*, 139 Ariz. 321, 324-27, 678 P.2d 506, 509-12 (App. 1983) (overruled), this Court agreed that requiring detailed information before the filing of the complaint in class suits against public entities would severely and improperly restrict appropriate class action relief. 163 Ariz. 425-26, 788 P.2d at 1176-77.

The strict application of *Deer Valley* to class actions would make class actions against public entities impossible. It is not possible or permissible for class representatives to specify an amount for which the case could be settled in a pre-suit notice of claim. The information needed to comply with *Deer Valley* is not

² *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 788 P.2d 1174 (1990).

³ *Deer Valley Unified School District No. 97 v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007).

available to class plaintiffs until after commencement of the putative class action lawsuit, class certification, identification of potential class members, notice, and the expiration of the “opt out” period. No class members or representatives have authority to settle a class action without the approval of the court after notice to the class under Rule 23(e), Ariz.R.Civ.P.

Requiring the class claimants here to comply with *Deer Valley* is incorrect for several additional reasons. First, unlike in *Deer Valley*, the City controlled almost all of the information that would have been necessary for the Notices of Claim to have *Deer Valley* specificity. It would have been impossible, as a practical matter, for the claimants to acquire that information and process it prior to the filing of the lawsuit and certification of the class. As this Court stated in *Arena*, once notified of the parameters of class claims, the responsibility for investigating and assessing the claims belongs to the public entity because it has the necessary information. 163 Ariz. at 425-26, 788 P.2d at 1176-77. Second, the potential class representatives and their counsel could not have in good faith specified at the pre-suit stage an amount for which this case could be settled. Not only did they lack the necessary information, but, as important, they lacked the authority to specify a settlement. Before filing suit, before certification of the class, there simply is no court in place to approve a settlement as required by Civil

Rule 23(e). Without that authority and without the information about the size of the class and its damages, the potential class representatives could not possibly formulate an exact settlement demand. Because the court can later refuse class certification and refuse to approve a settlement, an exact settlement demand in a pre-suit notice of claim is futile, and therefore not required. *Coronado Co. v. Jacome's Dept. Store, Inc.*, 129 Ariz. 137, 140, 629 P.2d 553, 557 (1981).

These issues were not present in *Deer Valley* because *Deer Valley* involved a single individual plaintiff who was complaining of wrongful termination injuries. 152 P.3d at 491-92, ¶¶2-3. That person would have known her damages and would have been able to file a notice of claim with a specific settlement demand. She also would have had authority to state a settlement amount. In *Deer Valley*, this Court reasoned that, for the individual in question, “[c]ompliance with this statute is not difficult . . .” 152 P.3d at 493, ¶9. That is clearly not the situation when dealing with the class claims of 1,167 individuals employed in the City’s Head Start program for various periods of time, in various positions, at various locations, with various pay and benefits compared to other City employees, between 1965 and 2002. Contrary to the opinion below (Op. ¶18), applying *Deer Valley* to class claims does lead to an absurd result.

C. The Court of Appeals Misapplied the Legislative Notice Rule

The Court of Appeals ruled that because the 1994 amendment to the notice of claim statute did not make an exception for class actions, *Arena* does not come into play. (Op., ¶ 16 at 13). This is an incorrect reading of *Dauro v. Harris*, 139 Ariz. 353, 678 P.2d 934 (1984).

Under *Dauro*, it is assumed that the Legislature was aware of *Arena* at the time it amended A.R.S. § 12-821 in 1994. However, the Legislature did not address *Arena* or class actions. Contrary to the Court of Appeals ruling, this evidences the Legislature's intent to leave the existing law, as represented by *Arena*, as it was. *Dauro*, 139 Ariz. at 357, 678 P.2d at 938. In *Galloway v. Vanderpool*, 205 Ariz. 252, 69 P.3d 23 (2003), this Court held:

If the legislature amends a statute after it has been judicially construed, but does not modify the statute in a manner that changes the court's interpretation, we presume the legislature approved of the court's construction and intended that it remain a part of the statute.

205 Ariz. 252, 256 ¶ 17, 69 P.3d 23, 27 (2003) (citing cases).

The Court of Appeals opinion turns *Dauro* on its head, holding that the Legislature would have had to craft a specific exception to A.R.S. § 12-821.01 for class actions. The opinion below (Op. ¶16) stretches the view of legislative intent to reach this result. *Dauro* instructs that *Arena* is still good law because the

Legislature did not change the notice of claim statute with respect to class actions despite the existing holding of *Arena*.⁴ In adopting Judge Grant's dissent from *Evans*, *Arena* specifically dealt with the same type of issue as here, that is, the degree of specificity needed in a notice of claim. The *Arena* court, however, ruled that so long as the notice gave the governmental entity notice of the parameters of the claim, it was improper to require highly specific information that could thwart class relief. *See Arena*, 163 Ariz. at 425-26, 788 P.2d at 1176-77 (discussing California law) and *Evans*, 139 Ariz. at 325, 678 P.2d at 510 (Grant, J., dissenting) (adopted in *Arena*) which quotes California case law with approval as follows: "To require such detailed information in advance of the complaint would severely restrict the maintenance of appropriate class actions -- contrary to the recognized policy favoring them." The *Arena* ruling is fully consistent with the legislative intent underlying the notice of claim statute. 163 Ariz. at 426, 788 P.2d at 1177.

D. A Public Records Request Would Not Be Workable

The Court of Appeals, picking up on the City's suggestion, believes that the problem created by the application of *Deer Valley* to class actions would have been solved by making a public records request prior to the statutory deadline for filing

⁴ *Arena* was reaffirmed by this Court in 2001 in *Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862 (2001).

a notice of claim.⁵ (Op. ¶ 21). This is not workable as a practical matter, particularly given the short timeframes of A.R.S. § 12-821.01.

The Court of Appeals assumed the City would have turned over private address, pay and benefits information on thousands of potential class members based on nothing more than a public records request, before any litigation was pending and without the authorization of the persons involved. The Court of Appeals also assumed that the class claimants would have been able to obtain, digest, compare and process this vast amount of information in a short timeframe. These highly unrealistic assumptions are out of tune with accepted class action practice. Indeed, even if the City were cooperative⁶ in handing such information over to those who were planning a class action against it, there is still the 180-day

⁵ In this case, there was no public records request. Despite this fact, the Court of Appeals accepted the City's argument with regard to a theoretical public records request, but rejected the Real Parties in Interest's arguments showing that a public records request was not workable. At the same time, the Court ignored the impact of the extremely limited timeframe available under the statute. (Op. ¶ 21).

⁶ There are many limitations on the disclosure of public records which are within the discretion of the officer holding the records. *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348-49, ¶18, 35 P.3d 105, 109-110 (App. 2001) (citing privacy, confidentiality and best interests of the state as grounds for non-disclosure, and discussing how "best interests of the state" is undefined and broad. If the custodian of the records fails to "promptly respond" (a term that is undefined) to a records request, access is deemed denied, A.R.S. § 39-121.01(E), and the person seeking the records must appeal by a Superior Court special action. A.R.S. § 39-121.02(A).

time window of the notice of claim statute. Further, the burden of obtaining and processing such information at the very inception of a class action would itself discourage individuals from formulating a class.⁷

This kind of information is obtained through discovery only after the class is certified, as it was in this case. Even through discovery, it took the City longer than six months just to supply the requested materials. (City CA App. at Tabs 6-10, 14). To suggest that the City would have timely handed over tens of thousands of pages of documents containing highly personal and private information about individuals other than those making the request in a timeframe that would have assisted the eventual class representatives even before a lawsuit commenced demonstrates that this argument is unrealistic, and should be rejected.

E. Several Other States Have Been Able to Reconcile Notice of Claim Statutes with Class Actions.

In addition to this Court's decision in *Arena*, several other states have dealt

⁷ The future class representatives, even if they received all the information about the potential class members, the Head Start program, the pay and benefits of those persons since 1965 compared to similarly-situated employees, and were then able to process it, at the pre-suit stage there is no class established, no notice, no opportunity to opt-out, no settlement hearing, no right to object and no court approval. These requirements of Rule 23(e) are necessary to comport with due process and to ensure that any settlement is fair. Class claimants and their counsel cannot in good faith presume in advance that the Court would approve a settlement.

with this issue, and have been able to reconcile language similar to A.R.S. § 12-821.01 with class actions. The Utah Supreme Court recently interpreted that state's notice of claim requirement not to strictly apply in class actions, and concluded that a requirement to identify each class member in a pre-suit notice would nullify Utah's class action rule. *Houghton v. Dept. of Health*, 125 P.3d 860, 867 (2005). Likewise, the Indiana Supreme Court ruled that the Indiana Tort Claims Act is designed to give notice to the public entity, in circumstances very similar to those present here:

The construction of the Tort Claims Act that IPS [the governmental entity] urges would render it impossible in many if not most cases to assert a class claim against a political subdivision. Class members are usually unknown to each other. Identification of the class members by name often requires discovery of records that are available to the defendant but not the plaintiffs. This can be accomplished in most cases only after litigation is instituted and rarely within the six-month time frame required for a tort claim notice.

* * *

The defendants contend that if the statute is read to permit a class action, some class members will in effect be allowed to bypass the notice requirement. That may be correct, but the Act is intended to give the political subdivision notice, not to create barriers to claims.

Budden v. Board of School Comm of City of Indianapolis, 698 N.E.2d 1157, 1162-63 (1998) (emphasis added). See *Arena*, 163 Ariz. at 426, 788 P.2d at 1177 (“...”).

claims statutes are not intended to thwart class relief.”) These courts have resolved very similar issues in a way that allows notices of claim and class actions to co-exist, as this Court previously did in *Arena*.

CONCLUSION

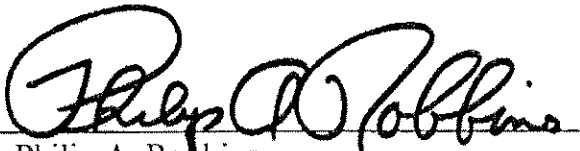
Allowing the decision below to stand would render class actions against governmental entities in Arizona impossible as a practical matter. Potential class claimants would face a true “Catch 22” scenario -- no class suit can be maintained without a prior specific settlement demand, but no specific settlement demand can be made without first filing suit to obtain the necessary information.

The rule permitting class actions should be construed liberally. *ESI Ergonomic Solutions v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98 ¶ 11, 50 P.3d 844, 848 (App. 2002). These class representatives complied with A.R.S. § 12-821.01 in the context of a class claim, as permitted by *Arena*.

The Court of Appeals incorrectly ruled on this legal issue of statewide importance. This Court should accept review, reverse the decision of the Court of Appeals, and grant Real Parties in Interest their costs and all such other and further appropriate relief.

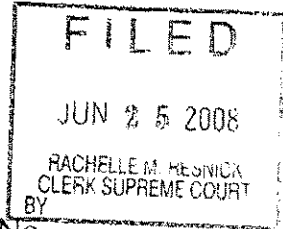
RESPECTFULLY SUBMITTED this 22nd day of May, 2008.

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ARIZONA SUPREME COURT



MARY ANN PEREZ, et al.,

Plaintiffs-Petitioners.

v.

CITY OF PHOENIX, a municipal
corporation,

Defendant-Respondent,

Supreme Court Case No.

CV-08-0159-PR

Court of Appeals Case No.

SA-07-0152

Superior Court Case No.

CV 2002-020383

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Prior to filing a state claim lawsuit against an Arizona public entity, a claimant must submit notice to the entity in compliance with A.R.S. § 12-821.01(A). The statute “unmistakably instructs claimants” to include a specific settlement amount in the notice; an estimate or approximate amount is insufficient. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007). On April 22, 2008, the Court of Appeals ruled that section 12-821.01(A) applies equally to individual claims and class claims. Plaintiffs have petitioned the Court for review of this ruling. For the reasons set forth below, the Court should deny the Petition.

ISSUE PRESENTED FOR REVIEW

Does A.R.S. § 12-821.01(A) – which requires that notices include “a specific amount for which the claim can be settled” – apply to class claims?¹

STATEMENT OF FACTS

On April 11, 2002, Plaintiffs presented a notice of claim to the City of Phoenix (“City”). *See* Pls.’ App. C. In the notice, Plaintiffs claimed they

¹ The issue statement contained in the Petition does not comply with Rule 23(c)(1) of the Arizona Rules of Civil Appellate Procedure. Specifically, the Petition misstates the sole issue presented to and decided by the Court of Appeals and lists issues not otherwise presented to the Court of Appeals. Accordingly, the Clerk may return the Petition to Plaintiffs with written instructions to re-file in accordance with this rule. *See* ARCP 23(c).

represented all current and former directors, administrators, and instructors of the Head Start educational program operated by the City since 1965. *See id.* at pp. 1-2. Plaintiffs alleged the City wrongfully excluded them from its retirement plan and denied them other benefits. *See id.* at pp. 2-4. Based on these allegations, Plaintiffs demanded payment of benefits worth “not less than 10 million dollars,” retirement plan contributions “greater than 50 million dollars and less than 100 million dollars,” and fees and costs “in an amount not less than \$1,500,000.00.” *See id.* at pp. 4-5. Plaintiffs later amended the notice to name additional claimants, but included the same monetary demand as before. *See Pls.’ App. D* at p. 5.

On October 21, 2002, Plaintiffs filed a complaint against the City in Superior Court based on the amended notice, seeking monetary relief and declaratory judgment. *See City’s App. 1*. Over two years later, Plaintiffs amended the complaint to include a claim against the City of Phoenix Retirement Board (“Board”). *See City’s App. 2*. The City then moved for summary judgment on Plaintiffs’ damages claims because the amended notice lacked a specific settlement amount, as required by A.R.S. § 12-821.01(A). *See City’s App. 3-4, 6*. The Board joined in the motion. *See City’s App. 5, 7*. On June 12, 2007, the Superior Court denied the motion. *See Pls.’ App. F*. Although the Superior Court recognized that Plaintiffs’ notice lacked the specific settlement amount required by A.R.S. § 12-

821.01(A), the court held that this requirement applies only to individual claims, not class claims. *See id.*

On July 18, 2007, the City petitioned the Court of Appeals for special action review of the Superior Court ruling. The Board joined in the petition. On April 22, 2008, the Court of Appeals accepted jurisdiction and granted relief in favor of the City and Board, holding that A.R.S. § 12-821.01(A) applies equally to individual claims and class claims. *See Ct. Appeals Op.* ¶ 2. Thus, all notices of claim – including those filed on behalf of a putative class – must include a specific settlement amount. The Court of Appeals also rejected Plaintiffs’ arguments that it is “impossible” for class claimants to include a specific settlement amount in a notice of claim. *See id.* ¶¶ 17-21. This Petition followed.

ARGUMENT IN OPPOSITION TO PETITION FOR REVIEW

The Court should deny the Petition for Review. First, the state legislature and this Court have established that Arizona’s notice of claim statute applies to class claims. In addition, the Court has already interpreted the current version of the claims statute, A.R.S. § 12-821.01(A), and concluded that its language and requirements are clear and unequivocal; a claim letter must include a specific settlement amount. Second, the Court of Appeals correctly held that the notice requirements set forth in A.R.S. § 12-821.01(A) apply to all claims against public entities, including class claims. Accordingly, further review is unnecessary.

I. STATE LEGISLATION AND COURT PRECEDENT HAVE ALREADY ESTABLISHED THE NOTICE OF CLAIM REQUIREMENTS APPLICABLE TO CLASS CLAIMS.

The state legislature has long set forth procedures governing claims against public entities. In 1956, the legislature enacted A.R.S. § 12-821, which provided that persons having claims on contract or for negligence against the state, “which have been disallowed,” may prosecute the action to final judgment. In *State v. Brooks*, the Court of Appeals explained that section 12-821 required claimants to submit a notice of claim to the public entity prior to filing suit. 23 Ariz.App. 463, 466-67, 534 P.2d 271, 274-75 (1975). The court concluded that a notice must contain “an amount that is sought to satisfy [the] potential liability.” *Id.* at 467, 534 P.2d at 275. Subsequently, in *Dassinger v. Oden*, the Court of Appeals ruled that a notice must contain a “sum certain” settlement amount. *See* 124 Ariz. 551, 553, 606 P.2d 41, 43 (App. 1979).

Although the legislature amended section 12-821 in 1984, the amendment did not address the sum certain requirement. *See* A.R.S. § 12-821 (1984). Under Arizona law, “[i]f the legislature amends a statute after it has been judicially construed, but does not modify the statute in a manner that changes the court’s interpretation, [it is presumed] the legislature approved of the court’s construction and intended that it remain a part of the statute.” *Galloway v. Vanderpool*, 205 Ariz. 252, 256, 69 P.3d 23, 27 (2003); *Daou v. Harris*, 139 Ariz. 353, 357, 678

P.2d 934, 938 (1984). As a result, the sum certain requirement articulated in *Dassinger* remained part of section 12-821 after 1984.

Thereafter, in *Andrew S. Arena, Inc. v. Superior Court*, this Court ruled that the notice of claim statute, as amended in 1984, applied to class claims. 163 Ariz. 423, 788 P.2d 1171 (1990). In particular, the Court concluded that claimants may file a single notice on behalf of a putative class. *Id.* at 426, 788 P.2d at 1177. The Court, however, did not hold that a more lenient standard applied to notices filed on behalf of a class as opposed to those filed individually. As a result, after *Arena*, individual claims and class claims were held to the sum certain requirement announced in *Dassinger* and incorporated into the 1984 amendment.²

The legislature last amended A.R.S. § 12-821.01 in 1994 to expressly require that claimants include a specific settlement amount in their notice of claim.

The amendment provides:

The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount.

A.R.S. §12-821.01(A) (emphasis added). The amendment makes no distinction between individual claims and class claims. Rather, section 12-821.01(A) applies

² In *Hollingsworth v. City of Phoenix* – which came after *Arena* – the Court of Appeals abandoned its requirement that a notice of claim include a sum certain settlement amount and adopted a “reasonableness standard” for assessing notice of claim settlement demands. 164 Ariz. 462, 465-66, 793 P.2d 1129, 1132-33 (App. 1990).

broadly to all actions filed against a public entity. *See* A.R.S. § 12-821.01(A) (“Persons who have claims against a public entity . . . shall file claims”); *Id.*, § 12-821.01(F) (“This section shall apply to all causes of action which accrue on or after the effective date of this section.”). The legislature is presumed to have known of *Arena* when it enacted section 12-821.01(A). Consequently, by not excluding class claims from section 12-821.01(A), the legislature signaled its intent to bind both individual and class claims to the statute.

In *Deer Valley*, this Court ruled that the language of section 12-821.01(A) is “clear and unequivocal” and “unmistakably instructs claimants to include a particular and certain amount of money that, if agreed to by the government entity, will settle the claim.” 214 Ariz. at 296, 152 P.3d at 493. The Court rejected the argument that a claimant need only provide a government entity with notice of a claim and its “estimated value.” *Id.* at 297, 152 P.3d at 494 (explaining that demand for economic damages of “approximately \$35,000.00,” compensatory damages of “no less than \$300,000.00,” and general damages of “no less than \$200,000.00” were not specific amounts). The Court did not in any manner qualify its ruling or otherwise limit it to individual claims. Therefore, the *Deer Valley* ruling, like section 12-821.01(A), applies to all causes of action against public entities, including class claims.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE NOTICE OF CLAIM REQUIREMENTS SET FORTH IN A.R.S. § 12-821.01(A) APPLY TO CLASS CLAIMS.

A. The Court of Appeals Properly Construed Section 12-821.01(A).

Plaintiffs contend the Court of Appeals erred in interpreting the specific amount requirement in section 12-821.01(A) to apply to class claims. Specifically, Plaintiffs assert that applying the specific amount requirement to class claims conflicts with *Arena*. Plaintiffs further challenge the Court of Appeals ruling on the ground that *Deer Valley* is limited to individual claims. The Court of Appeals correctly rejected both arguments.

First, the issue before the Court in *Arena* was whether the notice of claim statute precluded claimants from filing notices on behalf of a class. The Court concluded that nothing in section 12-821 indicated class claims were impermissible under the statute and explained it would “not read the absence of express authorization as a preclusion against class claims.” *Id.* In ruling, this Court noted that claims statutes are “not intended to thwart class relief.” *Id.* The Court made this statement in holding that class claimants may avail themselves of the notice of claim statute, not in holding that class claimants are exempt from providing the information otherwise required by the statute. At the time of *Arena*, the claims statute required that notices include a sum certain settlement demand.

The Court, however, made no overtures that requiring class claimants to include a sum certain amount thwarted class relief in contravention of its ruling.

Second, the Court of Appeals appropriately dismissed Plaintiffs' interpretation of section 12-821.01(A). According to Plaintiffs, *Arena* established that class claimants are exempt from providing specific information in the notice of claim, and the legislature's decision not to specify special procedures for class claims in section 12-821.01(A) reflects its intent that the specific amount requirement not apply to class claims. Plaintiffs mischaracterize *Arena*. Again, the issue there was whether the notice of claim statute precluded the filing of class claims against a public entity, not whether class claims are exempt from the notice requirements. Thus, the Court of Appeals aptly concluded that in light of *Arena* "the legislature would have specifically excluded class actions from the reach of A.R.S. § 12-821.01 had it intended to exempt them." Ct. Appeals Op. ¶ 16.

Third, Plaintiffs incorrectly assert that *Deer Valley* is limited to individual claims. Although the claimant in *Deer Valley* filed an individual notice, the Court's ruling did not turn on that fact. Rather, the Court interpreted A.R.S. § 12-821.01(A) – a statute applicable to "all causes of action" against a public entity – and concluded that it "unmistakably instructs" claimants to include a particular and certain settlement amount in the notice. *Deer Valley*, 214 Ariz. at 296, 152 P.3d at 493. Plaintiffs nevertheless make the following assertion: "In *Deer Valley*, this

Court reasoned that, for the individual in question, “[c]ompliance with this statute is not difficult.” See Pet. at p. 6 (emphasis added). *Deer Valley* does not contain the underscored language and nowhere in the opinion does this Court state or otherwise suggest that its interpretation of section 12-821.01(A) applies one way to individual claims and another way to class claims. Therefore, the Court of Appeals was correct in holding that section 12-821.01(A), as construed in *Deer Valley*, applies to all claims against public entities.

B. The Court of Appeals Properly Dismissed Plaintiffs’ “Impossibility” Arguments.

Plaintiffs also argue it is legally and factually impossible for class claimants to provide a specific settlement amount. In particular, Plaintiffs contend Rule 23(e) of the Arizona Rules of Civil Procedure prevents class claimants from including a specific settlement amount in their notice. In addition, Plaintiffs assert that class claimants can only obtain the information necessary to calculate a specific settlement amount after the expiration of the “opt out” period. In light of this assumed impossibility, Plaintiffs urged the Court of Appeals to create a class claim exemption from the specific amount requirement in section 12-821.01(A). The Court of Appeals rightly declined to do so.

Foremost, given the plain language and legislative history of A.R.S. § 12-821.01(A), the Court of Appeals concluded it lacked authority to create a class claim exemption. This decision comports with established Arizona law that “in the

absence of clear legislative intent” courts may not graft exceptions on statutes. See *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 141, 927 P.2d 796, 801 (App. 1996); see also *State v. Ring*, 131 Ariz. 374, 378, 641 P.2d 862, 866 (1982) (“We will not judicially create an exception to the plain statutory wording.”); *Gorney v. Meaney*, 214 Ariz. 226, 230, 150 P.3d 799, 803 (App. 2007) (explaining that the absence of an express exception “suggests Arizona’s legislature did not intend to make one”).³

Moreover, as the Court of Appeals recognized, Rule 23(e) does not prevent class claimants from including a specific settlement amount in the notice of claim. See Ct. Appeals Op. ¶ 19. The rule provides that representatives may not settle a class action without notice to the class and court approval. Under this rule, class claimants may engage in settlement negotiations and identify a specific amount in their notice for which they would be willing to settle, subject to class certification and court approval. In fact, parties to class actions frequently enter into settlement agreements before a class is certified and then submit simultaneous motions to

³ In seeking a class claim exemption from this Court, Plaintiffs contend “several other states have dealt with this issue, and have been able to reconcile language similar to A.R.S. § 12-821.01 with class actions.” Pet. at pp. 10-11. Plaintiffs then cite two cases, neither of which address the exemption of class claims from a sum certain requirement. See *Houghton v. Dep’t of Health*, 125 P.3d 860 (Utah 2005); *Budden v. Board of Sch. Comm’rs of the City of Indianapolis*, 698 N.E.2d 1157 (Ind. 1998). Rather, the courts in these cases held that named claimants may file a single notice of claim on behalf of a putative class. See *Houghton*, 125 P.3d at 867; *Budden*, 698 N.E.2d at 1162.

certify and approve settlement. See Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 112 (1996). As a result, Rule 23 provides a mechanism – not an impediment – to effecting pre-litigation settlement.

Plaintiffs are also incorrect in asserting that class claimants can only calculate a specific settlement amount after close of the opt out period. Before preparing a notice, claimants may evaluate the claim, assess the size of the potential class, determine the applicable time frame, and decided on a specific pre-suit settlement amount. They may accomplish this latter step by extrapolating putative class damages from damages the “representative” claimants allegedly sustained and, if necessary, seek documents under Arizona’s public records law. See A.R.S. § 39-121. If the public entity is not forthcoming with these documents, the time to file the notice of claim is subject to equitable tolling. See *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990). Plaintiffs, however, never availed themselves of the public records law, rendering their impossibility arguments speculative and appropriately rejected by the Court of Appeals.

In addition, a review of the case law, including decisions cited by Plaintiffs, shows that class claimants do include specific settlement amounts in their notices. *Bamonte v. City of Mesa*, No. CV 06-01860, 2007 WL 2022011, at *6 (D. Ariz. July 10, 2007) (\$20,000,000.00 for purported wage and hour violations – rendered

imprecise only by inclusion of unspecified fees and costs in demand); *Evans v. Arizona Dep't of Corr.*, 139 Ariz. 321, 322, 678 P.2d 506, 507 (App. 1983) (\$8,000,000.00 for physical and emotional abuse); *Budden*, 698 N.E.2d at 1159 (\$500,000.00 for damages stemming from alleged embezzlement). Notably, *Budden* involved a notice of claim statute requiring claimants to provide “the amount of damages sought.” *Id.* at 1161. In discussing this and other requirements of the statute, the Indiana Supreme Court noted that “the Act is no impediment to a class action here” *Id.* at 1164 (emphasis added). Therefore, the Court of Appeals was correct in rejecting Plaintiffs’ impossibility arguments and electing not to create a class claim exemption from section 12-821.01(A).

CONCLUSION

Plaintiffs ask this Court to revisit an issue warranting no further attention from the judiciary. Legislative history and Court precedent are clear: All notices of claim, including those filed on behalf of a class, must comply with A.R.S. § 12-821.01(A). The language of section 12-821.01(A) is, in the words of this Court, “clear and unequivocal” and mandates that all notices include a specific settlement amount. Although Plaintiffs might wish the requirements of section 12-821.01(A) applied differently to class claims, their recourse is to state legislature, not this Court. Accordingly, the City requests that the Court deny the Petition and grant the City its costs and attorneys’ fees incurred in responding to this Petition.

RESPECTFULLY SUBMITTED this 25th day of June 2008.

LITTLER MENDELSON, PC

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CERTIFICATE OF SERVICE

Pursuant to Rule 4(c) of the Arizona Rules of Civil Appellate Procedure, I hereby certify that on this day I caused to be filed an original and seven (7) copies of the Response to Petition for Review with the Clerk at:

Clerk of the Court
Arizona Supreme Court
1501 West Washington, Suite 402
Phoenix, AZ 85007

Furthermore, two (2) copies of the Response to Petition for Review were hand-delivered to:

The Honorable Kenneth L. Fields
Maricopa County Superior Court
201 West Jefferson (CCB-7D)
Phoenix, AZ 85003

The Honorable John A. Buttrick
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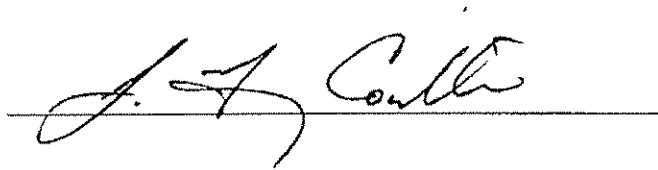
Dated this 25th day of June 2008.



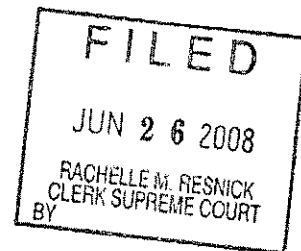
R. Shawn Oller
Attorney for Defendant-Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 23(e) of the Arizona Rules of Civil Appellate Procedure, the undersigned certifies that the accompanying Response complies with the Rules. The Response is double-spaced, utilizes 14-point proportionally spaced Times New Roman typeface, and does not exceed twelve (12) pages.

A handwritten signature in cursive script, appearing to read "J. J. Coulter", is written over a horizontal line.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



CITY OF PHOENIX, a municipal
corporation; CITY OF PHOENIX
EMPLOYEES' RETIREMENT SYSTEM
BOARD,

Petitioners,

v.

THE HONORABLE KENNETH L.
FIELDS, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for
the County of Maricopa,

Respondent Judge,

MARY ANN PEREZ, LOU KRAFTS,
SHERRY GILL, NAN NELSON,
DOROTHY HANSEN, EVA
HERNANDEZ, NORMA VEACH, LILLIE
DYE, NEFRETARI SALAHDEEN,
TERESA ANDERSON, ELAINE
STOCKTON, GERALDINE MARTINEZ,
MARIA MONTOYA, PAULINE HODGES,
VIOLET TODD, MARTHA MARTINEZ,

Real Parties in Interest.

No. CV08-0159 PR

Court of Appeals
No. 1 CA-SA 07-0152

Maricopa County Superior Court
No. CV2002-020383

**RESPONSE TO PETITION FOR REVIEW OF A SPECIAL ACTION
DECISION OF THE COURT OF APPEALS**

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INTRODUCTION

The Court of Appeals held that the Real Parties in Interest's amended notice of claim did not comply with Ariz.Rev.Stat. ("A.R.S.") § 12-821.01(A) because it failed to contain a "specific amount" for which the claim could be settled. This Court should deny the Real Parties in Interest's Petition for Review because the Court of Appeals correctly held that the "specific amount" requirement of the notice of claims statute applies to class actions.

ISSUE PRESENTED FOR REVIEW

Does the "specific amount" requirement of the notice of claim statute, § 12-821.01 (2003), apply to class action claims?

FACTUAL BACKGROUND

Real Parties in Interest ("the Class") separately served the Petitioner City of Phoenix Employees' Retirement System ("COPERS") Board with the Notice of Claims and Amended Notice of Claims at issue in this Petition. *See* Appendix in Support of Petition for Review ("App.") at C, D. In all other respects, Petitioner COPERS Board adopts the Statement of Facts set forth in the Response to the Petition for Review filed by Petitioner City of Phoenix.

ARGUMENT IN OPPOSITION TO PETITION FOR REVIEW

At issue is the application of the notice of claim statute, A.R.S. § 12-821.01, to class actions. A.R.S. § 12-821.01(A) provides as follows:

Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. *The claim shall also contain a specific amount for which the claim can be settled* and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

(Emphasis added.) Because the language of the statute is “clear and unequivocal,” *Deer Valley Unified School Dist. No. 97 v. Houser*, 214 Ariz. 293, ___, 152 P.3d 490, 493 ¶ 9, (2007), this Court should deny review.

I. THE PLAIN LANGUAGE OF THE STATUTE MANDATES THAT A CLASS CLAIM MUST SPECIFY A SUM CERTAIN, AND COMPLIANCE WITH THE STATUTE IS NOT IMPOSSIBLE.

This Court undertook an exhaustive review of the case law applicable to the notice of claim statute in its various forms, and examined the legislative history of A.R.S. § 12-821.01, in *Deer Valley*. The Court found that the language involving the “specific amount” requirement was “clear and unequivocal,” stating: “This language unmistakably instructs claimants to include a particular and certain amount of money that, if agreed to by the government entity, will settle the claim.” 214 Ariz. at ___, 152 P.3d at 493 ¶ 9. A court may interpret a statute in a manner that is contrary to its plain meaning “if necessary to effectuate the legislature’s clearly expressed contrary intent or to avoid an absurd result that the legislature

could not in any event have intended.” Opinion at 15 ¶ 18 (citing *Ariz. Dep’t of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 444, 937 P.2d 363, 366 (App. 1996)). However, as the Court noted in *Deer Valley*, an examination of the legislative history surrounding the addition of A.R.S. § 12-821.01(A) indicates that the legislature indeed intended to require a specific sum in notices of claim. 214 Ariz. at ___, 152 P.3d at 493 ¶ 22. Even if the plain meaning of the statute operated to bar a class action lawsuit, there is no evidence that such a result would be an absurd one and not intended by the legislature.

The Class argues that compliance with the statute is “impossible.” In fact, while there may be some procedural differences that arise with respect to a class settlement, it is not impossible to determine what amount a class would accept as settlement of a claim.

It is important to note that the “specific amount” that must be in a notice of claim is not necessarily the total amount of all damages, but is merely an amount for which the claimant or claimants will *settle*. Settlement is compromise, and generally contemplates that a party will take less than all amounts allegedly owed in order to avoid the expense and delay associated with litigation. The Class did not need to know all the damages that might have accrued in order to compromise its claim. Even in litigation against a public entity by an individual, there can be uncertainty with regard to the total amount of damages. For example, someone

who has a claim against a public entity for physical harm may not know within 180 days what the full extent of the injuries are, but still must specify an amount for which he or she will settle within the statutory time frame.

Indeed, the Class could have estimated damages, and determined an amount for which it would settle, based upon the claims of the representative plaintiffs. Or the Class could have served Petitioners with a public records request for the relevant records of at least some, if not all, of the possible class members, in order to estimate the damages and determine an amount for which they would settle. The Class did neither, but now argues that it could not have obtained all the information it needed within the 180 day period set forth in the notice of claim statute. The Court of Appeals properly rejected that argument as pure speculation.

Assuming the Class had complied with the statute and listed a specific sum for which it would settle, and the Petitioners had agreed to settle the matter, the Superior Court could then have certified the matter as a class action and determined whether the settlement should be approved. There is nothing in the class action rules which would prohibit such a procedure. *See* Ariz.R.Civ.P. 23(e).

II. CASE LAW SUPPORTS THE COURT OF APPEALS DECISION.

The Class argues that the Court of Appeals decision conflicts with this Court's previous decisions, citing *Andrew S. Arena, Inc. v. Superior Court*, 163 Ariz. 423, 788 P.2d 1174 (1990). *Arena's* holding is that the notice of claim statute does not bar class actions. *Id.* at 426, 788 P.2d at 1177. The case does not stand for the proposition that the notice of claim statute should be read differently with respect to class actions, but in fact should be read the same. The Court noted, "[w]e find nothing in the language of A.R.S. § 12-821 to suggest that the legislature intended to exempt public entities from either the burdens or the benefits of class actions in appropriate cases." *Id.* at 425, 788 P.2d 1176. It is in this context that this Court stated that "claims statutes were not intended to thwart class relief." *Id.* at 426, 788 P.2d at 1177. And just as the government must take the bitter with the sweet in litigating class actions, so must class plaintiffs.

The Class cites *Budden v. Board of School com'rs of City of Indianapolis*, 698 N.E.2d 1157 (Ind. 1998) in support of its argument that the notice of claim statute should not be strictly construed. In *Budden*, the issue presented was "whether members of a prospective class in a class action must either satisfy the requirements [of the Indiana notice of claim statute] or expressly authorize a putative class member to give notice on their behalf." 698 N.E.2d at 1161. The

notice of claim under Indiana’s statute required “the names of all persons involved, if known,” among other things. *Id.* (citing Indiana Code § 34-13-3-10). The court found that the statute contemplated absent class members to be “persons involved” and their identity was required only “if known.” *Id.* at 1162. Thus, the Indiana Supreme Court merely applied the language of the statute, and did not carve out a judicial exception to the notice of claim statute with respect to class actions, as the Class would have this Court do. Of additional interest is the fact that the Indiana notice of claim statute also required “the amount of the damages sought.” 698 N.E.2d at 1161 (citing Indiana Code § 34-13-3-10). In *Budden*, the class complied with that requirement and stated a specific sum of \$500,000.00. 698 N.E.2d at 1159. Thus, this case is of no help to the Class.

Another case cited in the Class’ Petition for Review is *Houghton v. Dept. of Health*, 125 P.3d 860 (Utah 2005). *Houghton* involved, in part, the issue of whether the class’ claims for attorneys’ fees failed because the notice of claim did not sufficiently articulate the claim. 125 P.3d at 866, ¶ 19. The precise issue before the Utah Supreme Court was whether the description of the claim (“attorneys’ fees as may be provided by law” and similar statements regarding the claim for fees) was sufficient under the statute, not whether a specific sum was either required or stated. 125 P.3d at 867, ¶ 22-23. In fact, the notice of claim statute at issue in this case did not require specification of a sum certain, only “the

damages incurred by the claimant so far as they are known.” 125 P.3d at 866, ¶ 9 (citing Utah Code § 63-30-11(3)(a)). Thus, this case also does not assist the Class.

However, the Supreme Court of Wyoming decided a case strikingly similar to the instant case. In *Hochalter v. City of Gillette*, 120 P.3d 674 (Wyo. 2005), the court in a class action case construed a notice of claim statute and a constitutional provision which required an “itemized statement” of the damages claimed. 120 P.3d at 676, ¶ 7. The court found that the district court had properly dismissed the plaintiffs’ claims, in part due to the class’ failure to comply with the notice of claim statute and include an “itemized statement.” 120 P.3d at 679, ¶ 23.

CONCLUSION

The Class failed to comply with the notice of claim statute’s clear and unequivocal direction to state a sum certain for which it would settle. There is no exception to the statute’s mandate for class claims, and the courts may not judicially create one. Accordingly, this Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 26th day of June, 2008.

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CERTIFICATE OF SERVICE

The original and seven (7) copies of the foregoing RESPONSE TO PETITION FOR REVIEW were filed with:

Clerk of the Court
Arizona Court of Appeals, Division One
1501 W. Washington Street
Phoenix, Arizona 85007

and two (2) copies of the foregoing RESPONSE TO PETITION FOR REVIEW were served on this 26th day of June, 2008 by first class US mail, postage prepaid, addressed to:

Hon. Kenneth L. Fields (retired)
66 W. Vernon Avenue
Phoenix, Arizona 85003

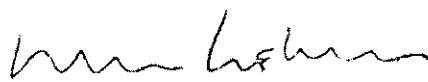
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City of Phoenix Employees'
Retirement System Board

CERTIFICATE OF COMPLIANCE

I certify that the foregoing RESPONSE TO PETITION FOR REVIEW is proportionately spaced, has a typeface of 14 points or more and does not exceed twelve (12) pages.

Dated this 26th day of June, 2008.



Marc R. Lieberman

Paige A. Martin