JET NO. 6

ARIZONA COURT OF APPEALS

DIVISION ONE

HAVASUPAI TRIBE of the Havasupai Reservation, a federally-recognized Indian Tribe, Plaintiff-Appellant, v. ARIZONA STATE UNIVERSITY BOARD OF REGENTS; THERESE ANN MARKOW; KEVIN ZUERLEIN Defendants-Appellees.	No. 1 CA-CV 07-0454 Maricopa County Superior Court No. CV2005-013190

JOINT ANSWERING BRIEF

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STATEMENT OF THE CASE

The Havasupai Tribe appeals from summary judgment in its lawsuit against public entities and public employees based on its failure to comply with Arizona's notice-of-claim statute, A.R.S. § 12-821.01. The Tribe alleged generally that then-University of Arizona Professor Therese Ann Markow had persuaded tribal members to give blood samples for her research and then had used those blood samples for purposes far exceeding the scope of the permission given by the members. (R.A. 3, 4, 16.)

This is the Tribe's separate appeal of a case that was consolidated in the trial court with another, similar, suit filed by individual members of the Tribe. After Judgment was entered against the individual Plaintiffs in that action—also on notice-of-claim statute grounds—they appealed, and that appeal has been docketed in this Court. *Tilousi v. Arizona Board of Regents*, No. 1 CA-CV 07-0801 (this Brief will refer to the individual Plaintiffs as "Tilousi" except where necessary to distinguish the individual Plaintiffs from one another).

The case has a complex procedural history. It began when Tilousi filed her Complaint in the Coconino County Superior Court naming numerous Defendants. (R.A. 1.) The Tribe soon filed its own Complaint. (R.A. 3A, 16.) It also named

numerous Defendants. In addition to the Arizona Board of Regents[1] (ABOR), it sued Professor Therese Ann Markow, among others. The Plaintiffs then filed amended Complaints (R.A. 4 [Tilousi], 16 [Tribe].) The Board of Regents appeared and removed the case to federal court. (R.A. 21.) After some proceedings there, the case was remanded to Coconino County Superior Court. (R.A. 27.) The superior court consolidated the cases, and later transferred venue to Maricopa County. (R.A. 42–44.[2])

ABOR and Professor Markow then moved for summary judgment against the Tribe. (R.A. 158, 162.) The court granted the Motion and entered Judgment on April 30, 2007, which it did not certify final under Civil Rule 54(b). (R.A. 195 [Appendix N].) The Tribe filed its Notice of Appeal on May 24, 2007. (R.A. 202.) The Appellees moved to dismiss the appeal. (Motion filed July 23, 2007.) While that Motion was pending, the superior court entered Judgment against Tilousi. (R.A. 221.) This Court therefore concluded that the Judgment against the

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[1] The Complaint actually named the "Arizona State University Board of Regents." By order dated November 14, 2007, this Court deferred ruling on the Arizona Board of Regents' motion to correct the caption until it rules on Zuerlein's Motion re: Status of Appeal.

[2] The cases were consolidated in two separate orders entered on July 12, 2007. The index of record lists three orders with that date—R.A. 42, 43, 44—but that appears to be an error. The next item in the record after the July 12, 2007 Orders is an Order dated August 4, 2007, transferring venue to Maricopa County, which the Appellees surmise is R.A. 44.

Tribe was final, giving the Court jurisdiction under A.R.S. § 12-2101(B). (Order dated September 18, 2007.)

STATEMENT OF FACTS

I. Allegations of the Complaint.

The controversy surrounds research that Professors Markow and Martin, among others, did in connection with the Havasupai people. In the operative pleading, the Second Amended Complaint, the Tribe alleged generally that Professor Markow obtained blood and handprint samples for Tribal members under false pretenses and used them for purposes beyond the scope of the permission given. (R.A. 75 [Opening Brief Appendix H].) The following are allegations taken from the Second Amended Complaint.

In 1989, ASU Professors Martin and Markow designed a research project to study diabetes among the Havasupai people (the "Diabetes Project"). (*Id.*, ¶ 27.) Martin and Markow discussed using Havasupai blood samples to study schizophrenia, but neither the Tribe nor its people were informed that blood samples would be used for any purpose other than the diabetes study. (*Id.*, ¶¶ 29, 73.)[3]

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[3] While the issues on appeal do not involve the merits of the Tribe's claim or the truth of its allegations, it is noteworthy that this very basic part of the Plaintiffs' claims does not go unimpeached. In Motions for Summary Judgment against both the Tribe and Tilousi, Dr. Markow testified by Declaration that study participants were informed that the research had a wider purpose: they were read a script that included the following statement:

(continued) . . .

Professors Martin and Markow presented the Diabetes Project to the Tribal Council. (*Id.*, ¶ 30.) Under the project, Markow and Martin or their agents would reside in Supai and take as many blood samples as possible. (*Id.*) They misinformed the Council that that the only purpose was a study to help address diabetes among the Havasupai, when in fact they intended to use the samples for other purposes, which they knew would be harmful to the Tribe and its members. (*Id.*) Before Martin and Markow presented their proposal to the Tribal Council, Markow—without the knowledge of the Tribe or its members—had applied for a grant to study schizophrenia among Tribal members. (*Id.*, ¶ 33.)

Based on Martin's and Markow's representations, the Tribe agreed to the Diabetes Project and allowed them to use its health center. (*Id.*, ¶ 31.) In exchange, ASU allowed Tribal members to attend ASU classes for free. (*Id.*, ¶ 32.)

. . . (continued)

> We are conducting research to try to identify factors that cause some of the health problems experienced by the Havasupai and other Native American peoples. *Many of these diseases, such as diabetes, schizophrenia, depression,* are complicated and so we try to look at as many factors as possible. There may be causes that are passed down in families through genes and there may be causes also from different lifestyles and from the environment. Risk factors for many diseases that occur in families can sometimes be identified by tests on genetic material from the blood.

(R.A. 69, Ex. A, ¶¶ 6–8, and Ex. C; R.A. 70, Ex. A, ¶¶ 6–8, and Ex. C [emphasis added].)

For several years, Martin and Markow and others collected blood samples from many Tribal members without their informed consent. (*Id.*, ¶¶ 34, 35, 61, 73.) In conducting the project, the researchers failed to adhere to proper protocol and violated federal regulations. (*Id.*, ¶¶ 36–45, 48.) They mishandled blood samples, in the process losing or destroying some and allowing their wholesale transfer to other laboratories and universities. (*Id.*, ¶¶ 46, 47.) The samples were used in many unauthorized studies, leading to the publication of many papers, articles, and dissertations on such non-diabetes topics as schizophrenia, inbreeding, and ancient human migration from Asia to North America. (*Id.*, ¶¶ 49, 50, 60.) The migration studies are incompatible with Havasupai religion and culture, a central tenet of which is that the Havasupai people arose from the Grand Canyon. (*Id.*, ¶ 49.) Professors Markow and Zuerlein conducted some of those unauthorized studies, which included the unauthorized viewing of medical records of Tribal members. (*Id.*, ¶ 50.) When Professor Markow left ASU for UA, she took samples with her, where she conducted further unauthorized research and published other papers unrelated to diabetes. (*Id.*, ¶ 59.)

The Defendants also collected numerous handprints from Tribal members, without informed consent, and misrepresented that they would be used in the diabetes study, when in fact they were used in a study of inbreeding. (*Id.*, ¶¶ 51, 61.) This was also done in violation of protocol and federal regulations. (*Id.*)

The Tribe alleged that "ABOR created, permitted and allowed a systemic permissive environment for professors, graduate students and staff to abuse their authority, misuse state-issued property, and bypass laws and regulations to violate the rights of the TRIBE and its Members" (*Id.*, ¶ 52), in violation of protocol and federal regulations (*Id.*, ¶¶ 54–57).

Tribal member Carletta Tilousi first learned on February 27, 2003, that the blood samples might have been misused. (*Id.*, ¶ 64.) She soon informed the Tribal Council, which made an inquiry to ABOR, which in turn instigated an independent investigation by attorney Stephen Hart. (*Id.*) The Tribe and Tribal members requested that their samples be returned, but that did not occur. (*Id.*, ¶ 74.)

II. The Notice(s) of Claim and Events Surrounding Them, and the Filing of This Suit.

On April 29, 1997, Professor Martin wrote a letter to the Havasupai Tribal Counsel concerning the Diabetes Project. (R.A. 157, Exhibit D [Appendix 1].[4]) In the course of summarizing the results of the project and his recommendations for future work in controlling diabetes among the Havasupai people, Professor Martin alluded to the fact that the blood samples were being used for studies other than diabetes:

---

[4] The Opening Brief has Appendices A–W. Appendices attached to this Brief will be numbered.

> Dr. Therese Markow, her colleagues and students analyzed the 217 blood samples to look for any genetic factors that might pre-dispose Havasupais to the disease. In particular, she looked at HLA-A2, which in Pimas (Akimel Oodham) is supposedly associated with getting diabetes early in life, and at genes controlling the mechanisms which affect insulin secretion. They did not find HLA-A2 to be associated with diabetes and found that most Havasupais had the same genes (paper attached). Some other genes suspected to underlie diabetes have also been studied in the Pimas and Dr Markow and her colleagues were able to compare the Havasupai for two of these genes as well. Glucose transporter-2 and glucokinase genes show fewer genetic differences in Havasupais than in Pimas. Low genetic variation became evident for the other genes as well when a graduate student of Dr. Markow, Chris Armstrong, looked at the genes controlling dopamine receptors. *Scientists study dopamine receptors because of their possible role in medical problems such as depression, schizophrenia, and movement control. Because Dr. Markow is well known for her work on inherited diseases such as schizophrenia, we were able to get funding for the dopamine receptor research which also paid for blood sampling for the diabetes work.* Because Havasupais indicated in their conversations with Dan Benyshek ("the tall man") and me that they were not interested in *additional* behavioral medicine research, Dr. Markow did not go beyond research examining the level of variation in these genes in Havasupai.

(*Id.* at 2–3 [emphasis added].)

According to Michael C. Shiel, the Tribe's attorney, at a Tribal Council meeting on March 14, 2003, Professor Martin "advised the Council that he thought ASU may have mishandled Havasupai blood samples." (R.A. 176A,[5] Exhibit A, ¶

[5] The Tribe's Counter-Statement of Facts in Opposition to Motion for Summary Judgment does not appear in the index of record. Document No. 176 is the (continued) . . .

3 [Appendix D].) On April 9, Shiel met with Nancy Tribbensee, ASU Deputy General Counsel, who committed to an internal investigation of Professor Martin's concerns. (*Id.*, ¶ 4.)

The Tribe demonstrated its awareness of the claims raised in this suit in May 2003. On May 8, the Tribal Counsel approved a Havasupai Banishment Order:

> 1. In 1990, an Arizona State University (A.S.U.) Research Professor requested that Havasupai tribal members donate blood for a research project at A.S.U. to be called "Medical Genetics at Havasupai." A.S.U. told tribal members that the project would invoke community-based diabetes education/awareness, diabetes screening/testing, and diabetes research.
>
> 2. A.S.U. told Havasupai members that possible benefits of donating blood would include "better understanding and treatment of diseases in my family and tribe" and that there were "no alternative procedures available for this study."
>
> 3. The Havasupai members who donated blood gave their consent for A.S.U. to conduct the research study based on these and other commitments by A.S.U.
>
> 4. The Havasupai Tribe has recently been informed by reliable sources that Havasupai blood collected by A.S.U. has been distributed to others for research, and that research may have been conducted on Havasupai blood, by Arizona State University and by others, for purposes unrelated to diabetes or any other medical disorder, all in violation of the consent given by Havasupai members.

. . . (continued)

Tribe's Response to the Motion for Summary Judgment. This Brief will refer to the associated Statement of Facts as R.A. 176A.

5. The Havasupai Tribe has demanded that A.S.U. disclose to the Tribe all of its actions regarding Havasupai blood and stop all unauthorized experimentation on Havasupai blood, but A.S.U. has failed to disclose to the Tribe *any information* about where A.S.U. distributed the blood and the purposes for all research.

NOW, THEREFORE, PURSUANT TO ARTICLE V, SECTION 1 OF THE HAVASUPAI CONSTITUTION, THE HAVASUPAI TRIBAL COUNCIL FINDS,

1. The presence of Arizona State University on the Havasupai Reservation has led to an invasion of the Tribe's rights to cultural privacy, and therefore has been and may in the future be injurious to the Havasupai People.

2. Arizona State University, its Professors and employees are, from this date forward banished from the Havasupai Reservation.

3. Professors and employees of Arizona State University who enter the Havasupai Reservation shall be deemed in trespass, in violation of federal and tribal law, and shall be subject to arrest and prosecution by the United States.

(R.A. 176A, Exhibit A, Exhibit 2 [Appendix 2] at 1–2.) Tribal Chairman Don Watahomigie certified that the "Banishment Order was approved May 8, 2003, at a Special Tribal Council meeting held in Supai, Arizona." (*Id.* at 2.)

After issuing its banishment order, the Tribe planned a news conference for May 15, 2003. (Appendix D, ¶ 9.) Shiel drafted a media advisory. (*Id.*, ¶ 10.) Milton Glick, ASU Vice-President and Provost, spoke with Shiel several times by telephone, asking whether ASU could do anything to make the Tribe call off the news conference. (*Id.*, ¶ 9.) On May 13, Tribbensee sent a fax Shiel stating that an

investigation had been begun on Professor Martin's concerns about the potential misuse of the samples. (*Id.*, ¶ 11.) She stated that "Dr. Markow confirm[ed] that she did not authorize any research use of samples sent to Stanford or La Roche (but we are still investigating to determine if further unauthorized use may have been made of these samples, as alleged)." (*Id.*) A few hours later, ASU General Counsel Paul Ward sent Watahomigie a fax that memorialized ASU's proposal to pay for an external authority to investigate what had happened. (*Id.*, ¶ 12.)

On May 14, 2003, Havasupai Tribal Chairman Don Watahomigie faxed a letter to Glick. (R.A. 157, Exhibit G.) The letter—on Havasupai Tribal Counsel stationery—accepted ASU's proposal and clarified the Tribe's requirements as to the investigation. (*Id.* at 1–2.) The attached media advisory—on the stationery of a public-relations firm—spoke of a planned news conference to discuss the "unauthorized usage of blood samples taken by Arizona State University researchers from an Arizona Indian tribe" and noted that blood samples had been used for unauthorized purposes. (*Id.*) The Tribal Counsel met on May 14 and decided not to hold the news conference and not release the media advisory. (R.A. 176A, Exhibit A, ¶ 22.)

On May 15, 2003, ASU and the Tribal Counsel entered into a formal agreement to conduct an investigation. (Appendix D, ¶ 26.) The purpose was to discover "the circumstances surrounding the collection of blood samples and other

research data from members of the Havasupai Tribe and any and all subsequent uses of the samples or their derivatives and other research data for research or other purposes." (R.A. 176A, Exhibit 6 to Exhibit A.) Ward signed the agreement as Counsel for ASU and the Board of Regents. (Appendix D, ¶ 26.) On May 30, Ward—again acting as counsel for ASU and the Board of Regents—hired attorney Stephen Hart to conduct the investigation. (Id., ¶ 27.)

On September 5, 2003, Hart made a preliminary report on the status of his investigation at a meeting held Shiel's office, which Hart, Ward, and Assistant Attorney General Richard Albrecht also attended. (*Id.*, 29.) Following the preliminary report, on September 8, 2003, the Tribe's attorneys made their first attempt to comply with the notice-of-claim statute in a letter from Shiel addressed to Attorney General Terry Goddard, ASU President Michael M. Crow, and Professor Markow, which stated:

> This notice of claim ("Notice") is filed pursuant to A.R.S. § 12-821.01(A) by the Havasupai Tribe on its own behalf and as *parens patriae* on behalf of all members of the Tribe who allowed Arizona State University, its employees and agents ("ASU") to draw their blood during the approximately period 1990-1994, and for whom no other proper and timely notice of claim has been filed. The Tribe and its member–donors have been injured by the actions and inaction of ASU and certain of its employees and agents. The Tribe and its member donors claim that ASU, its employees and agents, the Arizona Board of Regents, and certain third party institutions are liable for causing such injuries.

A. *Factual basis upon which liability is claimed.*

In 1990, ASU contacted the Havasupai Tribal Council seeking the Council's agreement to permit ASU to come to Supai Village on the Havasupai Reservation to conduct a diabetes education, nutrition and genetics research project ("Project"). ASU requested that Havasupai tribal members donate blood for diabetes research purposes. ASU advised the Havasupai Tribal Council in writing:

> "The blood work . . . would provide baseline data on blood sugar and other relevant variables and perhaps allow the identification of genetic markers which could then be used to identify and warn people that they are susceptible before they get the disease. This work, too, is best done in close cooperation with tribal members . . ."

Without ASU requesting or obtaining the consent of the Havasupai Tribe or any member–donor, and without informing the Tribe or any donor, ASU conducted genetics experiments on the Havasupai blood samples or derivatives from the samples ("blood samples") for purposes unrelated to diabetes. The experiments generated private genetic data and other private information from the Havasupai blood samples. ASU had promised the Tribe and member–donors that it would keep Havasupai donors' names and identities confidential. The papers identified the data as being derived from Havasupai tribal members.

ASU advised the Tribe and tribal members who donated blood that the diabetes research Project would be conducted entirely at ASU. Without requesting or obtaining the consent of the Havasupai Tribe or any member–donor, and without informing the Tribe or any donor, ASU distributed Havasupai blood samples to the University of Arizona, to Stanford University, to the University of California–Berkeley, and to Roche Molecular Systems, Inc. ("third party institutions"). Some or all third party institutions still have possession of the Havasupai blood samples.

These third party institutions, in turn, performed additional genetics experiments on the Havasupai blood samples provided by ASU. These experiments were conducted without ASU or any third party institution requesting or obtaining the consent of the Havasupai Tribe or any member–donor and without informing the Tribe or any donor. The experiments generated private genetic data and other private information from the Havasupai blood samples.

Without ASU or any third party institution requesting or obtaining the consent of the Havasupai Tribe or any member–donor, and without informing the Tribe or any donor, all third party institutions published papers or made public oral presentations which disclosed private genetic data and other private information derived from Havasupai blood samples. All such papers and presentations identified the data as being derived from Havasupai tribal members.

ASU distributed Havasupai blood samples to a third party institution in 1992, without requesting or obtaining the consent of the Havasupai Tribe or any member–donor. Thereafter, ASU continued to encourage the Tribe and tribal members to participate in the diabetes Project and ASU continued to draw blood from tribal members through 1994, without disclosing that it had distributed, and intended to continue distributing, Havasupai blood samples to third party institutions.

ASU misrepresented to the Tribe and member–donors the purpose for which Havasupai blood was requested, the purpose of ASU's genetics experiments, who would have access to and possession of the blood samples, who would conduct experiments on the blood samples, who would publish data derived from the blood samples, the extent to which ASU would maintain the confidentiality of Havasupai donors' names and identities, and the location where the blood samples would be maintained. These misrepresentations, among others, induced the Tribe to participate and consent to ASU conducting the Project and induced member–donors to consent to ASU taking their blood.

ASU violated its agreement with the Tribe and with member donors.

ASU took blood without informed consent.

ASU breached its duties to the Tribe and member–donors.

ASU's actions have invaded the personal privacy of Havasupai tribal members and the cultural and religious privacy of the Havasupai Tribe.

B. *Amount for which the claim can be settled.*

The Havasupai Tribe does not know all of the facts about what ASU has done with the Havasupai blood samples since ASU removed them from Supai Village. The Tribe has requested this information from ASU. ASU has not disclosed all such facts. Therefore, this Notice is based on the best available information. At this time, however, the Tribe is not sufficiently informed to set an amount for which the Tribe's and member–donors' claims can be settled. After ASU provides sufficient facts about what ASU and others have done with Havasupai blood samples, the Tribe will amend or supplement this Notice and provide a settlement figure.

(R.A. 78, Ex. D [Appendix A].)

Hart provided an updated report on September 22, 2003, again at a meeting in Shiel's office with Ward, Hart, and Albrecht in attendance. (Appendix D, ¶ 31.) On October 24, a settlement meeting took place in Flagstaff, which Hart, representatives of the Tribe, and the State attended. (*Id.*, ¶ 35.) In attendance for the Tribe were Shiel and members of the Havasupai Tribal Counsel; in attendance on the other side were Glick, Ward, Albrecht, Alexander Dreier, a private attorney also representing the Board of Regents, and Michelle Wilkerson of State Risk Manage-

ment. (*Id.*, ¶ 35.) Ward held himself out as representing ASU and the Board of Regents, while Albrecht was understood to represent the Board of Regents and Risk Management. (*Id.*, ¶ 40.)

Hart presented his final report on December 23, 2003. (*Id.*, ¶ 18). On December 30, 2003, a meeting took place at Risk Management's offices, with Shiel, Albrecht, Ward, Wilkerson, and others in attendance. (*Id.*, ¶ 39.) After Hart issued his final report, the Tribe's attorneys attempted to supplement their notice of claim with a letter from attorney Robert A. Rosette dated March 5, 2004, addressed to Attorney General Terry Goddard, ASU President Michael M. Crow, and Professor Markow. (R.A. 78, Ex. C [Appendix C].) It claimed that the Tribe remained ignorant of some of the facts, but nonetheless for the first time stated a specific settlement amount:

> The Tribe has not had the opportunity to review the voluminous Investigative Report Concerning the Medical Genetics Project at Havasupai prepared by Stephen Hart and Keith Sobraske (the "Hart Report"), which was only completed in late December 2003, and to take other steps to inform itself about the true facts and circumstances of ASU's misconduct. However, ASU has still not disclosed all of the relevant facts, including the whereabouts of all of the Havasupai blood and genetic material taken from tribal members and all of the uses to which such blood and genetic materials have been put. Nevertheless, the Tribe, in compliance with A.R.S. § 12-821.01(A) hereby notifies ASU that it is willing to settle all claims for the sum certain of $50 million. The Tribe believes that this amount would be adequate to compensate the Tribe and those individual members for whom the Tribe is acting *in*

> *parens patriae* for the litany of injuries inflicted on them by ASU, and to punish ASU for its wrongful conduct.

(R.A. 78, Ex. C [Appendix C].)

On March 31, 2004, attorney Rosette hand-delivered to the Attorney General yet another letter, which was not dated and was addressed only to the Attorney General, purporting to be "merely a brief summary of events known to the Havasupai Tribe relating to this matter" and "meant to provide enough facts to satisfy a notice of claim as provided in Ariz. Rev. Stat. § 12-821.01." (R.A. 78, Ex. E [Appendix 3].) It reiterated the $50-million settlement amount for all claims against all parties. (*Id.* at 1.) It described the Hart investigation and report, repeated allegations from the previous letters, and warned that "[t]he Havasupai Tribe will seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under applicable causes of action." (*Id.* at 2.) It demanded

> that the University of Arizona immediately discontinue all use and/or transfer of Havasupai blood samples, data and related information. It is further demanded that the University of Arizona locate, secure, and provide all information regarding possession use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writing, and other related documents or evidence. It is also demanded that the University pay for all damages, costs and attorneys' fees caused by its conduct.

(*Id.* at 3.)

On March 12, 2004, the Tribe filed its Complaint in Coconino County Superior Court. (R.A. 3A [Appendix E].)

ISSUES PRESENTED FOR REVIEW

This appeal concerns the notice-of-claim statute, which applies to claimants planning to sue public entities and public employees and requires them to file a proper notice of claim within 180 days after their causes of action accrue. The appeal raises two main issues concerning the statute:

1. Was the Tribe's notice of claim filed late?

2. Was the Tribe's notice of claim insufficient because it lacked facts that described the Tribe's injuries and supported the $50 million settlement amount?

The Tribe's response to the Appellees' notice-of-claim defense raises two issues:

3. Did the Appellees waive the defense?

4. Were the Appellees estopped from asserting the defense?

In addition to the above issues, the appeal raises an additional issue with respect to the Tribe's claims against Professor Markow:

5. Did the Tribe's failure to state a separate settlement sum applicable to its claims against Professor Markow bar its claims against her?

ARGUMENT

I. The Trial Court Properly Granted Summary Judgment Because the Tribe Did Not Comply with the Notice-of-Claim Statute.

A. Standard of Review.

This Court reviews the grant of summary judgment de novo; it views the facts, and the reasonable inferences from them, in the light most favorable to the party opposing the motion. *Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, 248, ¶ 7, 92 P.3d 876, 878 (App. 2004). It determines whether the trial court properly applied the law to the undisputed facts, *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 498, ¶ 14, 88 P.3d 565, 568 (App. 2004), to determine whether the movant was entitled to judgment as a matter of law, Ariz. R. Civ. P. 56(c)(1).

B. The Tribe Did Not Properly and Timely File Its Notice of Claim.[6]

Claimants who plan to sue a public entity or public employee must file a notice of claim within 180 days of the accrual of the cause of action:

> 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

[6] Although the trial court did not decide this issue, this Court may properly consider it because ABOR argued and supported it in the Motion for Summary Judgment. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 403, ¶ 18, 10 P.3d 1181, 1190 (App. 2000).

> 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.

A.R.S. § 12-821.01(A). Compliance with the claim statute is mandatory; a failure to comply bars the claim: "Persons who have claims against a public entity or a public employee shall file claims . . . . 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." A.R.S. § 12-821.01(A); *see Deer Valley Unified Sch. Dist. v. Houser*, 214 Ariz. 293, 299, ¶ 24, 152 P.3d 490, 496 (2007) (directing trial court to dismiss action where plaintiff's claim did not satisfy the statute). Claim statutes benefit both governments and claimants, and a majority of states have adopted notice of claim requirements similar to those found in Arizona's statute. *See Felder v. Casey,* 487 U.S. 131, 157, 108 S. Ct. 2302, 2317 (1988) (O'Connor, J. dissenting) (noting that 37 other states had notice-of-claim statutes).

For purposes of the statute, "a cause of action accrues when the damaged party [1] realizes he or she has been damaged and [2] knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12-821.01(B). This definition of accrual is designed to be consistent with the common-law accrual date for statutes of limitations. *Stulce v. Salt River Project Agric. Improvement & Power Dist.,* 197 Ariz. 87, 90, 3 P.3d 1007, 1010 (App. 1999). A plaintiff need not know all the facts and

details underlying a claim to trigger accrual. *Doe v. Roe,* 191 Ariz. 313, 323, 955 P.2d 951, 961 (1998). It is enough that a claimant realizes that he has been damaged and that he knows or reasonably should know what caused the injury. *Id.*

The heart of each of the Tribe's allegations is that it approved use of blood samples for diabetes research but was deceived about the intended use for non-diabetes research, and that it suffered a loss because it could not negotiate compensation for the use of Tribe members' blood for non-diabetes purposes. (Appendix D.) The Tribe first realized its claimed injury when it received a letter from ASU Professor John Martin, dated April 29, 1997. (R.A. 157, Exhibit D [Appendix 1].) That letter informed the Tribe that researchers had studied materials derived from the Tribe members' blood "because of their possible role in other medical problems such as depression, schizophrenia, and movement control" and that funding had been obtained for collecting the blood samples as a result of Dr. Markow's "work on inherited diseases such as schizophrenia." (*Id.* at 2–3.) This letter informed the Tribe that its members' blood had been studied for non-diabetes research; therefore, the Tribe realized it had been damaged and it knew who the researchers were who had caused the damage. Thus, the Tribe's cause of action accrued around April 29, 1997. The Tribe's first attempt at a notice of claim—its letter of September 8, 2003 (Appendix A)—was filed years too late.

But even if Dr. Martin's letter was insufficient notice for the cause of action to accrue in 1997, there can be no doubt that accrual had occurred by May 8, 2003 at the very latest. On that date, the Tribe issued the Banishment Order, signed by the Chairman of the Havasupai Tribal Council, after a Tribal Council meeting at which a quorum was present, which set forth the Tribe's full understanding of the facts and its realization of its claimed injury. (Appendix 2.) The Banishment Order described the ASU research project and the Tribe's recent understanding from "reliable sources" that

> Havasupai blood collected by A.S.U. has been distributed to others for research, and that research may have been conducted on Havasupai blood, by Arizona State University and by others, for purposes unrelated to diabetes or any other medical disorder, all in violation of the consent given by Havasupai members.

(*Id.* at 1.) The Banishment Order states that the "presence of Arizona State University on the Havasupai Reservation has led to an invasion of the Tribe's rights to cultural privacy, and therefore has been and may in the future be injurious to the Havasupai People." (*Id.*) The Banishment Order banishes all ASU professors and employees from the Havasupai Reservation from May 8, 2003 forward. (*Id.* at 2.) The Order demonstrates that the Tribe knew that it had been injured and knew who had caused that injury by May 8, 2003, at the latest.

If May 8, 2003, was the accrual date, the Tribe had to file its Notice of Claim by November 8, 2003. The Tribe submitted three letters that it argues con-

stituted its notice of claim. (Appendices A, C, 3.) But only the first, dated September 8, 2003, was filed within the statutory deadline. (Appendix A.) The second letter was dated March 5, 2004 (Appendix C), well outside the 180-day statutory period, and the third—an undated letter that the Attorney General's Office received on March 31, 2004 (Appendix 3)—was even later. Thus, even allowing for the generous accrual date of May 8, 2003, the Tribe's compliance with the notice-of-claim statute rises and falls with its first letter.

The Tribe's first letter is insufficient because it was not properly served. (Appendix A.) It was not addressed to ABOR, it did not assert a claim against ABOR, and it was not served on the proper person. Section 12-821.01(A) requires the claimant to file the notice of claim "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." A.R.S. § 12-821.01(A); *see Falcon ex rel. Sandoval v. Maricopa County,* 213 Ariz. 525, 144 P.3d 1254 (2006) (notice of claim was deficient because not properly served on all members of the county board of supervisors, as required by the rules of civil procedure). Civil Rule 4.1(h), (i), and (j) identify the proper persons to be served when suing governmental entities. When the State is the defendant, service is to be made on the Attorney General. Ariz. R. Civ. P. 4.1(h). But the State is not the Defendant here, ABOR is, so either Rule 4(i) or (j) applies. They state:

> **(i) Service of Summons Upon a County, Municipal Corporation or Other Governmental Subdivision.** Service upon a county or a municipal corporation or other governmental subdivision of the state subject to suit, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof.
>
> **(j) Service of Summons Upon Other Governmental Entities.** Service upon any governmental entity not listed above shall be effected by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

Whichever subdivision applies, (i) or (j), the letter was not properly served because it was addressed to and served on only Terry Goddard, Michael Crow, and Dr. Therese Markow. (The same holds true for the second and third letters.) Because the letter was not served on an appropriate person for ABOR, it was not properly filed as to ABOR.

The September 8 letter also failed to satisfy the notice-of-claim statute because it did not contain a settlement sum—the Tribe expressly refused to provide a sum. (Appendix A.) Instead, under the heading "Amount for which the claim can be settled," the Tribe claimed that it did not know all the facts and stated that it was "not sufficiently informed to set an amount for which the Tribe's and member–donors' claims can be settled." (*Id.* at 3.) Thus, the Tribe expressly refused to follow the statutory mandate that it provide both a settlement sum and supporting

facts. Our supreme court recently made it clear that Arizona courts must demand strict compliance with the common-sense, threshold requirements of A.R.S. § 12-821.01: "Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements." *Deer Valley*, 214 Ariz. at 295, ¶ 6, 152 P.3d at 492 (quoting *Falcon*, 213 Ariz. at 527, ¶ 10, 144 P.3d at 1256). "The notice of claim statute is clear and unequivocal." *Id.* at 296, ¶ 9, 152 P.3d at 493. It states that a claim "*shall* also contain a *specific amount* for which the claim *can be settled* and the facts supporting that amount." *Id.* (quoting A.R.S. § 12-821.01(A) (emphasis added in *Deer Valley*)). It is no excuse for a claimant to assert the need to investigate a claim further or obtain more information. *See City of Tucson v. Fleischman,* 152 Ariz. 269, 273, 731 P.2d 634, 638 (App. 1986) (under excusable-neglect portion of predecessor statute, attorney not excused from filing notice of claim because of need for further investigation). The settlement sum and supporting facts do not have to be asserted with precision, but they do have to be provided in the notice of claim to preserve the claim for later proceedings.

Thus, the only notice of claim letter sent within the 180-day statutory period was not properly served and did not even attempt to set forth a settlement sum. The Tribe's claims against ABOR and Professor Markow were thus barred and summary judgment was proper.

C. Even if the Tribe Could Combine Its Letters into a Single Notice of Claim, It Still Did Not Comply with the Claim Statute Because Its Claim Did Not Contain Any Facts Supporting the Statement That It Would Settle for $50 Million Dollars.

The 1994 adoption of A.R.S. § 12-821.01 was the "most detailed effort by the Legislature to define the information necessary to provide a valid notice of claim." *Deer Valley*, 214 Ariz. at 298, ¶ 19, 152 P.3d at 495. In two separate sentences, the statute clearly sets out the information that must be in the notice of claim:

> 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). This plain language requires three categories of information: (1) facts identifying the basis upon which liability is claimed; (2) a specific settlement amount; and (3) facts supporting that amount. Claimants must strictly comply with the statutory requirements. In *Deer Valley*, the court explicitly rejected *Young v. City of Scottsdale,* 193 Ariz. 110, 114, ¶ 13, 970 P.2d 942, 946 (App. 1998), which had adopted a standard of reasonable compliance with the specific-sum requirement first established by *Hollingsworth v. City of Phoenix,* 164 Ariz. 462, 466, 793 P.2d 1129, 1133 (App. 1990):

> We reject and disapprove *Young*'s conclusion that the statute includes a reasonableness standard. First, as we discussed above, fundamental principles of statutory construction

> do not allow us to ignore the "clear and unequivocal language of the statute, which in this case requires that a "specific amount" be set forth. Contrary to *Young,* we are convinced that the Legislature intended the 1994 changes to establish specific requirements that must be met for a claimant to file a valid claim with a government entity.
>
> . . . We find nothing to suggest that the Legislature intended anything other than to clearly define the information needed in future claims. These statutory requirements are more specific than, and thus inconsistent with, the *Hollingsworth* reasonableness standard. To the extent that *Young* perpetuates the *Hollingsworth* reasonableness standard, it is irreconcilable with A.R.S. § 12-821.01(A). . . . Accordingly, contrary to the conclusion reached by the court of appeals in *Young,* we conclude that the 1994 amendment repeals, rather than codifies, the *Hollingsworth* standard.

Deer Valley, 214 Ariz. at 299, ¶¶ 21–22, 152 P.2d at 496 (quotation marks and citation omitted).

While strict compliance with the statutory requirements is necessary, the statute does not impose a particularly difficult or onerous burden on claimants:

> Compliance with this statute is not difficult; the statute does not require that claimants reveal the amount that 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.

Id. at 296, ¶ 9, 152 P.2d at 493. Thus, the statute does not require that claimants know all the facts or calculate with precision the amount they intend to demand at trial. *See Hernandez v. State*, 201 Ariz. 336, 340, 35 P.3d 97, 101 (App. 2001)

(noting that notice of claim merely serves "to preserve the claim for later proceedings"), *vacated on other grounds*, 203 Ariz. 196 , 52 P.3d 765 (2002).

Even if all three letters are considered as the Tribe's notice of claim, the trial court properly granted summary judgment because the Tribe did not provide facts supporting its $50 million settlement amount. The purposes of the notice of claim requirements are to "allow the public entity to investigate and assess liability, . . . permit the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting." *Falcon,* 213 Ariz. at 527, ¶ 9, 144 P.3d at 1256 (2006) (quoting *Martineau v. Maricopa County,* 207 Ariz. 332, 335-36, ¶ 19, 86 P.3d 912, 915-16 (App. 2004)). Requiring a factual foundation specifically explaining the settlement amount is essential to serve the important purposes of the notice of claim statute. To properly evaluate a case for settlement, a public entity must know both the amount for which the plaintiffs would be willing to settle and facts showing that the amount is reasonable. *See id.* (noting that the obligation to include facts supporting the settlement 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"). The factual foundation of the settlement amount "ensures that claimants will not demand unfounded amounts that constitute 'quick unrealistic exaggerated demands.'" *Id.* (quoting *Hollingsworth,* 164 Ariz. at 466, 792 P.2d at 1133).

In this case, the Tribe's second letter constituted its attempt to comply with the statutory requirement of stating a settlement amount. The first letter explicitly refused to state a settlement amount. (Appendix A at 3.) The second letter stated that the Tribe had reviewed the Hart Report and taken other steps to inform itself of the facts and that

> [T]he Tribe . . . hereby notifies ASU that it is willing to settle all claims for the sum certain of $50 million. The Tribe believes that this amount would be adequate to compensate the Tribe and those individual members for whom the Tribe is acting in parens patria for the litany of injuries inflicted on them by ASU, and to punish ASU for its wrongful conduct.

(Appendix C at 2–3.) Notably lacking are any facts explaining or supporting this sum. There was, therefore, no way for the Defendants to evaluate whether the sum was based in reality or whether it was actually what it appeared to be—an exaggerated and unsubstantiated amount.

The only statements in the third letter remotely related to damages provide:

> [The actions described in the letter have] violated the Havasupai Tribe's and tribal members' cultural, religious, and legal rights and have caused the Havasupai Tribe and its members severe emotional distress. The Havasupai Tribe and its members intend to pursue all relevant state and federal claims in this matter. The Havasupai Tribe will seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

(Appendix 3 at 2.) This letter provided no facts to support the $50 million settlement amount.

Thus, even taking all three letters into consideration as a unitary notice of claim, the Tribe did not satisfy the statutory requirement of supporting the settlement amount with facts.

The Tribe argues that its letters satisfy the statute because of their facts related to the alleged liability. (Opening Brief at 11–20.) This argument fails because, as noted above, the statute requires facts related to *both* liability *and* the settlement amount—two separate and distinct sets of facts. As the trial court properly concluded, the notice-of-claim statute must be interpreted so that every word, phrase, clause, and sentence is given meaning and so that no part is redundant. (R.A. 195 at 3–4 [citing *Williams v. Thude,* 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997)]). While the Tribe's letters provide information about the Defendants' alleged misconduct, they provide no information about how that conduct specifically injured the Tribe such that $50 million dollars would be required to settle the claim.[7]

---

[7] In support of its argument that their notices of claim were sufficient, the Tribe cites three memorandum decisions from the Federal District Court for the District of Arizona, mainly *Castaneda v. City of Williams*, 2007 WL 1713328 (D. Ariz. 2007), but also *Franklin v. City of Phoenix*, 2007 WL 1463753 (D. Ariz. 2007), and *Simmons v. Navajo County*, 2007 WL 1200940, 2007 U.S. Dist. LEXIS 30124 (D. Ariz. 2007). (Opening Brief at 17, 18, 20, 22, 23–25.) Citing these cases was improper and the Court cannot consider them. Unpublished memorandum decisions may not be cited as authority in Arizona courts: (continued) . . .

. . . (continued)

> Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review.

Ariz. R. Civ. App. P. 28(c). Rule 28(c) applies to all memorandum decisions, whether they emanate from Arizona state courts or other jurisdictions: "We find no reason for out-of-state memorandum decisions to be more citable than in-state memorandum decisions. We hold that ARCAP 28(c) applies to memorandum decisions from any court." *Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 589, ¶ 22, 12 P.3d 809, 814 (App. 2000). *Walden Books* is one in a long line of cases so holding. *See, e.g., Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n.3, 701 P.2d 1182, 1185 n.3 (1985) ("We will treat memorandum decisions from the federal district court the same as memorandum decisions of our state courts."); *Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, 273 n.6, 77 P.3d 444, 448 n.6 (App. 2003); *Asarco, Inc. v. Indus. Comm'n*, 122 Ariz. 241, 244, 594 P.2d 107, 110 (App. 1979) (citing State Bar of Arizona Ethics Opinion No. 78-4 (Jan. 30, 1978)), *superseded by statute on other grounds as noted in Aguiar v. Indus. Comm'n*, 165 Ariz. 172, 175, 797 P.2d 711, 714 (App. 1990).

The recent change in the Federal Rules of Appellate Procedure allowing citation of memorandum decisions in federal courts does not allow their citation in Arizona courts. The new rule provides that federal courts "may not prohibit or restrict the citation of federal judicial opinions, order, judgments, or other written dispositions that have been . . . designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." Fed. R. App. P. 32.1(a). This rule merely prevents the federal courts from barring the citation of unpublished decisions; it does not change unpublished decisions into published opinions. Thus, Arizona Appellate Rule 28(c) still applies and precludes citation of federal memorandum decisions, as interpreted in the cases cited above.

This Court should therefore not consider *Castaneda*, *Franklin*, or *Simmons*. The Court should be aware that there are other district-court decisions that disagree with *Castaneda* that the Appellees would cite if it were allowed.

The fact that the Tribe, in its last letter, noted broad damage categories it thought applicable to its claims is insufficient to satisfy the statute and serves to highlight the absence of supporting facts. The Tribe noted generally that it was seeking damages for severe emotional distress, as well as "compensatory, general, specific, punitive, and other relevant damages." (Appendix 3 at 2.) But the Tribe identified no medical expenses that any Tribal member had incurred. Nor did it identify any emotional injury that any Tribal member had suffered, such as inability to attend to personal affairs, sleeplessness, or lost wages as a result of the Defendants' conduct. Generally stating an entitlement to damages by listing broad categories does not state facts and is therefore insufficient to satisfy the statute. The letters did not contain facts that might illuminate the nature and extent of the injuries that the Tribe claimed.

The Tribe's letters did not satisfy the requirements of the notice-of-claim statute because they provide no facts to support the settlement sum of $50 million dollars. The superior court properly granted summary judgment on this basis.

D. The Superior Court Properly Determined That Waiver and Estoppel Did Not Bar Assertion of the Notice-of-Claim Defense.

1. There was no waiver.

The trial court properly determined that ABOR did not waive its notice-of-claim defense because it asserted the defense in its Answer. (R.A. 156 at 2, ¶¶ 3–5; *id.* at 19, ¶¶ 137, 139 .) *See* Ariz. R. Civ. P. 8(b) (requiring the answer to "state

. . . the party's defenses to each claim asserted"); Ariz. R. Civ. P. 8(c) (requiring the answer to "set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense"); Ariz. R. Civ. P. 12(b) (requiring answer to set forth "[e]very defense, in law or fact, to a claim for relief"). No rule required ABOR to raise the defense in a motion filed before its Answer. Rule 12(b), which lists the defenses that must be raised in a pre-answer motion, does not include a defense under the notice-of-claim statute. Because the notice-of -claim requirements are essential and mandatory to the presentation of a valid claim, they cannot be waived simply by failing to assert them in pre-Answer motions. *See Pritchard v. State*, 163 Ariz. 427, 432–33, 788 P.2d 1178, 1183–84 (1990) (defense under notice-of-claim statute is properly raised in a motion to dismiss for failure to state a claim or a motion for summary judgment).

2. There was no estoppel.

Similarly, ABOR was not estopped from asserting the notice-of-claim statute as a defense. Like the statute of limitations, the notice-of-claim statute is subject to defenses like the statute of limitations. *Pritchard*, 163 Ariz. at 432, 788 P.2d 1183. The elements of estoppel include: (1) the defendant acted inconsistently with the defense; (2) the other party relied on the defendant's actions; (3) the other party suffered prejudice because of its reliance. *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 537–38, ¶¶ 11–13, 96 P.3d 530,

535–36 (App. 2004); *Honeywell, Inc. v. Arnold Constr. Co.*, 134 Ariz. 153, 158, 654 P.2d 301, 306 (App. 1982). "A defendant will be estopped from asserting the defense of the statute of limitations if by its conduct the defendant induces the plaintiff to forego litigation by leading plaintiff to believe a settlement or adjustment of the claim will be effected without the necessity of bringing suit." *Roer v. Buckeye Irrigation Co.*, 167 Ariz. 545, 547, 809 P.2d 970, 972 (App. 1990).

The Tribe argues that ABOR is estopped because it commissioned the Hart investigation. (Opening Brief at 35–36.) But commissioning an investigation is not inconsistent with insisting on a notice of claim. The investigation did not show that the Tribe had incurred $50 million in damages. With no citation of supporting facts, the Tribe asserts:

> The Tribe relied on the fact that Appellees had fully investigated the Tribe's claim when it incorporated the Hart Report by reference in its Supplement [the second letter]. In reliance upon Appellees acceptance of documents and information provided by the Tribe in settlement negotiations, the Tribe understood Appellees had received an abundance of factual information concerning its injuries.

(Opening Brief at 36 [footnote omitted].) The Tribe cites Opening Brief Appendix B as supporting the fact that it delivered documents to the Appellees. Nothing in that Appendix—or anywhere else in the record—establishes that the Tribe relied to its detriment on the Hart investigation or that it was induced not to file a notice of claim because ABOR had led it to believe that no notice was necessary. The

Tribe's failure to adduce evidence of reliance is fatal to its estoppel argument. *See Morgan v. City of Phoenix*, 162 Ariz. 581, 785 P.2d 101 (App. 1989) (plaintiffs' failure to produce evidence that they had "withheld filing a formal notice of claim in reliance on" the city's conduct defeated their estoppel argument).

The Tribe also points to several meetings, which it calls "settlement meetings," as constituting the estoppel. But the only facts in the record about those meetings is that they occurred and who attended them. (Appendix D, ¶¶ 29, 31, 35, 39.) Again, there are no facts showing any inconsistency between those meetings and asserting the notice-of-claim statute as a defense, nor are there any facts showing any detrimental reliance by the Tribe. In any event, the Tribe's inflated settlement sum—$50 million—shows that any settlement discussions would have been futile: the Tribe never gave the Defendants a reasonable sum to settle its supposed damages.

Finally, the Tribe asserts that the Risk Management office of the Arizona Department of Administration reviewed the Notice of Claim and associated information, "processed and considered the Tribe's claim," and "denied the amount demanded in the Supplement without objecting to the Tribe's notice letters or even requesting additional facts." (Opening Brief at 36.) The Tribe relies on Appendix D (a declaration by its former attorney Michael Shiel), but it simply does not back up this assertion. The cited pages (14 through 16), merely relate that ABOR's

attorney and an adjustor from Risk Management attended some meetings at which the Tribe's claims were discussed. There are no facts establishing that Risk Management actually processed the deficient claim, or that the attorney or adjustor did or said anything to induce the Tribe to refrain from filing a notice of claim.

In short, the Tribe fails to establish any facts that could support its estoppel argument. The trial court properly considered the notice-of-claim statute as a defense.

II. Summary Judgment in Favor of Appellee Professor Therese Markow Was Also Appropriate Insofar as the Tribe Asserted Discrete Claims Against Her Individually.

A. Standard of Review.

The standard of review stated in Section I(A) applies here as well.

B. The Tribe Did Not Comply with the Notice-of-Claim Statute with Respect to Markow.

In addition to the other reasons cited in this brief, summary judgment was also appropriate as to the claims asserted against Appellee Therese Markow because the Tribe failed to comply with its statutory duty, pursuant to A.R.S. § 12-821.01(A), to provide a separate notice stating facts supporting the "specific amount for which the claim[s] can be settled" against Appellee Markow. A recent decision by this Court confirms that the requisite notice and information supporting the amount must be given to both the employer and the employee. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 341, ¶ 25, 160 P.3d 223, 230 (App. 2007).

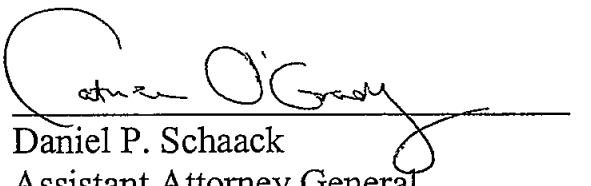
The failure to file an adequate separate notice to the employee results in automatic dismissal of any claim against the employee. *Id.* (citing *Salerno v. Espinoza*, 210 Ariz. 586, 588, ¶ 7, 115 P.3d 626, 628 (App. 2005)). Thus, because the Tribe's notice of claim did not list a separate and discrete amount sought against her and facts supporting that amount for the claims against her, summary judgment was mandated. *See Harris*, 215 Ariz. at 341, ¶ 25, 160 P.3d at 230*:* *Salerno*, 210 Ariz. at 588, ¶ 7, 115 P.3d at 628.

CONCLUSION

The Court should affirm the Judgment.

Respectfully submitted this 3rd day of December, 2007.

Terry Goddard
Attorney General



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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionally spaced type of 14 points or more, is double-spaced using a roman font, and contains 9,330 words.

Dated this 3rd day of December, 2007.

Daniel P. Schaack
Assistant Attorney General

CERTIFICATE OF SERVICE

Original and six copies hand-delivered
this 3rd day of December, 2007, to:

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APPENDIX

Appendix	R.A. #	Document
1.	157, Ex. D	Professor Martin's 4/29/1997 letter to Tribal Council
2.	176A, Ex A, Ex. 2	Banishment Order
3.	78, Ex. E	Tribe's third notice-of-claim letter, dated 3/31/2004

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April 29, 1997

Havasupai Tribal Council
Havasupai Tribe
Supai, AZ 86435

Dear Tribal Council Members,

This letter is to follow up on the report I gave you and the community several years ago. At that time the Council asked me to continue searching for additional funding so that we could continue and expand the Havasupai-ASU Diabetes project. Shortly after making that report serious illness in my family required my attention and for some time I was unable to do much concerning diabetes. This past year, however, I have been able to again turn my attention to the diabetes project. Here I want to bring you up to date on (1) what we have found, (2) the results of our attempts to slow down the progression of the disease and (3) the results of our efforts to find funding to support a program aimed at controlling the disease.

In the briefest terms, let me tell you that we tested the blood of 217 tribal members. Twenty-five previously had been diagnosed as diabetic and we found another 26 who were undiagnosed but whose blood sugars exceeded the normal range. We gave these results to each individual in their homes. One year after the beginning of the adult education and research program we re-tested 78 people. Normally, blood sugars increase as you age but in these cases more went down than went up and on average their glycolated hemoglobin score declined from 7.46 to 7.27. This indicates that with some effort people can get their blood sugar down.

We also did several diet studies and found that Havasupai women (the men would not participate) consumed 14 kilocalories per pound of body weight per day. This is not excessive but because many Havasupai women are very heavy they process more food and calories than do most people. This stresses the parts of the body that make insulin and, when combined with insulin resistance, can increase blood sugar and increase fat. Further, the make-up of the diet could be better. Women were low on vitamins and minerals and got too many of their calories (37 percent) from fats. That the people we retested mostly lowered their blood sugars means that they improved their diets and exercise some and/or were more religious about taking their diabetes medicines. We are including a paper detailing these findings.

As you know, virtually all scientists and medical doctors believe that you get diabetes when you have a complex of genes which pre-dispose you to the disease and then eat too many of the wrong foods (sugars and fats, and alcohol) and don't exercise enough. For this reason Dr. Therese Markow, her colleagues and students analyzed the 217 blood samples to look for any genetic factors that might pre-dispose Havasupais to the disease. In particular, she looked at HLA-A2, which in Pimas (Akimel Oodham) is supposedly associated with getting diabetes early in life, and at genes controlling the mechanisms which affect insulin secretion. They did not find HLA-A2 to be associated with diabetes and found that most Havasupais had the same genes (paper attached). Some other genes suspected to underlie diabetes have also been studied in the Pimas and Dr. Markow and her colleagues were able to compare the Havasupai for two of these genes as well. Glucose transporter-2 and glucokinase genes show fewer genetic differences in Havasupais than in Pimas. Low genetic variation became evident for the other genes as well when a graduate student of Dr. Markow, Chris Armstrong, looked at the genes controlling dopamine receptors. Scientists study dopamine receptors because of their possible role in other

medical problems such as depression, schizophrenia, and movement control. Because Dr. Markow is well known for her work on inherited diseases such as schizophrenia, we were able to get funding for the dopamine receptor research which also paid for blood sampling for the diabetes work. Because Havasupais indicated in their conversations with Dan Benyshek ("the tall man") and me that they were not interested in additional behavioral medicine research, Dr. Markow did not go beyond research examining the level of variation in these genes in Havasupai. Dr. Markow and I would be happy to further discuss the results and implications of all the genetic studies among Havasupai at any time in the future.

I believe that further genetic research on diabetes among the Havasupai may not be the best way to spend money and effort. One reason is that no one, including people working in populations with a good deal of genetic variation, has been able to isolate a complex or complexes of genes which are associated with a predisposition to get Type II diabetes. Further, among Pima people (Akimel Oodham) you are 33 times more likely to get diabetes if your mother has it then if she does not (paper attached). Among the Havasupais the difference is not this great but we found that when your father but not your mother has the disease you're no more likely to get the disease than if neither parent has it. Further, another student of Dr. Markow found that your chances of getting diabetes increase with the number of older brother and sisters you have (paper included). This occurs because maternal blood sugar increases with the mother's age and number of previous pregnancies and higher blood sugar levels in pregnant women raise the chances that their children will get diabetes. Studies in animals also show that even mildly high blood sugars in pregnant mothers will impair the ability of their children to produce the right amounts of insulin, especially when those children are fed a high calorie diet grow up and get pregnant.

All this suggests that the best way to reduce diabetes in the next generation is to focus on pregnant women. The Indian Health Service already does this but a program which reinforces and expands their existing efforts might really pay off. Such a program would involve near clinical control of blood sugars through carefully controlled diets, blood tests, and administration of medicine by trained (Havasupai) health aides working under the supervision of the doctor and a nutritionist. This program could go so far as to provide meals for pregnant women (and their families) and 3-4 blood tests every day to carefully monitor blood sugars.

Such a program would reduce the risks of sugar related birth defects as well as of diabetes in the children. It might also have a spin-off effect on the members of the women's families and others. There is even the potential that it might almost eliminate diabetes in the children and other descendants of the women who participate.

Before I begin to tell you why, let me qualify what follows by reiterating that almost all scientists continue to believe that diabetes starts when people with a complex of genes predisposing them to diabetes eat the wrong foods and don't exercise enough. However, recent work in England and Norway found that people got diabetes when their mothers were undernourished. Other work shows that high blood sugar in diabetic mother causes <u>their</u> children to be predisposed to getting diabetes. <u>In short, diabetes can begin if mothers are poorly nourished while pregnant.</u> This suggests that starvation in one generation followed by normal or sugar rich diets in the next generation can lead to the spread of diabetes (paper attached).

This is all highly suggestive because Indian people and the other people who have high rates of Type II diabetes (Australian aborigines, Polynesians, Melanesians, Africans moving to cities, Mexican-Americans, African-Americans) are all peoples who have been subjected to economic dislocations and sometimes outright starvation in the recent past. The Pimas starved

between 1870 and 1910 because the whites at Safford took all the water out of the Gila River. After 1910 diets improved and starting two generations later medical doctors began to notice diabetes which has gotten worse every generation since. The Havasupais suffered between 1895 and 1910 when ranchers and later the Park Service took the old hunting range and epidemics killed many people and disrupted farming and family life. If Havasupai women were short of protein (meat and beans) in this period, people born then would have been born with impaired insulin production and, maybe, livers which produced more blood sugar. As diets became richer in lard, sugar, refined flour and other bad but tasty and cheap foods, their blood sugars may have risen, especially in pregnancy. This would have resulted in damage to the pancreases of the offspring of these women, children born between 1915 and 1930, and then to the pancreases of the children (born 1925 to 1950) of those women.

This is incorrect - the would be incidence reduced -

All this suggests that the diabetes epidemic in Supai could be a function of the bad conditions of 1896-1910 followed by normal and high calorie diets. If gene complexes unique to diabetics are involved at all, for instance, genes for certain kinds of fat and low metabolic rates, their effects may be small relative to the effects of maternal blood sugars. Hence, if every Havasupai female who got pregnant kept their blood sugars in the normal range while pregnant, these considerations suggest that their children would not be predisposed to get the disease and their daughters' children would be at no more risk than would children of white people so long as nutrition in mothers was adequate.

Further still, even if there are as yet undiscovered genes which pre-dispose to diabetes, because the mothers' physical state is so overwhelmingly important in determining diabetic risk in their children, women can still radically reduce their chances that their children will get diabetes. For these reasons I suggest that if the Havasupai-ASU diabetes project is to go forward, it should

focus on pregnant women. Among other people with the disease or on the way to developing diabetes, the answer would be familiar: Watch your diet, exercise, take your medicine and follow the advice of the doctor. But for pregnant women it should be much more, with emphasis on detecting pregnancies very early, strict control of diets and medicines to the point of virtual clinically controlled meals, monitoring of blood sugars, and administering medicines by trained health workers, etc.

To date, the tribe and we at ASU have applied to the National Science Foundation, the National Institutes of Health, the Steele Foundation, the Robert Wood Johnson Foundation, and other private foundations for money to support a big expensive, multi-year prevention and research program with genetic research, blood testing, adult education and the development of a school curriculum which takes the best from modern science education and diabetes education and then uses local language, culture, and natural resources to ensure that Havasupai kids leave Supai well prepared in science and knowledgeable about diabetes. While our grant proposals have received complimentary reviews, we have not received the big multi-year grant we have been seeking. This lack of success and this new information on diabetes and mothers' health while pregnant suggest that a better course might be to prepare a smaller program which focuses on pregnant women. This could have spin-offs for other people who have the disease or are on their way to getting it, but it is the emphasis and focus on pregnant women which might be attractive to funding agencies.

I have some ideas on how such a program might be developed. For it to work over the long run, Havasupais would have to be employed to run it and tribal members along with a doctor and a nutritionist are the only people who would know how to make such a program work.

I would be happy to come to Supai to talk about these things if the tribe so desires. I'll wait a week or so after mailing this letter and then call the council to see if you want me to come down or provide more information.

Regards,

Dr. John F. Martin
Professor of Anthropology
Arizona State University

cc: Dr. Gilmore, IHS., Supai

HAVASUPAI TRIBAL COUNCIL
P.O. Box 10 • Supai, Arizona 86435 • (520) 448-2731

HAVASUPAI BANISHMENT ORDER

(2003-01)

ARIZONA STATE UNIVERSITY

1. In 1990, an Arizona State University (A.S.U.) Research Professor requested that Havasupai tribal members donate blood for a research project at A.S.U. to be called "Medical Genetics at Havasupai." A.S.U. told tribal members that the project would involve community-based diabetes education/awareness, diabetes screening/testing, and diabetes research.

2. A.S.U. told Havasupai members that possible benefits of donating blood would include "better understanding and treatment of diseases in my family and tribe" and that there were "no alternative procedures available for this study."

3. The Havasupai members who donated blood gave their consent for A.S.U. to conduct the research study based on these and other commitments by A.S.U.

4. The Havasupai Tribe has recently been informed by reliable sources that Havasupai blood collected by A.S.U. has been distributed to others for research, and that research may have been conducted on Havasupai blood, by Arizona State University and by others, for purposes unrelated to diabetes or any other medical disorder, all in violation of the consent given by Havasupai members.

5. The Havasupai Tribe has demanded that A.S.U. disclose to the Tribe all of its actions regarding Havasupai blood and stop all unauthorized experimentation on Havasupai blood, but A.S.U. has failed to disclose to the Tribe any information about where A.S.U. distributed the blood and the purposes for all research.

NOW, THEREFORE, PURSUANT TO ARTICLE V, SECTION 1 OF THE HAVASUPAI CONSTITUTION, THE HAVASUPAI TRIBAL COUNCIL FINDS,

1. The presence of Arizona State University on the Havasupai Reservation has led to an invasion of the Tribe's rights to cultural privacy, and therefore has been and may in the future be injurious to the Havasupai People.

2. Arizona State University, its Professors and employees are, from this date forward banished from the Havasupai Reservation.

3. Professors and employees of Arizona State University who enter the Havasupai Reservation shall be deemed in trespass, in violation of federal and tribal law, and shall be subject to arrest and prosecution by the United States.

C E R T I F I C A T I O N

Pursuant to authority contained in Article V, Section 1, of the Amended Constitution and Bylaws of the Havasupai Tribe of the Havasupai Reservation, approved by the voters on December 18, 1991, and approved by the Secretary of Interior on January 27, 1992, the foregoing Banishment Order was approved May 8, 2003, at a Special Tribal Council meeting held in Supai, Arizona at which a quorum was present.

HAVASUPAI TRIBAL COUNCIL

Don Watahomigie, Chairman

HAROLD A. MONTEAU [MT]
JOHN M. PEEBLES, P.C. [NE]
MICHAEL J. ANDERSON [CO, D.C.]
FRED ASSAM, P.C. [NE, ID]
CHRISTINA V. KAZHE [CA]
ROBERT A. ROSETTE, P.C. [AZ, CA, D.C.]
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DATE RECEIVED 3-31-04
TIME RECEIVED 12:53
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33
SIGNED

Attorney General's Office
MAR 31 2004
Executive Office

RECEIVED
2004 MAR 31 P 12:53
ATTORNEY GENERAL

VIA PERSONAL SERVICE

Terry Goddard
State of Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Re: *Notice of Claim. University Of Arizona Misuse of Havasupai Blood*

To Whom it May Concern:

Notice is hereby given that, in accordance with the provisions of Ariz. Rev. Stat. § 12-821.01, the Havasupai Tribe presents its claims for monetary and other relief and also proceeds in parens patriae for the benefit of currently unrepresented injured members of the Havasupai Tribe against The University of Arizona, Professor Therese Markow, Professor Michael Hammer, Professor Tatiana Karafet, and Professor Stephen Zegura. This Notice of Claim, pursuant to Rule 408 of the Arizona Rules of Evidence, is within compromise negotiations and is therefore not admissible in any legal proceedings. The following claims and notice are based upon facts currently known to the Havasupai Tribe. The Havasupai Tribe is prepared to settle all claims regarding this matter for $50,000,000.

The Claimant, Havasupai Tribe is located at Supai, in Coconino County, Arizona. The attorney for the Havasupai Tribe is Robert Rosette, of Monteau and Peebles, LLP, whose business address is 80 Rio Salado Parkway, Ste. 211, Tempe, Arizona, 85281.

The Arizona State University hired Mr. Stephen Hart in 2003, to conduct a thorough investigation into the events surround the Diabetes Project initiated in Havasupai in the 1990s. Attorney Stephen Hart of the law firm of Burch and Cracchiolo, P.A., in January 2004, issued a Final Report on the acquisition, use, transfer, loss and destruction of hundreds of blood samples, data and related information including handprints and genealogy research obtained from members of the Havasupai Tribe. The Final Report shows that Arizona State University committed numerous violations of law, and that the University of Arizona and its professors engaged in extensive misconduct, which has caused serious harm to the Havasupai Tribe and tribal members.

Arizona State University Professors John Martin and Therese Markow helped design a project to study diabetes ("Diabetes Project") among the members of the Havasupai Indian Tribe ("Tribe") in 1989. This project was presented to the Havasupai Tribe and tribal members strictly as a diabetes project. The professors involved presented the Diabetes Project only as a study of diabetes. This presentation and related representations was known to be, or should have been known to be false and with the intent to obtain the Havasupai blood samples for purposes other than a diabetes study.

From 1990 through 1994, Professors Martin and Markow obtained and collected, or caused to be obtained and collected, nearly four hundred (400) blood samples from members of the Havasupai tribe without obtaining informed consent, without Arizona State University Institutional Review Board approval, and in violation of Federal and State laws and regulation. In 1995, Professor Markow transferred many Havasupai blood samples from Arizona State University to the University of Arizona.

Professor Markow mishandled the blood samples, caused the destruction, loss, improper use and transfer of the blood samples, and related information to the extent that many blood samples are unaccounted for at this time. Additionally, Professor Markow did provide the blood samples, data and information, directly and indirectly, to other University of Arizona professors including Professors Hammer, Karafet and Zegura, as well as numerous other out of state professors and laboratories. All of these professors used the Havasupai blood samples in multiple research projects and publications without the oversight or approval of the University of Arizona Committee on Ethics and Commitment and without informed consent of the Havasupai Tribe or Tribal members. No less than fifteen (15) of the publications deal with non-diabetes subjects and research including schizophrenia, inbreeding, and theories about ancient human population migrations from Asia to North America, all to the harm, detriment and injury of the Havasupai Tribe and tribal members.

The uncontrolled, unmonitored and indiscriminant use and transfer of the Havasupai blood samples and data has resulted in a breach of duties imposed by federal and state laws applicable to the University of Arizona and its professors, as well as rules and protocol principles in the area of human subject research. As a result, the University of Arizona and its professors have substantially benefited financially and otherwise.

The acts, omissions and conduct of the University of Arizona and its professors constitutes breach of fiduciary duty, lack of informed consent, fraud, misrepresentation, fraudulent concealment, intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, violations of civil rights, negligence, gross negligence and negligence per se. These actions have violated the Havasupai Tribe's and tribal members' cultural, religious, and legal rights and have caused the Havasupai Tribe and its members severe emotional distress. The Havasupai Tribe and its members intend to pursue all relevant state and federal claims in this matter. The Havasupai Tribe will seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

The Havasupai Tribe and tribal members demand that the University of Arizona immediately discontinue all use and/or transfer of Havasupai blood samples, data and related information. It is further demanded that the University of Arizona locate, secure, and provide all information regarding possession use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writings, and other related documents or evidence. It is also demanded that the University pay for all damages, costs and attorneys' fees caused by its conduct.

The information recited in this letter is merely a brief summary of events known to the Havasupai Tribe relating to this matter. This letter is not meant to serve as an admission, sworn testimony or other evidence admissible for trial. This notice is only meant to provide enough facts to satisfy a notice of claim as provided in Ariz. Rev. Stat. §12-821.01.

Sincerely,

MONTEAU & PEEBLES LLP

Robert Rosette

RAR:cc