SET NO. 6

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE HAVASUPAI TRIBE of the Havasupai Reservation, a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

ARIZONA BOARD OF REGENTS and **THERESE MARKOW**,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE ARIZONA TRIAL LAWYERS' ASSOCIATION

Arizona Court of Appeals Case No. 1 CA-CV 07-0454
Maricopa County Superior Court Case No. CV 2005-013190
Honorable Janet E. Barton

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Amicus Curiae's Interest

Amicus has been privileged to serve as amicus curiae in scores of Arizona appellate cases.[1] Lawyer-members of Amicus have represented thousands of clients making tort claims against public employees and public entities. Amicus has thus developed wide expertise and experience in this area. Counsel representing Amicus have read the briefs in this case. And they have also researched *Deer Valley Unified School District No. 97 v. Houser*—and the dictum that has influenced many Arizona trial judges.[2]

Relying on that dictum, trial judges are routinely dismissing Arizona tort-claim cases. (*See* Exhibit 1) This case is another example. This appeal is important both on its merits and because it is among the first to reach the appellate courts. It will help decide how courts resolve such cases for claimants across Arizona. Amicus has the experience, interest, and ability to present a brief aiding this Court's fair resolution of this appeal.

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[1] Important recent cases where Amicus has served as amicus curiae include: *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 89938 (Ariz. Jan. 10, 2008); *State Farm Ins. Companies v. Premier Manufactured Systems, Inc.*, 172 P.3d 419 (Ariz. 2007); *Kohl v. City of Phoenix*, 215 Ariz. 291, 160 P.3d 170 (2007); *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007); *Grammatico v. Industrial Commission*, 211 Ariz. 67, 117 P.3d 786 (2005); *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005); and *Safeway Ins. Co., Inc. v. Guerrero*, 210 Ariz. 5, 106 P.3d 1020 (2005).

[2] 214 Ariz. 293, 297 n.3, 152 P.3d 490, 494 n.3 (2007) (dictum on sufficiency of support for claimed amount).

Table of Contents

TABLE OF AUTHORITIES

Page

Cases

Constitutions

Statutes

Rules

Other Authorities

The Claim Statute

This dispute centers on A.R.S. § 12-821.01(A), which states:

> 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.)

Preliminary Statement

This appeal involves five main questions:

***Deer Valley* and the notice-of-claim statute.** Arizona tort claims must contain: (1) sufficient facts to let a public entity "understand the basis upon which liability is claimed" and (2) "the facts supporting" a specific claimed amount.[3] *Deer Valley* emphasizes that claimants must provide "the government entity with a factual foundation to permit the entity to evaluate the amount claimed."[4] The Tribe did that. The trial judge thus erred by ruling that the Tribe had failed to provide facts supporting its claim.

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[3] A.R.S. § 12-821.01(A).

[4] 214 Ariz. at 296, 152 P.3d at 493.

***Deer Valley* and jury evaluation of damages.** The claim letter in *Deer Valley* supposedly had no "facts supporting the claimed amounts" for emotional-distress and injury-to-reputation damages.[5] But in the present case, the Tribe provided detailed facts supporting its claimed damages for: (1) fraud, (2) unjust enrichment, (3) misrepresentation, and (4) invasion of privacy. Juries decide if evidence justifies requested damages. Here, the trial judge wrongly preempted the jury by holding that the Tribe had not provided enough facts supporting the claimed damages.

The void-for-vagueness doctrine. Vague laws violate due process by: (1) denying a fair chance to know what is prohibited; (2) not giving explicit standards to those applying them; (3) wrongly delegating policy matters to judges for case-by-case, subjective resolution; and (4) fostering arbitrary and discriminatory application.[6] Although the claim statute lacks reasonableness or sufficiency standards, the State wants it applied to require "reasonable" and "sufficient" damage claims. Applied as the State wants, the claim statute becomes unconstitutionally vague.

Estoppel against the State. Estoppel applies when: (1) the State acts inconsistently with a later-adopted position, (2) another party relies on the

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[5] 214 Ariz. at 297 n.3, 152 P.3d at 494 n.3.

[6] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

acts, and (3) the other party is injured by repudiation of the acts.[7] The State is estopped to assert these claims were defective because: (1) the State did not object to them when defects were curable; (2) the Tribe sued relying on the State's inaction; and (3) the State's repudiation destroyed the Tribe's case.

Prospectively applying *Deer Valley*'s dictum. If followed, *Deer Valley*'s dictum on sufficiency of facts for claim notices would: (1) establish a new legal principle by overruling clear and reliable precedent and deciding an issue whose resolution was not clearly foreshadowed; (2) retard the rule's operation—considering its history, purpose and effect; and (3) produce substantially inequitable results. This Court should not apply *Deer Valley*'s dictum. But if it does, it should only apply that dictum prospectively.

Standard of Review

Because statutory interpretation forms the basis of the trial court's ruling, the Court will review this appeal de novo.[8]

Legal Argument

1. The *Deer Valley* standard for Arizona tort claims.

In *Deer Valley*, a school district challenged the sufficiency of Pamela McDonald's notice of claim.[9] McDonald sought economic-loss, emotional-

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[7] *Karbal v. Ariz. Dept. of Rev.*, 215 Ariz. 114, 119, 158 P.3d 243, 248 (App. 2007).

[8] *State v. Pandeli*, 215 Ariz. 514, 530, 161 P.3d 557, 573 (2007).

distress, and loss-of-reputation damages arising from her allegedly wrongful termination.[10] The school district argued that her notice of claim lacked both a specific settlement amount and sufficient supporting facts.[11] The Supreme Court held that the claim's "qualifying language" meant that it lacked a specific amount, and ruled against McDonald.[12]

In doing that, the Supreme Court disapproved court of appeals' cases addressing the specific-amount rule.[13] One was the 1990 *Hollingsworth* case, which adopted a reasonableness standard for the sum-certain requirement.[14] Under that standard, a claim letter sufficed even if it qualified the claimed amount with words like "in excess of" or "approximately."[15]

In 1994, the Legislature amended the claim statute into its current version. In 1998, the court of appeals upheld its prior reasonableness standard in the case of *Young v. City of Scottsdale*.[16] In *Young*, the court of appeals approved a claim letter lacking a specific amount because it "satisfied the purposes of the claim statute" by providing "a reasonable estimate" of the

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[9] *Deer Valley*, 214 Ariz. at 294, 152 P.3d at 491.
[10] *Id.* at 295, 152 P.3d at 492.
[11] *Id.* at 295-96, 152 P.3d at 492-93.
[12] *Id.* at 296, 152 P.3d at 493.
[13] *Id.* at 299, 152 P.3d at 496.
[14] *Hollingsworth v. City of Phoenix*, 164 Ariz. 462, 466, 793 P.2d 1129, 1133 (App. 1990).
[15] *Id.*
[16] 193 Ariz. 110, 113-14, 970 P.2d 942, 945-46 (App. 1998).

claim's value.[17] But in 2007, *Deer Valley* rejected *Hollingsworth*'s and "*Young*'s conclusion that the statute includes a reasonableness standard" for the sum-certain requirement.[18]

In her *Deer Valley* claim, McDonald stated **no** specific damages. So *Deer Valley* did not need to determine if McDonald had provided "facts supporting that amount."[19] But *Deer Valley* still commented on that aspect of the statute, making three relevant statements.

- **First**, the statute requires claimants to give the public entity "a factual foundation" for the claimed amount.[20]
- **Second**, the supporting-facts requirement lets the public entity "evaluate the amount claimed," so claimants do "not demand unfounded amounts."[21]
- **Third**, McDonald had not provided "*any* facts supporting the claimed amounts for emotional distress and for damages to [her] reputation."[22]

2. The Tribe's claims satisfied the *Deer Valley* standard.

Deer Valley—interpreted in context—created no new legal principle or rule for the supporting-facts requirement. Indeed, *Deer Valley*'s comments on supporting facts are dictum, because they are unnecessary to sustain the

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[17] 193 Ariz. at 114, 970 P.2d at 946.

[18] 214 Ariz. at 299, 152 P.3d at 496.

[19] A.R.S. § 12-821.01(A); *Deer Valley*, 214 Ariz. at 297 ¶ 11 n.3, 152 P.3d at 494 ¶ 11 n.3.

[20] 214 Ariz. at 296 ¶ 9, 152 P.3d at 493 ¶ 9.

[21] *Id.*

[22] 21 Ariz. at 297 n.3, 152 P.3d at 494 n.3 (emphasis in original).

holding.[23] And since *Deer Valley* did not "expressly declare" that its comments would "be a guide for future conduct"—they are not precedent or binding on any court.[24]

Deer Valley did not direct that claimants must provide complete or detailed damages facts—or all possible supporting facts. Moreover, *Deer Valley* did not comment further on the sufficiency of needed facts. Indeed, any requirement for detailed facts would exceed the statute and unrealistically burden claimants. Here, for example, the Tribe fought the State for every scrap of information, and only slowly learned of the State's wrongs. Because of the State's delay and concealment, the Tribe will never know the complete story of the State's perfidy—short of extensive discovery and a full trial.

In fact, the State admitted in December 2007 that a claimant need not "present a final and complete assessment of [a claim's] value."[25] All that a

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[23] *Arizona Corp. Commission v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 412, 228 P.2d 749, 754 (1951).

[24] *Phelps Dodge Corp. v. Arizona Dept. of Water Resources*, 211 Ariz. 146, 152 n.9, 118 P.3d 1110, 1116 n.9 (App. 2005).

[25] "[State's] Reply to Response to Motion to Dismiss" at 2, lines 4-6, *Soto v. Kunz*, Pima County Superior Court Case No. C2007-6268 (Dec. 6, 2007). A copy of this Reply is attached as Exhibit 2. Since this is a public record, this Court may take judicial notice of the State's admissions. This Court may take judicial notice of public records, including documents in superior court files. *Wallace v. Shields*, 175 Ariz. 166, 173, 854 P.2d 1153, 1159 (App. 1992). Judicial notice is proper even on appeal. *McConnell v. United States*, 478 F.3d 1092, 1096 n.4 (9th Cir. 2007). Amicus thus respectfully asks that the Court take judicial notice of this document.

claimant must "provide the State [is] some rudimentary information as to his damages claim, such as whether he was seeking damages because he suffered bruises or because he suffered brain trauma."[26] Thus, as the State conceded, "the nature of the injury" is the "most basic and needed information" in a claim.[27] Here, the Tribe provided detailed information about the nature of the injuries that its members had sustained. That satisfied *Deer Valley*.

Before *Deer Valley*, the Supreme Court had not ruled specifically on the supporting-**facts** requirement. It had addressed only the specific-**amount** requirement. The State now apparently sees *Deer Valley*'s dictum about supporting facts as a chance to end lawsuits based on allegedly insufficient claim notices. *Deer Valley*'s comments, however, simply affirmed the statutory language in effect for years. *Deer Valley* disapproved of a claimant's failure to provide **any** supporting facts—a roundabout way of affirming the duty to provide **some** supporting facts. And since the Tribe provided **some** supporting facts, the trial judge improperly found that its damage claims were deficient.

But the trial judge in the present case is far from alone in making this error. Governments have filed a "flurry of motions to dismiss" based on *Deer*

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[26] *Soto* at 2, lines 6-9, Exhibit 2 to this Brief.

[27] *Id.* at 2, lines 19-21. "As noted, Plaintiff merely had to furnish some very basic information as to the nature of his injury." *Id.* at 2, lines 24-25.

Valley's sufficiency-of-claim dictum.[28] And many trial judges have accepted arguments that *Deer Valley* has changed the law—when it has not. On the other hand, many other trial judges have refused to misapply *Deer Valley*.[29] And so, like the Tribe, many Arizona tort claimants find no justice. And those who do find justice, only find it providentially.

3. The notice-of-claim statute does not let the trial judge preempt the jury's role in determining damages.

Any given judge—or jury—might or might not award damages for the harms that the Tribe suffered. But the Tribe at least has the right to **seek** recovery of the tort damages that the State proximately caused.[30]. The Tribe also has the right to have a **jury** consider damages—with judicial oversight to

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[28] Hon. Peter Swann, Minute Entry Order at 2, *Barker v. Cullins*, Maricopa County Superior Court Case No. CV 2006-012711 (Aug. 3, 2007). This statement is not cited as precedent, but as a factual statement of the impact of *Deer Valley*'s dictum. A copy of this Minute Entry Order is attached as Exhibit 3. Amicus respectfully asks that the Court take judicial notice of this document for the reasons given in footnote 25.

[29] The attached Exhibit 1 is a chart listing some of the cases granting—or denying—*Deer Valley* motions.

[30] *See, e.g.*, ARIZ. CONST. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); RESTATEMENT (SECOND) OF TORTS § 917 (1970) ("One who tortiously harms the person or property of another is subject to liability for damages for the consequences of the harm in accordance with the rules on whether the conduct is a legal cause of the consequences.").

prevent a runaway verdict.[31] The notice-of-claim statute does not require trial-level proof of damages, just some facts to support the claimed damages. The jury may then decide liability—and what damages, if any, to award.[32]

In its claim notices—acting as *parens patriae*—the Tribe demanded $50 million to compensate the Tribe and its members. The damages were to compensate for the State:

- Committing fraud.
- Invading the cultural, religious, and personal privacy of tribal members.
- Conducting stigmatizing genetic experiments on Havasupai blood samples under false pretenses and without informed consent.
- Misrepresenting the reason for requesting Havasupai blood.
- Obtaining and distributing private genetic data and other private information through fraud.

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[31] *See, e.g., Valley National Bank v. Brown*, 110 Ariz. 260, 264, 517 P.2d 1256, 1260 (1974) ("The rule in this State is that an award of damages is within the province of the jury and will not be disturbed on appeal except where the verdict is so exorbitant as to show passion, prejudice, mistake or complete disregard of the evidence."); *Sheppard v. Crow-Barker Paul No. 1 Ltd. Partnership*, 192 Ariz. 539, 549, 968 P.2d 612, 622 (App. 1998) ("The amount of an award for damages is a question peculiarly within the province of the jury, and the award will not be overturned or tampered with unless we find that the verdict was, indeed, the result of passion or prejudice.").

[32] *Meyer v. Ricklick*, 99 Ariz. 355, 357-58, 409 P.2d 280, 281-82 (1966) ("The amount of damages for personal injury is a question particularly within the province of the jury. . . . In an action for personal injuries, the law does not fix precise rules for the measure of damages but leaves their assessment to a jury's good sense and unbiased judgment.").

- Distributing Havasupai blood samples to third parties without consent from the donors.

- Enriching itself unjustly by distributing fraudulently–obtained blood samples and publishing unauthorized research.[33]

Thus, the Tribe is claiming general damages for fraud, invasion of privacy, misrepresentation, and unjust enrichment. "General damages" are damages that necessarily result from wrongs.[34] They "are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man."[35] In the nature of things, there are no definite or fixed standards for determining the proper amount of general damages. "It is **always** left to the sound reason and discretion of the jury, under proper instruction. It is **only** when the amount awarded appears clearly to be out of reason and the result of passion and prejudice that the appellate court will disturb the verdict."[36]

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[33] *Opening Brief* at 10-21.

[34] RESTATEMENT (SECOND) OF TORTS § 904(1) (1979) ("'General damages' are compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved.").

[35] *Palmer v. Kelly*, 54 Ariz. 466, 468-69, 97 P.2d 209, 209-10 (1939).

[36] *Selaster v. Simmons*, 39 Ariz. 432, 441, 7 P.2d 258, 261 (1932) (emphasis added). *See also Frontier Motors, Inc. v. Horrall*, 17 Ariz. App. 198, 200, 496 P.2d 624, 626 (App. 1972) ("The amount of damages is a question particularly within the province of the jury.").

Here, the State purloined and desecrated the tribal members' blood—grossly violating their right to cultural, religious, and personal privacy. No precise scale exists for measuring the unique harm the State caused.[37] But American tort law only demands "a very rough correspondence between the amount awarded as damages and the extent of the suffering."[38] Determining fair damages for the State's wrongs will challenge the jury. But it remains "the genius of the common law that difficult damage questions are left to juries."[39] They are not left to trial judges.

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[37] *See* RESTATEMENT (SECOND) OF TORTS § 912 cmt. a (1979) (An injured person should not "be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered. Particularly is this true in situations where there can not be any real equivalence between the harm and compensation in money, as in case of emotional disturbance, or where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof[.]").

[38] RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) ("There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering."). *See also Horn v. Ruess*, 72 Ariz. 132, 137, 231 P.2d 756, 760-61 (1951) ("There is no rule by which damages for mental suffering and humiliation may be measured. The amount to be assessed must be left to the sound discretion of the jury.").

[39] *Felder v. Physiotherapy Associates*, 215 Ariz. 154, 163, 158 P.3d 877, 886 (App. 2007). *See also* Roselle L. Wissler, Allen J. Hart, and Michael J, Saks, *Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751, 757 (Dec. 1999) (To "compensate for noneconomic losses, the law must turn to an alternative source of values, namely, the social judgment of the community, typically supplied by juries. A task that involves assigning a value to the virtually undefinable is, by definition, challenging to perform and at least as challenging to evaluate.").

4. As the State applies it, the claim statute violates public policy.

The Legislature enacted the claims statute: (1) to give time for public entities and employees to assess their liability; (2) to permit a chance for settling before litigation; and (3) to aid public entities in financial planning and budgeting.[40] The Legislature meant to make it easier—not harder—to hold public entities liable for their wrongs. And it directed courts to construe all of the claim statute's provisions to carry out that purpose.[41] The State's proposed application of the claim statute, however, violates that public policy. It uses technicalities to kill cases when the State knows the facts supporting the claim—but simply seeks a windfall victory.

5. As the State applies it, the claim statute violates the void-for-vagueness doctrine—and is thus unconstitutional.

A law violates due process if it is so vague and standardless that it "leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[42] Relying on the *Deer*

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[40] *Harris v. Cochise Health Systems*, 215 Ariz. 344, 351, 160 P.3d 223, 230 (App. 2007).

[41] ARIZONA LAWS 1984, ch. 285, § 1(A) ("[I]t is hereby declared to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state. **All of the provisions of this act should be construed with a view to carry out the above legislative purpose**.") (emphasis added).

[42] *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The void-for-vagueness doctrine applies to civil **and** criminal statutes. *Boutilier v. INS*,

Valley dictum, the State demands that damage claims against the government must have sufficient support. And that support must be so strong that it convinces a judge that the claimed settlement amount is reasonable.

But even if this Court applies the statute as the State wants: What are **sufficient** facts to support claimed damages? And what is a **reasonable** settlement amount? The Arizona claim statute cannot answer those questions. Nor does its plain language even raise them.

After all, the claim statute only requires (1) "facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed," and (2) "facts supporting" the claimed amount.[43] These words do **not** mandate that damage claims be "reasonable" or "sufficient"—whatever those terms mean. It is true that the statute uses "sufficient" when referring to liability facts. But it uses that word only in a limited sense—namely, so the public entity can "understand the basis upon which liability is claimed." Under the State's interpretation, the statutory discretion given trial judges is void for vagueness.[44]

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387 U.S. 118, 123 (1967) ("It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions.").

[43] A.R.S. § 12-821.01(A).

[44] *See Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to . . . judges . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

But that is not the end of the analysis. When possible, courts interpret statutes to avoid void-for-vagueness constitutional flaws.[45] Thus, a law "will not be held void for vagueness if any reasonable and practical construction can be given to its language."[46] Applying that principle, this Court should read the statute as requiring a specific demand (whether the State finds it reasonable or not), with some basic facts supporting that claim (but not a complete damages analysis)

And *Deer Valley* itself supports that interpretation, explaining that:

> The attendant statutory obligation that claimants present "facts supporting that amount" **requires** that claimants explain the amounts identified in the claim by providing the government entity with **a factual foundation to permit the entity to evaluate the amount claimed. . . . Compliance with this statute is not difficult; the statute** does not require that claimants reveal the amount they will demand at trial if litigation ensues but **simply requires that claimants identify the specific amount for which they will settle and provide facts supporting that amount.**[47]

The reference to the ease of statutory compliance—and the open-ended reference to supporting facts—do not impose any requirement for a comprehensive damages work-up. Nor does it require more than some facts supporting the claimed amount.

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[45] *See, e.g., United States v. Superior Court,* 144 Ariz. 265, 278, 697 P.2d 658, 671 (1985).

[46] *In re Appeal in Maricopa County Juvenile Action No. JS-5209 and No. JS-4963*, 143 Ariz. 178, 183, 692 P.2d 1027, 1032 (App. 1984).

[47] 214 Ariz. at 296, 152 P.3d at 493 (emphasis added).

The Tribe apparently did not raise the void-for-vagueness doctrine at the superior court. But the void-for-vagueness doctrine represents one of the "most fundamental" of all due-process protections.[48] Indeed—in Arizona—the right to seek damages for personal injury is itself a fundamental right.[49] Applying the claim statute in a way making it void for vagueness is fundamental error. And that level of error can be raised for the first time on appeal.[50] Indeed, because of this case's statewide importance, arguments not raised in the superior court may be raised for the first time on appeal.[51]

6. The State is estopped from challenging the claim notices.

The State is estopped if: (1) it commits acts inconsistent with a position it later adopts, (2) the other party relies upon those acts, and (3) the other

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[48] *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2nd Cir. 2007) (As one of the "most fundamental" due-process protections, "the void-for-vagueness doctrine requires that laws be crafted with sufficient clarity to give the person or ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them.") (citations and internal quote marks omitted).

[49] *See* ARIZ. CONST. art. 2, § 31 and art. 18, § 6.

[50] *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). *See also Fuenning v. Superior Court*, 139 Ariz. 590, 597, 680 P.2d 121, 128 (1983) (indicating that a full void-for-vagueness analysis would apply to laws affecting fundamental or basic rights).

[51] *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552 n.9, 105 P.3d 1163, 1171 n.9 (2005) ("While we generally will not consider arguments not presented below, this is a rule of prudence, not of jurisdiction. When good reason exists, this court may and will entertain such questions. One such good reason is when the issue is of statewide importance.") (citations and internal quote marks omitted).

party is injured when the State repudiates its prior acts.[52] The government can be estopped when its wrongful conduct threatens to work a serious injustice and estoppel would not unduly damage the public interest.[53] And estoppel applies even when, as here, the wrongful conduct comes "in the form of inaction or silence."[54] In fact, since the notice-of-claim law is a procedural rule resembling a statute of limitations, it is subject to estoppel.[55]

This Court might regard *Deer Valley* as mere dictum—or as a new supporting-facts requirement. In either case, the State is estopped from using it to nullify the Tribe's claims. Estoppel applies for four main reasons.

First, the State "engaged in affirmative conduct inconsistent" with the position it now adopts.[56] The State did not reject the Tribe's claim notices—but instead investigated them for seven months. The State participated in several settlement meetings and in a non-binding arbitration. Even after the Tribe began litigating this costly case, the State still delayed challenging the notices. The State only raised insufficiency of the claim notices **after** filing

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[52] *Karbal v. Arizona Department of Revenue*, 215 Ariz. 114, 119, 158 P.3d 243, 248 (App. 2007).

[53] *State ex rel. Romley v. Gaines*, 205 Ariz. 138, 143, 67 P.3d 734, 739 (App. 2003).

[54] *In re Paternity of Gloria*, 194 Ariz. 201, 204, 979 P.2d 529, 532 (App. 1998).

[55] *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990).

[56] *Luther Construction Co., Inc. v. Arizona Dept. of Revenue*, 205 Ariz. 602, 604, 74 P.3d 276, 278 (App. 2003).

its **second** motion to dismiss. The State's conduct was inconsistent with its present position that the claim amounts lack sufficient facts.

Moreover, the timing of the State's factual-sufficiency motion to dismiss defeats the factual-sufficiency argument. If the State truly lacked facts to evaluate the Tribe's claims, the State could have—and should have—told the Tribe. Then the Tribe could have timely supplied the supposedly missing facts to aid the State's evaluation. The State's dismissal motion isn't about factual-insufficiency—it's about grabbing a windfall victory.

All this raises the question of the State's reciprocal duty to claimants. That is, the law demands that claimants submit damage claims with some supporting facts. But suppose that the State receives a claim that it cannot investigate properly because of an apparent lack of supporting facts. If there is still time to correct the insufficiency, doesn't the State have a duty to tell the claimant that the claim is insufficient? Can the State just wait until a complaint is filed—and then move to dismiss the lawsuit for insufficiencies that the claimant could have easily repaired? Is that honorable conduct?

Second, the Tribe "actually and reasonably relied on the [State's] prior conduct."[57] Under the statute, the Tribe's claim was deemed denied because

[57] *Luther Construction*, 205 Ariz. at 604, 74 P.3d at 278.

the State failed to respond within sixty days.[58] The Tribe reasonably relied on the State's silence in assuming that the claim notices were sufficient and that it could sue. The State never asked for facts that would have prompted the Tribe to file an amended claim curing any alleged shortcomings.

Third, the State's conduct will destroy the Tribe's case, causing the Tribe to "suffer a substantial detriment."

Fourth, estopping the State "would neither unduly damage the public interest nor substantially and adversely affect the exercise of governmental powers."[59] In fact, the public interest demands the adjudication of legitimate claims against the State.[60] The Court should thus find that the State is estopped from contesting the validity of Plaintiff's notice of claim.[61]

7. *Deer Valley*'s dictum should only apply prospectively.

This Court may decide that *Deer Valley*'s dictum establishes a new and different standard for the supporting-facts requirement. If that happens, this

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[58] A.R.S. § 12-821.01(E).

[59] *Luther Constr.*, 205 Ariz. at 605 ¶ 11, 74 P.3d at 279 ¶ 11.

[60] *Ryan v. State*, 134 Ariz. 308, 311, 656 P.2d 597, 600 (1982).

[61] *See Freightways, Inc. v. Arizona Corporation Commission*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981) (When applying estoppel will not affect the state's exercise of its government powers and sovereignty, estoppel will be applied against the State as justice dictates.) (citing Peter C. Smoot, Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. CAL. L. REV. 391 (1969)).

Court should not apply the dictum to the Tribe's notice of claim. The dictum should only apply prospectively.

In civil cases, Arizona appellate opinions generally operate both retrospectively and prospectively. In deciding if an opinion should have prospective-only application, the important factors are:

- The decision establishes a new legal principle by either overruling clear and reliable precedent or deciding an issue whose resolution was not clearly foreshadowed;
- Retroactive application will further or retard the rule's operation, considering its history, purpose and effect; and
- Retroactive application will produce substantial inequitable results.[62]

"The decision of whether an opinion will only be applied prospectively involves a balancing of these three factors."[63] In this instance, all factors favor a finding that *Deer Valley* applies prospectively only.

First, *Deer Valley*'s dictum establishes a new rule overruling clear and reliable precedent. Nothing foreshadowed that change. In fact, in May 2007, the State conceded that:

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[62] *Mark Lighting Fixture v. General Electric Supply Co.*, 155 Ariz. 27, 30, 745 P.2d 85, 88 (1987). *See also Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 313, 560 P.2d 1216, 1220 (1977) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

[63] *Law v. Superior Court*, 157 Ariz. 147, 161, 755 P.2d 1135, 1149 (1988).

- The State "discovered" its supporting-facts argument "only after the Supreme Court rendered its decision in *Deer Valley*."

- *Deer Valley* "signaled" the Supreme Court's "willingness to analyze the sufficiency of notices of claim in a new and more technical manner."

- Under *Deer Valley*, claimants must now "*explain* the settlement demand by providing the government entity with a *factual foundation* to permit the entity to evaluate the demand."

- The State "is unaware of any case law that discusses the 'supporting facts' requirement prior to *Deer Valley*."

- "Almost immediately" after Deer Valley was filed (Feb. 26, 2007), "the State began systematically reviewing notices of claim to determine whether they complied with the claim statute's mandate."[64]

For the State, *Deer Valley* has become just another weapon to attack claims—even in cases filed before *Deer Valley*—and even in cases where the State had never previously argued that it lacked the supporting facts needed to evaluate a claim.

Second, retroactively applying *Deer Valley*'s dictum will not further its possible intent to make claims more demanding. It will just punish those unexpectedly trapped in the rule change.

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[64] "State of Arizona's: (1) Reply in Support of its Motion to Dismiss; and (2) Response to Plaintiff's Motion for Summary Judgment," *Estate of Timothy Maudsley v. Meta Services, Inc.*, Maricopa County Superior Court Case No. CV 2006-006112 at 5-6 (May 4, 2007) (emphasis in original) (copy attached to this brief as Exhibit 4). Amicus respectfully asks that the Court take judicial notice of this document for the reasons given in footnote 25.

Third, retroactive application will harm the Tribe. It will also harm many other tort claimants fighting the flood of *Deer Valley* dismissal and summary judgment motions—often in cases filed before *Deer Valley*'s dictum even existed.

Conclusion

The Court should let the Tribe litigate this case because:

- The Tribe's claim notices satisfy both the claim statute and *Deer Valley*.
- The superior court's dismissal violates the Tribe's right to have a jury determine if the claimed damages are justified and reasonable.
- Dismissal of this case contravenes public policy.
- As the State and superior court applied it here, the claim statute is void for vagueness—and thus unconstitutional.
- The State is estopped to apply *Deer Valley*'s dictum.
- If *Deer Valley*'s dictum has substantively changed the facts needed to support claimed damages—that change should only apply prospectively.

DATED this 31st day of January, 2008

THE LAW FIRM OF CHARLES M. BREWER, LTD.

David L. Abney
Attorneys for Amicus Curiae

Certificate of Compliance

Under Rule 14, ARIZ. R. CIV. APP. P., the above-signing lawyer certifies that the attached document uses proportionally-spaced type of 14 points or more, is double-spaced using a Roman font, except for quotations and footnotes, if there are any, and contains 4,877 words, according to the computer word-processing program used to prepare this document.

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List of Exhibits

1. Partial List of Cases involving *Deer Valley* motions.

2. "[State's] Reply to Response to Motion to Dismiss," *Soto v. Kunz*, Pima County Superior Court Case No. C2007-6268 (Dec. 6, 2007).

3. Hon. Peter Swann, Minute Entry Order, *Barker v. Cullins*, Maricopa County Superior Court Case No. CV 2006-012711 (Aug. 3, 2007).

4. "State of Arizona's: (1) Reply in Support of its Motion to Dismiss; and (2) Response to Plaintiff's Motion for Summary Judgment," *Estate of Timothy Maudsley v. Meta Services, Inc.*, Maricopa County Superior Court Case No. CV 2006-006112 (May 4, 2007).

Partial List of *Deer Valley* Cases

Cases dismissed under *Deer Valley*

1. *Bamonte v. City of Mesa*, United States District Court for the District of Arizona Case No. CV-06-01860-PHX-NVW, 2007 WL 2022011. Trial judge dismissed complaint for failure of claim to state a particular and certain amount and for failure to provide sufficient facts to support the claim.

2. *Campos v. City of Glendale*, United States District Court for the District of Arizona Case No. CV-06-00610-PHX-DGC, 2007 WL 3287586. Trial judge dismissed complaint for failure of claim to state a specific amount and for failure to provide sufficient facts to support the claim.

3. *Cava v. Town of Buckeye*, United States District Court for the District of Arizona Case No. 2007 WL 4449277. Trial judge dismissed wrongful death case because the notice of claim was supposedly untimely and supposedly had provided no factual support for $3 million claim.

4. *Clark v. State*, Maricopa County Superior Court Case No. CV 2006-013198, Arizona Court of Appeals Case No. 1 CA-CV 07-0823. Claim for $5 million for state prisoner rendered paraplegic by negligent state-provided medical care. Trial judge dismissed the case for an alleged failure to provide sufficient supporting facts.

5. *Estrada v. City of San Luis*, United States District Court for the District of Arizona Case No. CV-07-1071-PHX-DGC, 2007 WL 4025215. Trial judge dismissed complaint for alleged failure of claim to provide sufficient facts to support claimed damages.

6. *Feavel v. Arizona State Department of Administration Risk Management*, Maricopa County Superior Court Case No. CV 2006-017452. Notice of claim sought $20 million. Trial judge dismissed because the six-page notice of claim supposedly had "absolutely no facts supporting that amount."

7. *Florian v. Perkinson*, United States District Court for the District of Arizona Case No. CV-05-002067-PHX-FJM, 2007 WL 1317263. Trial judge dismissed complaint for failure to file claim with proper entity, failure to identify all plaintiffs, and failure to provide a specific amount.

8. *Franklin v. City of Phoenix*, United States District Court for the District of Arizona Case No. CV-06-02316-PHX-NVW, 2007 WL 1463753. Trial judge dismissed complaint because part of claim was untimely and for failure to provide sufficient facts to support the claim.

9. *Haab v. County of Maricopa*, Maricopa County Superior Court Case No. CV 2005-018125, Arizona Court of Appeals Case No. 1 CA-CV 07-0562. Trial judge dismissed complaint because allegations in amended complaint were not covered in the notice of claim, the county was not given notice of new claims or opportunity to assess them, the plaintiff did not provide facts to support the claims or the amount claimed, and the claims were time barred.

10. *Havasupai Tribe v. Arizona Board of Regents*, Maricopa County Superior Court Case No. CV 2005-013190, Arizona Court of Appeals Case No. 1 CA-CV 07-0454. Trial judge dismissed Tribe's lawsuit alleging that ASU had misappropriated the blood of tribal members for unauthorized genetic and other research purposes. Trial judge concluded that the notices of claim lacked supporting facts for the $50 million damages claim.

11. *Johnson v. State*, Maricopa County Superior Court Case No. CV 2007-001453, Arizona Court of Appeals Case No. 1 CA-CV 07-0671. Trial judge dismissed case because notice of claim did not break down the sum-certain demand among the claimants.

12. *Jones v. Cochise County*, Pima County Superior Court Cause No. C2007-0134, Arizona Court of Appeals Case No. 2 CA-CV 2007-0132. The notice of claim stated: "If this matter can be settled prior to litigation, I will recommend to JC that he settle his claims against [the Defendants] for $4.500,000. I will advice Mr. and Mrs. Jones to settle their claim against [the Defendants] for $1,000,000. **These offers to settle will be withdrawn sixty (60) days from the receipt of this claim and suit will be filed.**" (Emphasis added.) Trial judge dismissed for failure to provide a sum certain.

13. *Lee v. State*, Maricopa County Superior Court Case No. CV 2005-012207, Arizona Court of Appeals Case No. 1 CA-CV 06-0145, Arizona Supreme Court Case No. PR 2007-0293. Trial judge dismissed the case because the State had alleged that it had never received notice of claim sent to it by first-class mail.

14. *Lopez v. City of Eloy*, Pinal County Superior Court Cause No. CV2006-01220, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2006-0231. Notice of claim asked for $50,000, and then added: "Claimant reserves the right to supplement this response as discovery continues." The court of appeals upheld dismissal, reasoning that the claim had not asked for a sum certain.

15. *Maudsley v. Meta Services*, Maricopa County Superior Court Case No. CV 2006-006112. In this wrongful death case, trial judge dismissed because the notice lack facts supporting the claimed amount.

16. *Patterson v. State*, Maricopa County Superior Court Case No. CV 2006-006788. Trial judge dismissed case because of a supposed lack of factual support for the claimed amount.

17. *Riley v. State*, Maricopa County Superior Court Case No. CV 2006-011026, Arizona Court of Appeals Case No. 1 CA-CV 07-0497. The trial judge dismissed for an alleged failure to provide sufficient facts to support a $10,000,000 claim for death of an inmate. The State had allegedly failed to timely diagnose and treat a brain tumor.

18. *Simmons v. Navajo County*, United States District Court for the District of Arizona Case No. CV-06-701-PCT-DGC, 2007 WL 4435533. Wrongful death claim where claimants demanded $20 million for emotional-loss, loss-of-economic-support, and other damages. Trial judge dismissed complaint because the claim supposedly stated no facts supporting the claimed damages.

19. *Yollin v. City of Glendale*, Maricopa County Superior Court Case No. CV 2007-090263, Arizona Court of Appeals Case No. 1 CA-CV 07-0513. Claim asked for $150,000 in a personal-injury case with about $20,000 in special medical damages. Claim had about 100 pages of supporting medical records attached to it. Trial judge dismissed the complaint because the claim allegedly lacked enough supporting facts.

Cases not dismissed under *Deer Valley*

1. *Barker v. Cullins*, Maricopa County Superior Court Case No. CV 2006-012711.

2. *Cantañeda v. City of Williams*, United States District Court for the District of Arizona Case No. CV-07-00129-PCT-NVW, 2007 WL 1713328.

3. *Dunlap v. State*, Maricopa County Superior Court Case No. CV 2006-008606.

4. *Graham v. Value Options*, Maricopa County Superior Court Case No. CV 2006-010027.

5. *Jantzen v. Arpaio*, Maricopa County Superior Court Case No. CV 2007-006060.

6. *Saville v. Maricopa County*, Maricopa County Superior Court Case No. CV 2004-010518.

7. *Scroggins v. City of Phoenix*, Maricopa County Superior Court Case No. CV 2007-005757.

8. *Smith v. Value Options*, Maricopa County Superior Court Case No. CV 2005-001586.

9. *Spellers v. Value Options*, Maricopa County Superior Court Case No. CV 2005-012760.

10. *Tarr v. Maricopa County*, Maricopa County Superior Court Case No. CV 2003-020880 ("Compliance is not jurisdictional, and the Court finds that the City has waived compliance by actively litigating this case for the last five years or so, thereby satisfying the purpose of the notice of claim statute.").

11. *Trojanovich v. City of Globe*, United States District Court for the District of Arizona Case No. CV-06-421-PHX-MHM. Trial judge denied motion to dismiss because "Plaintiff requested $2,000,000 and incorporated facts supporting the amount of his claim."

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Attorney for Defendants

ARIZONA SUPERIOR COURT

PIMA COUNTY

PHILIP L. SOTO,

Plaintiff,

v.

LINDSEY J. KUNZ & "JOHN DOE KUNZ, husband & wife; UNIVERSITY OF ARIZONA, a State university; STATE OF ARIZONA, a body politic; and THE ARIZONA BOARD OF REGENTS, a body corporate as managing entity for the UNIVERSITY OF ARIZONA; JOHN DOE & JANE DOE 1 through 10, inclusive, husband and wife; ABC CORPORATIONS 1 through 10 inclusive; and XYZ PARTNERSHIPS 1 through 10, inclusive,

Defendants.

No. C2007-6268

REPLY TO RESPONSE TO MOTION TO DISMISS

Assigned to:
Honorable Paul Tang

115 ¶ 14, 7 P.3d 121, 124 (App. 2000) (declining to adopt an "interpretation [of A.R.S. § 12-821.01 that] would clearly defeat the pre-litigation notification and settlement purposes of the notice of claim statute, . . .[and would] defeat the legislative intent.").

Plaintiff disingenuously argues that "Defendants appear to be asking this Court to require Plaintiff to present a final and complete assessment of the value of Plaintiff's claim." (Response at page 4, lines 22-23.) Defendants have made no such request. At a minimum, however, Plaintiff was required to provide the State with some rudimentary information as to his damages claim, such as whether he was seeking damages because he suffered bruises or because he sustained brain trauma. And the law requires nothing less. *See* A.R.S. § 12-821.01(A) (claimant must provide "a specific amount for which the claim can be settled and **the facts supporting that amount**")(emphasis added).

Plaintiff further argues that the Supreme Court's holding in *Deer Valley* is inapposite because it dealt with § 12-821.01(A)'s "specific amount" requirement and not its requirement that a claimant set forth "the facts supporting that amount." Yet *Deer Valley* recognizes that "[t]he notice of claim statute is clear and unequivocal," and "[c]ompliance with this statute is not difficult." 214 Ariz. 293, 296 ¶9, 152 P.3d 490, 493 (2007). Moreover, Plaintiff provides no authority for the assertion that either the Legislature or the Supreme Court intended for only some of the claim statute's requirements to be applied as written. And here, it certainly would not have been difficult

difficult." Instead, he argues that compliance is "impractical, . . . has problematic unintended consequences, . . . [and] is inequitable." If this is his position, however, he must address it to the legislature. *See Reyes v. Cuming*, 191 Ariz. 91, 93-94, 952 P.2d 329, 331-32 (App. 1997) ("If the statute unduly burdens" particular individuals, they "may lobby the legislature to change it; until then it is the law.").

Plaintiff's Notice of Claim was woefully deficient as it did not provide even the most basic of information. Because it did not comply with either the letter or the purpose of § 12-821.01(A), this Court should dismiss Plaintiff's Complaint with prejudice.

RESPECTFULLY SUBMITTED this 6th day of December, 2007.

TERRY GODDARD
ATTORNEY GENERAL

BRUCE L. SKOLNIK
Assistant Attorney General
Attorney for Defendants

COPY of the foregoing hand-delivered this 6th day of December, 2007 to:

Honorable Paul Tang
PIMA COUNTY SUPERIOR COURT
110 W. Congress
Tucson, AZ 85701

COPY of the foregoing mailed

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/10/2007 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-012711 08/03/2007

HONORABLE PETER SWANN

CLERK OF THE COURT
D. Monroe
Deputy

JAMES BARKER, et al. JOHN N WILBORN

v.

WILLIAM CULLINS, et al. MICHAEL NAPIER

ROSEMARY H ROSALES

MINUTE ENTRY

9:45 a.m. This is the time set for Oral Argument regarding Defendants City of Tempe's and Ralph Tranter's Motion to Dismiss and Defendant Cullins' Joinder in Tempe's Motion to Dismiss and Separate Motion to Dismiss. Plaintiffs, James Barker, Kelly Wilcott, and the Estate of Kyle Barker, are represented by counsel, John N. Wilborn. Defendant, William Cullins, is represented by counsel, Michael Napier. Defendants, Ralph Tranter and the City of Tempe, are represented by Assistant City Attorneys, Clarence E. Matherson, Jr., and Joseph I. Vigil.

Court Reporter, Judie Bryant, is present.

Argument is heard.

IT IS ORDERED taking Defendants City of Tempe's and Ralph Tranter's Motion to Dismiss and Defendant Cullins' Joinder in Tempe's Motion to Dismiss and Separate Motion to Dismiss under advisement.

10:36 a.m. Matter concludes.

LATER:

For the following reasons,

IT IS ORDERED denying the motions to dismiss.

These motions involve a question frequently presented in the flurry of motions to dismiss following the Supreme Court's recent decision in *Deer Valley Unified School Dist. No. 97 v. Houser*, 214 Ariz. 293 (2007). The question raised, but not answered, by the decision is the level of specificity required to set forth a valid settlement demand pursuant to A.R.S. § 12-821.01 where the damages involve purely non-economic elements under Arizona's wrongful death statute, A.R.S. § 12-613.

In this wrongful death case, the surviving parents of the decedent timely served a notice of claim. The notice undisputedly set forth adequate facts to provide fair notice of the basis on which liability was claimed. Those facts, which involved rather egregious conduct, were followed by a brief statement that the putative Plaintiffs lost their only son in the accident, that he was a 24 year-old training to be a firefighter, and that they enjoyed a close and loving relationship with the decedent. The amount demanded in settlement of the two claims was $15 million and $8 million, respectively. Apart from the basic facts referred to above, the only justification for the total $23 million demand was that 23 had been the decedent's favorite number.

The Court has carefully considered the opinion in *Deer Valley*, and its admonition that the notice of claim statute was designed to thwart litigation following "quick unrealistic exaggerated demands." *Deer Valley* is unlike this case, however, because it involved inadequately quantified claims for *economic* harm – harm that could be calculated with some precision and objectivity. Unlike the claims in *Deer Valley*, A.R.S. § 12-613 provides that damages for wrongful death are to be determined according to what the jury believes "fair and just" with regard to the "mitigating and aggravating circumstances" of the death. In view of the open-ended means by which the legislature has directed that damages for wrongful death be quantified, the Court concludes that the bases set forth in support of the demand, including the egregious alleged conduct that caused the death (apart from the favorite number) form appropriate support for a large demand.

The question remains, however, whether the settlement demand is so large as to create a legal defect in the notice. The Court concludes that it is not. While there is surely some extreme figure that would constitute a bad-faith offer, the Court cannot find that $23 million is *per se* outside the realm of good faith opening settlement offer for a wrongful death, as there exists no damage cap under current Arizona law. The Court is wary of the invitation to dismiss a case

because it may disagree with the Plaintiffs' valuation of their case. Where, as here, damages are largely determined by the subjective evaluation of a factfinder, Rule 12(b)(6) has no role to play. But while the sheer amount of the demand is not enough to justify dismissal under the statute, is the reliance upon a "favorite number" sufficient to generate that result?

At best, the reliance upon a favorite number was intemperate. At worst, it was frivolous. And standing upon its own, such reliance would be so insubstantial as to warrant dismissal. But in the context of the entire contents of the notice, the Court cannot find that the "favorite number" so infected the remainder of the factual support for the claim as to deprive Defendants of the information required by the statute. Defendants were on adequate notice of facts which if proven to the jury could support a multimillion dollar award in the range demanded. They are well able to conduct a meaningful preliminary evaluation of their exposure and make a counteroffer. In these circumstances, the Court cannot find that the addition of an improper consideration to an otherwise sufficient notice should operate to deprive Plaintiffs of their claim.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ESTATE OF TIMOTHY MAUDSLEY; PATRICK MAUDSLEY AND KEADY MAUDSLEY, husband and wife, and personal representatives of ESTATE OF TIMOTHY MAUDSLEY, Plaintiffs, v. META SERVICES, INC., an Arizona corporation; et al., Defendants.	No. CV2006-006112 **STATE OF ARIZONA'S: (1) REPLY IN SUPPORT OF ITS MOTION TO DISMISS; AND (2) RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Assigned to: Honorable Robert Miles

The State of Arizona respectfully submits the following Reply in support of its Motion to Dismiss, and Response to Plaintiffs' Motion for Partial Summary Judgment. The State's position is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

On March 23, 2007, the State filed a Motion to Dismiss the Complaint (Second Amended) for failure to state a claim for relief. Plaintiffs decided to treat the State's Motion as a motion for summary judgment, and on April 19, 2007 filed a Response, as well as their own Cross-Motion for Partial Summary Judgment. The State did not object

rules of civil procedure "shall be construed to secure the just . . . determination of every action.")

3. Plaintiffs Cannot Rely On the State's Disclosure Statements To Support Its Contention That the State Has Admitted Plaintiffs' Full Compliance With the Claim Statute.

As previously noted, the State's Answer preserved its notice of claim defense. Plaintiffs now contend that the State waived that defense by failing to expound upon it in its Disclosure Statements. It is not surprising that they have failed to cite any legal authority that directly addresses and supports this contention. *Barrett v. Melton*, 112 Ariz. 605, 545 P.2d 42 (1972), cited by Plaintiffs, is inapposite. There, the court merely held that answers to interrogatories, when proffered by the answering party as substantive evidence, are inadmissible hearsay.

While subdivision (a)(2) of Rule 26.1 provides that each party shall disclose "[t]he legal theory upon which each . . . defense is based," subdivision (b)(2) states that the duty prescribed in subdivision (a) shall be a continuing one, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Here, the State discovered the argument upon which its Motion to Dismiss is based only after the Supreme Court rendered its decision in *Deer Valley*.

In *Deer Valley*, the Court signaled its willingness to analyze the sufficiency of notices of claim in a new and more highly technical manner. It expressly rejected the *Hollingsworth/Young* "reasonableness" test as regards the sufficiency of the "sum certain" allegation. But more to the point, it discussed the rationale behind the "supporting facts" requirement and indicated what is required to comply with that statutory obligation: claimants must *explain* the settlement demand by providing the government entity with a *factual foundation* to permit the entity to evaluate the demand. The State is unaware of any case law that discusses the "supporting facts" requirement prior to *Deer Valley*.

Deer Valley was decided on February 26, 2007. Almost immediately, the State

began systematically reviewing notices of claim to determine whether they complied with the claim statute's mandate. The State's Motion to Dismiss in this case was filed on March 23, 2007, less than one month after the *Deer Valley* decision. Although the State did not raise the notice of claim defense in its Disclosure Statement, it promptly raised it by way of a Motion to Dismiss after the *Deer Valley* decision came down.

A waiver is an intentional and voluntary relinquishment of a known right, express or inferred, and must be shown by clear and compelling evidence. *Ray v. Mangum*, 163 Ariz. 329, 332, 788 P.2d 62, 65 (1989). By promptly filing of its Motion to Dismiss, the State demonstrated that it had no intention of waiving the notice of claim defense. The fact that the defense was first raised by motion rather than by supplemental disclosure is legally insignificant. To argue otherwise is to elevate form over substance.

Also, because the time to cure a deficient Notice of Claim has already expired, Plaintiffs cannot argue prejudice from the timing of the State's Motion to Dismiss. If Plaintiffs did not comply with the requirements of the claim statute, their claim is barred. Furthermore, the defense of failure to state a claim for relief is so basic that it cannot be waived. *Mallamo v. Hartman*, 70 Ariz. 420, 422, 222 P.2d 797, 798 (1950). In fact, the Court can raise the issue sua sponte at trial even though the issue has not been listed in the pretrial statement. *Zuniga v. City of Tucson*, 5 Ariz.App. 220, 223-24, 425 P.2d 122, 124-25 (1967).

B. There Is No Merit to Plaintiffs' Claim That the State Had Sufficient Facts to Evaluate Damages.

1. The Decedent's ValueOptions Records, Which Were Not Attached to or Incorporated By Reference Into the Notices of Claim, Do Not Supply the Requisite Supporting Facts for Plaintiffs' Settlement Demand.

Even though the Notices themselves fail to show that Claimants suffered actual injury resulting from the Decedent's death, Plaintiffs argue that because the Decedent was