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ARIZONA COURT OF APPEALS
DIVISION ONE

CARLETTA TILOUSI, et al. Plaintiffs-Appellants, v. ARIZONA BOARD OF REGENTS, et al. Defendants-Appellees.	No. 1 CA-CV07-0801 Maricopa County Superior Court No. CV2005-013190

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Albert M. Flores (Ariz. No. 005653)
LAW OFFICES OF ALBERT FLORES
337 North 4th Avenue
Phoenix, Arizona 85003
Telephone: (602) 271-0070
Fax: (602) 252-1922

Stephen F. Hanlon (DC 481751)
Frank Lawrence (CA 147531)
George E. Schulz, Jr. (FL 169507)
LaKeytria W. Felder (NY LF 8074)
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 955-3000
Fax: (202) 955-5564

Attorneys for the Plaintiffs-Appellants Carletta Tilousi, et al.

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Attorneys for the Plaintiffs-Appellants Carletta Tilousi, et al.

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I. INTRODUCTION[1]

This case is about a vulnerable population -- Native Americans -- who have been subjected to generations of exploitation and oppression by agents of state and federal governments. One would think that the unethical medical research projects and practices that are challenged in this case were a sordid and long discarded remnant of this nation's past. Unfortunately, that is not the case.

During the course of nearly a decade, over 100 members of the Havasupai Tribe were used as unwitting research subjects by Arizona State University ("ASU") and University of Arizona ("UA") researchers. Under the guise of preventing and treating diabetes within the community of the Havasupai Tribe, these researchers used the Havasupai's blood samples to research schizophrenia, inbreeding, and human migration patterns. Not only did ASU go beyond the scope of the original project; in so doing, ASU researchers violated the Havasupai's deeply held religious and spiritual beliefs. This case, *Tilousi v. Arizona Board of Regents ("ABOR"), et al.*, was filed in response to this modern day exploitative and unauthorized

[1] On December 11, 2007, Tilousi Appellants and Appellant Havasupai Tribe filed a Joint Motion to Consolidate the pending appeals. To date, the Court has not ruled on that Joint Motion for Consolidation. Pursuant to Arizona Rule of Civil Appellate Procedure 13(f), Tilousi Appellants, to the extent possible have limited its recital of facts and statement of the case as to not duplicate the Tribe's Opening Brief, which was filed on August 13, 2007.

human genetics project designed by ASU researchers.

Initially, the Havasupai were resistant to having their blood drawn for diabetes research. But due to a long-established trust relationship with ASU researchers, many of the Havasupai agreed to the diabetes study to address an epidemic of diabetes within their community. In March 2003, ASU's deception came to end when the named plaintiff and Havasupai Tribal Leader Carletta Tilousi, serendipitously attended a graduate student's presentation of the study. The presenting graduate student readily admitted that he did not obtain consent from tribal members for use of their blood samples for studying the evolution and migration theories proposed in his dissertation. In response, ABOR engaged Stephen Hart and launched its own investigation into ASU researchers' exploitation of the Havasupai's blood samples. In January 2004, the final Hart Report disclosed, in great detail, the gross misuse of the Havasupai's blood samples and confirmed that the Havasupai Project went well beyond the scope of its consented intent and the bounds of ethical research practices. (I.R. 75).[2]

Plaintiffs-Appellants, Carletta Tilousi and 52 other Havasupai Tribe

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[2] The Record on Appeal in this case is indicated by the Index of Record ("I.R.") Item Number and provides a page reference for the specific citation. Additionally, appendices are submitted, which contain the specific documents at issue in this appeal (i.e. the Tilousi Appellants Notice of Claim).

The facts set forth above are found in the Tilousi Appellants Second Amended Complaint, which incorporates and attaches the Hart Report in relevant part.

members ("Tilousi Appellants") seek review of the trial court's grant of summary judgment entered in favor of Arizona Board of Regents, Theresa Markow, Daniel Benyshak, Kevin Zuerlein, and John Martin, (collectively, "ABOR"). The Superior Court of Maricopa County based its summary judgment ruling on a misconstruction and misinterpretation of the requirements of Arizona's notice of claim statute, Arizona Revised Statute § 12-821.01(A). In interpreting this statute, lower courts have been confounded by dicta contained in the Arizona Supreme Court's decision in *Deer Valley Unified School District No. 97 v. Houser,* 214 Ariz. 293, 152 P.3d 490 (2007).

II. STATEMENT OF THE CASE

In February 2004, Tilousi filed this lawsuit in the Superior Court of Arizona in Coconino County against ABOR and other Defendants for: breach of fiduciary duty, lack of informed consent, fraud and misrepresentation, fraudulent concealment, intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, violation of civil rights, negligence, negligence per se, and gross negligence. (I.R.75). In March 2004, the Havasupai Tribe ("the Tribe"), on its own behalf and in *parens patriae* (for unrepresented Havasupai Tribal Members) filed a separate action *Havasupai Indian Tribe v. ABOR, et al.*

ABOR removed both cases to the United States District Court for the District of Arizona and subsequently filed motions to dismiss in each action. In March and May of 2005, the district court judge denied in part and granted in part the Defendants' motions, holding that Tilousi stated several valid state law claims. In particular, the court stated Tilousi asserted valid claims for intentional infliction of emotional distress, negligent infliction of emotional distress, civil rights violations, negligence and gross negligence. (I.R. 27). The court dismissed Tilousi's and the Tribe's federal claims, and remanded both cases to the Superior Court of Arizona in Coconino County. (*Id.*).

Thereafter in 2005 and early 2006, several procedural matters occurred: Defendants moved the case from Coconino County (Flagstaff) to Maricopa County (Phoenix); the cases were consolidated, designated as "complex" and assigned to a special department of the Maricopa County Superior Court; and Defendants moved to dismiss the cases and for partial summary judgment. (I.R. 36-44).

In October 2006, the trial court issued an order granting in part and denying in part ABOR's motions to dismiss and motion for summary judgment. In sum, one individual defendant was dismissed, most of the

Tribe's claims were dismissed, and a subset of the Tilousi Plaintiffs were dismissed without prejudice. (I.R. 153 at 2- 4).

On February 26, 2007, the Arizona Supreme Court issued its opinion in *Deer Valley Unified School District No. 97 v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), addressing the specific amount requirement of Arizona's current notice of claim statute. The *Deer Valley* court rejected prior Arizona Court of Appeals holdings that invoked a reasonableness standard for the specific amount requirement. The court held that the "specific amount" requirement meant exactly that – an exact specific amount. There were no other issues before the court central to its holding.

While deciding a case limited to the "specific amount" requirement of the notice of claim statute, however, the Arizona Supreme Court reached out in clear dicta to construe the "facts supporting" requirement of the statute and added a new, judicially imposed requirement that the claimant "explain the amounts identified" so that the public entity could "evaluate the amount claimed." *Deer Valley*, 152 P.3d at 493. That ruling sent ABOR running to the courthouse doors, claiming that the facts, which Tilousi Appellants set forth in their notice of claim, did not sufficiently explain the specific amount identified so that ABOR could evaluate it.

On May 22, 2007, relying on the dicta of the *Deer Valley* opinion, ABOR moved for summary judgment against Tilousi, asserting noncompliance with Arizona's notice of claim statute. Specifically, ABOR alleged that Tilousi Appellants did not provide "specific" facts supporting. (I.R. 201 at 4) the specific amount demanded in their notice of claim. On August 28, 2007, honing in on this new judicial gloss on the statute, the trial court granted summary judgment in favor of ABOR, ruling that the notice of claim did not provide "facts sufficient to allow ABOR to evaluate the reasonableness of [Tilousi's] settlement demands. " (I.R. 153 at 4).

Tilousi Appellants now challenge that ruling in this appeal. This Court has jurisdiction over this appeal pursuant to A.R.S. § 12-2101(B).

III. STANDARD OF REVIEW

On appeal from a grant of summary judgment, the Court must determine *de novo* whether there are genuine issues of material fact and whether the trial court erred in applying the law, including issues of statutory construction. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). The Court views all facts and reasonable inferences drawn from those facts in the light most favorable to the party against whom judgment was entered. *Bothell v. Two Point Acres*, 192 Ariz. 313, 315, 96

P.2d 47, 49 (App. 1998).

IV. STATEMENT OF THE FACTS

On August 14, 2003, Tilousi served ABOR and other defendants with a Notice of Claim. Service was made upon Attorney General Goddard. (I.R. 213; Appendix 1). The August 14, 2003 Notice of Claim identified 29 individuals with claims against ABOR based on ABOR's misuse of Tilousi's blood samples. In the Notice of Claim, Tilousi reserved the right to bring additional claims in the event that additional facts came to light. (Id.) Tilousi unequivocally stated that at that early juncture and based on the facts of that date, the claims could be settled for $45,000 per plaintiff. (Id.) In the Notice of Claim, Tilousi asserted the following facts supporting that amount, asserting claims for compensatory, general, specific, and punitive damages:

- ABOR had fraudulently and intentionally misused Plaintiffs' blood samples for unauthorized purposes causing them severe harm, extreme distress, and emotional trauma
- Plaintiffs worry about the possible uses and locations of their blood samples
- Plaintiffs worry about the violation of their religious values and beliefs
- Plaintiffs worry whether the blood samples have been lost
- Plaintiffs worry whether the bloods samples will continue to be used for additional unauthorized purposes
- Plaintiffs now fear going to the health clinic
- Plaintiffs now fear seeking medical attention

- Plaintiffs now fear providing blood samples for medical diagnosis or treatment

On November 6, 2003 Plaintiffs supplemented the August 14, 2003 Notice of Claim with another Notice of Claim, identifying 15 additional plaintiffs who also asserted that their blood samples had been misused. (I.R. 213; Appendix 2). The November 6, 2003 Notice of Claim asserted that the misuse of plaintiffs' blood caused plaintiffs harm, extreme distress, and emotional trauma. The November 6, 2003 Notice of Claim was served upon Paul Ward, the Vice President and General Counsel of Arizona State University. On December 29, 2003 Tilousi again supplemented their August 14, 2003 Notice of Claim to include 2 additional plaintiffs who asserted that their blood samples had been misused. (I.R. 213; Appendix 3). The December 29, 2003 Notice of Claim was served upon Paul Ward and Attorney General Goddard.

In January 2004, Attorney Stephen Hart issued a Final Report of his investigation of ABOR's conduct, documenting in great detail ABOR's egregious actions in this matter, disclosing facts never before known to Plaintiffs and their lawyers. Hart's Final Report provided a substantial factual predicate for numerous claims by Plaintiffs for violations of their rights under state and federal laws, including claims for fraud and other intentional torts. (I.R. 75)

Thereafter, on March 4, 2004, Plaintiffs served a final supplemental Notice of Claim upon ABOR. (I.R. 213; Appendix 4). In the March 4, 2004 Notice, Plaintiffs identified 6 additional individuals who asserted that their blood samples had been misused, bringing the total number of plaintiffs to 52. Plaintiffs advised ABOR that the specific settlement amount increased to $10 million, due to the egregious conduct revealed in the Hart Report.

On May 22, 2007, ABOR moved for summary judgment against Tilousi asserting that: (1) the August 14, 2003 Notice of Claim contained no facts to support the specific amount claimed; (2) the November 6, 2003 and December 29, 2003 Notices of Claim were not properly served and did not contain any specific amount for which the additional plaintiffs would settle their claims; and (3) the March 4, 2004 Notice of Claim was untimely as to some plaintiffs and failed to state any facts to support the specific settlement amount. ABOR did not challenge the service of the August 14, 2003 Notice of Claim or the March 4, 2004 Notice of Claim.

On August 28, 2007, after oral argument, the trial court granted ABOR's motion for summary judgment, holding that Tilousi's Notice of Claim failed to state "facts sufficient to allow ABOR to evaluate the reasonableness of [Tilousi's] settlement demands ... or make a determination as to why such demands do not constitute a quick, unrealistic, exaggerated

demand." (I.R. 221 at 4).[3]

V. STATEMENT OF THE ISSUE

Whether the trial court erred in holding that the Tilousi Appellants' notice of claim failed to provide "facts sufficient " to support the specific settlement amount demanded pursuant to Arizona Revised Statute § 12-821.01(A)?

VI. LEGAL ARGUMENT

A. The Superior Court Erred By Relying on *Deer Valley* Dicta And Holding that Tilousi's Notice of Claim Failed to Provide Facts Supporting the Specific Amount Demanded pursuant to A.R.S. § 12-821.01(A).

The trial court erred when it concluded that, "the statute required facts sufficient to allow ABOR to evaluate the reasonableness of Plaintiff's settlement demands...and facts sufficient to allow ABOR to make a determination as to why such demands do not constitute a quick, unrealistic, exaggerated demand." (I.R. 221 at 4). There is no sufficiency standard for "facts supporting" the settlement amount demanded under the notice of claim statute. Relying on dicta in *Deer Valley*, the trial court conflated the sufficiency test for liability facts with the much less demanding "facts supporting" test for damages facts.

[3] The trial court noted that ABOR had raised other arguments as to why the notice of claim did not satisfy the statute, but declined to reach those arguments because its "facts sufficient" ruling was dispositive of the matter. (I.R. 221 at 2, n.1).

1. The Notice of Claim Statute, A.R.S. §12-821.01(A), Provides Clear and Unequivocal Statutory Requirements with which the Tilousi Appellants Have Complied

Under Arizona law, to maintain an action against a public entity or a public employee, a putative litigant must first file a notice of claim. The notice of claim statute provides, in pertinent part:

> 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).

In essence, the notice of claim provision establishes a two-part inquiry: (1) whether there are sufficient facts to enable defendants to understand the basis on which liability is claimed and (2) whether there are facts that support the specific settlement amount identified.

The purpose of § 12-821.01(A) is 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 ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006). When construing A.R.S. § 12-821.01(A), there can be no suggestion that the legislature's purpose in requiring a notice of claim is to defeat as many claims against public entities as possible. The legislature's purpose was neither to create a hurdle that can never be cleared

nor to establish requirements that are so vague that claimants cannot know if they have met them. The legislature's own statement of public policy regarding actions against public entities and public employees appears in an Historical Note following A.R.S. § 12-820:

> [I]t is hereby declared to be the public policy of this state that public entities are liable for the 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. Laws 1984, Ch. 285, § 1.

In *Deer Valley*, the Arizona Supreme Court recognized that one of the important purposes of a notice of claim is to permit and encourage settlement of a claim prior to litigation. *Deer Valley*, 152 P.3d at 492. The Supreme Court has long held that notices of claim are intended to serve this policy. A purpose of a notice of claim is "to afford the opportunity to arrive at a settlement of controversy and thus avoid the litigation between the state and its citizens." *State v. Brooks*, 23 Ariz. 463, 534 P.2d 271 (App. 1975). Importantly, the courts have never endorsed procedural rules as technical weapons to be used to undermine the settlement and resolution of a case. *See Allstate v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 257, 258 (1995):

> Whenever possible, procedural rules should be interpreted to maximize the likelihood of a decision on the merits...[for

> example], the disclosure rules and sanctions were not meant to thwart that goal by encouraging litigants to lie in wait for their opponents to miss a deadline and then use that momentary transgression to get a case effectively dismissed.

Beyond the stated intended purpose of the statute, courts are bound by and guided by the statute's language. When analyzing statutes, fundamental principles of statutory construction dictate that "the best and most reliable index of a statute's meaning is its language, and when language is clear and unequivocal, it is determinative of the statute's construction." *Janson ex rel Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

Here, in this notice of claim statute, in unequivocal language, the Arizona Legislature used the word "sufficient" with respect to liability facts, and used the word "supporting" with regard to damages facts. When the trial court interpreted the word "supporting" to mean "sufficient" the fundamental principle of statutory construction was clearly abandoned in favor of the *Deer Valley* dicta. The trial court erred by following that dicta.

2. *The Deer Valley Court Limited its Holding to the Specific Amount Requirement of the Notice of Claim Statute*

In *Deer Valley*, the claimant's notice of claim asked for approximately $35,000 per year or more..." and "similar appropriate pay increases" and damages for emotional distress and harm to her reputation of

"no less than" $300,000 and $200,000 respectively. *Deer Valley*, 152 P.3d at 492. The only question before the court was whether those words satisfied the "specific amount" language of the notice of claim statute. The *Deer Valley* court squarely held that those qualifying words did not. *Id.* at 493-494. The *Deer Valley* holding was quite limited: the court simply held that the statutory provision requiring that a notice of claim contain a specific amount means what it says – the notice must state a specific amount of money for which the claim could be settled, not an approximate amount. The court could not have been clearer that it did not decide whether the notice of claim in that case satisfied the "facts supporting" requirement of the statute:

> Because McDonald's letter does not include a specific sum, we need not reach the District's argument that McDonald's letter also fails to provide facts supporting the claimed amounts... *Id.* at 494.[4]

Despite its clear acknowledgement that it "need not reach" the issue that the notice of claim letter did not provide "facts supporting" the settlement amount, the court nonetheless commented on the "facts supporting" requirement of the statute. In unmistakable dicta, the court noted:

> 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. *Deer Valley*, 152 P.3d at 493.

[4] The court did note, without further comment that the notice of claim letter in that case "did not provide any facts supporting the claimed amounts." *Id.* at 494, n.3.

Because the court declined to decide the facts supporting issue, *Deer Valley* does not provide any binding precedent regarding the "facts supporting" the specific amount requirement of the notice of claim statute. Correctly interpreted, the court's comments did not establish a new legal principle for the facts supporting requirement. The court's observations were dicta because they were "unnecessary to sustain the judgment of the court." *Arizona Corp. Comm'n v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 412, 228 P.2d 749, 754 (1951). Importantly, the court did not expressly declare these comments to be a guide for future conduct and therefore, they are not precedential. *Phelps v. Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz. 146, 152, 118 P.3d 1110, 1116 (App. 2005).

Expanding on this dicta, the *Deer Valley* court cited *Hollingsworth v. City of Phoenix*, 164 Ariz. 462, 793 P.2d 1129 (App. 1990) for the proposition that the "facts supporting" requirement of the statute "ensures that claimants will not demand unfounded amounts that constitute 'quick unrealistic exaggerated demands.' *Id.* at 466. The court's reliance on *Hollingsworth* is problematic because *Hollingsworth* interpreted the 1984 version of the notice of claim statute, which did not even contain the words "facts supporting." In *Hollingsworth*, the court rejected prior case law which had imposed a "sum certain" requirement on a statute, which was

completely silent on the elements required for a notice of claim, and instead read a "reasonableness" standard into the statute. There was no facts supporting requirement for the *Hollingsworth* court to interpret, therefore, *Deer Valley's* citation to *Hollingsworth's* analysis of "sum certain" to support its dicta about "facts supporting" is wholly misplaced. The *Hollingsworth* court stated:

> Reasonable estimates of the value of a claim contribute to an assessment of a total claim; a rigid fixed sum or settlement figure does not. A rigid fixed sum certainly more often than not either delays notification or encourages *quick unrealistic exaggerated demands*. *Id.* at 466. (*Emphasis added.*)

In short, *Hollingsworth* was concerned that the judicially imposed "sum certain" requirement under the prior claims statute would encourage "quick unrealistic exaggerated demands." That is no support for *Deer Valley*'s dicta that the "facts supporting" language of the new statute "ensures that claimants will not demand unfounded amounts that constitute 'quick unrealistic exaggerated demands.'"

Accordingly, the current notice of claim statute's requirement that a claimant provide "facts supporting" can best be analyzed by setting aside the *Deer Valley* dicta that relied on the now legislatively and judicially overruled *Hollingsworth* analysis. Instead, this Court should focus on the

unambiguous language that the Arizona Legislature purposely chose for A.R.S. § 12-821.01(A).

3. *Deer Valley's "Facts Supporting" Dicta Creates a Vague Speculative Standard and Obscures the Clear Language and Purpose of the Notice of Claim Statute*

Under the notice of claim statute, the sufficiency standard for liability clearly calls for a qualitative analysis; that is, a judicial analysis that with the facts provided, a public entity could "understand the basis upon which liability is claimed." A.R.S. § 12.821.01(A) There is no issue in this case that the notice of claim in question did not satisfy the liability requirement under the statute. The second requirement under the statute, imposes a less stringent standard by simply requiring that a claimant provide "facts supporting" a specific settlement amount. *Id.* There is no sufficiency requirement in this distinctly separate prong of the statute. The statute *does not* require:

- facts justifying the specific amount claimed
- facts proving the specific amount claimed
- facts validating the specific amount claimed.
- facts explaining the specific amount claimed by providing the government entity with a factual foundation to permit the entity to evaluate the amount claimed. (as stated in *Deer Valley*)

Rather, in a separate sentence on damages distinct from the "facts sufficient" requirement of the preceding sentence on liability, the Arizona Legislature wisely used the word "supporting." The word "support" is defined as "to furnish corroborating evidence." *The American Heritage Dictionary, Second College Edition.*

There is a world of difference between facts corroborating a specific amount and facts justifying or proving or validating or explaining a specific amount. One or more facts may well corroborate or support a specific amount without justifying or proving or validating or, most importantly here – explaining that specific amount.

The Arizona Legislature wisely chose the much less demanding standard of "facts supporting" the specific amount claimed. The important thing in any settlement process is to get a specific number on the table. No experienced negotiator starts with a "bottom line," nor did Arizona Legislature require any such thing, especially for the very short period of 180 days after the cause of action accrues. All that is required is facts supporting or corroborating the specific amount. If the public entity thereafter concludes that those facts do not support the amount claimed, it can and should reject the claim – that is the process established by the Arizona Legislature. Simply because the public entity (or trial court)

believes the facts supporting the settlement amount do not justify that amount, does not mean that the plaintiff has not provided facts supporting the settlement amount. In this case, ABOR (or the trial court), may disagree that the supporting facts justify a settlement in the amount demanded, but the facts certainly support the specified settlement amount.

ABOR complains that there are no doctors' reports, no psychologists' reports, no anthropologists' reports in this common fund claim on behalf of 52 people; nor is each claimants' injury described with specificity, as noted by the trial court. (I.R. 221 at 4) The short answer to that complaint is that there is no such requirement under Arizona law. "Facts supporting" is all that is required.

The Legislature's far less demanding standard for "facts supporting" requirement for damages facts is sound public policy. Whether the known facts during the 180-day period after a cause of action accrues "explain" or "justify" or "prove" or "validate" an amount claimed is an endlessly speculative question which will bring – and has brought – rampant uncertainty to the claims process. No claimant could ever pursue a claim with any degree of reasonable certainty that a trial judge would agree with the claimants' "explanation" of the facts supporting the settlement demand. These are damages claims which are traditionally presented to juries; one

jury's assessment may, and often has, differed from another's assessment. The *Deer Valley* interpretation of the "facts supporting" requirement of the statute virtually guarantees endless litigation over a highly speculative and subjective standard, based on a record of preliminary and incomplete facts.

The Arizona Legislature got this one right. The Arizona Supreme Court got it wrong in its *Deer Valley* dicta. The trial court erred by following the *Deer Valley* dicta. This Court should reverse the decision of the trial court and find on this record that the Tilousi Appellants have provided "facts supporting" the specific amount set forth in their notice of claim.

B. The Superior Court Erred By Granting Summary Judgment Against Tilousi By Holding that the Plaintiffs' Worry and Fear About the Improper and Unethical Use of their Blood Samples and Future Medical Treatment Were Not "Sufficient" Facts Supporting the Specific Settlement Amount

In the instant case, there are a plethora of facts supporting the specific amount demanded in the four Notices of Claim. In the notice of claim, Tilousi Appellants provided facts supporting the specific settlement amount sought. Those supporting facts are the *worry* and *fear* that has permeated and affected their lives as a direct result of ABOR's wrongful conduct. Specifically, as stated in the notice of claim:

> ASU has simply left our clients to worry about the possible uses and location of their blood samples, the violation of their religious values and personal beliefs, whether these samples have been lost, and whether they will continue to be used for additional unauthorized purposes. Many of our of clients now fear going to the health clinic, seeking medical attention, or providing blood samples for medical diagnosis and treatment." (I.R. 213; Appendix 1).

Thus, in the Notice of Claim, ABOR was given: (1) the specific amount sought for settlement of the claim and (2) the facts supporting the amount claimed:

- ASU has fraudulently and intentionally misused Plaintiffs blood samples for unauthorized purposes causing them severe harm, extreme distress, and emotional trauma
- Plaintiffs worry about the possible uses and locations of their blood samples
- Plaintiffs worry about the violation of their religious values and beliefs
- Plaintiffs worry whether the blood samples have been lost
- Plaintiffs worry whether the blood samples will continue to be used for additional unauthorized purposes
- Plaintiffs now fear going to the health clinic
- Plaintiffs now fear seeking medical attention
- Plaintiffs now fear providing blood samples for medical diagnosis or treatment

The Notice of Claim described the theory of liability and underlying facts, and provided additional facts about the consequences of the ABOR's

wrongdoing. This type of factual foundation more than satisfies the command of the statute that claimants provide facts supporting the specific amount claimed. The notice of claim statute only requires facts supporting the claimed amount...it does not require the plaintiff to make their entire case only 180 days after the cause of action accrued. Neither the notice of claim statute nor *Deer Valley* requires a plaintiff to list all evidentiary facts that may be helpful in a defendant's evaluation of the claim.

In its ruling the trial court suggested that there were no facts to support $45,000 in damages and/or the aggregate $10 million demanded in the supplemental Notice of Claim. However, not only did Tilousi provide facts supporting the settlement amount sought, ABOR conducted its own investigation prior to the filing of the notice of claim letters, which resulted in the voluminous Hart Report. Those facts were the facts that convinced Tilousi to increase the demand from $45,000 per plaintiff to $190,000 per plaintiff.

Although the Arizona Supreme Court has not interpreted the "facts supporting" requirement, the Arizona federal district court has provided guidance on the issue.[5] In *Castaneda v. City of Williams*, 2007 WL 1713328

[5] Arizona Rule of Civil Appellate Procedure 28(c) provides that 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

(D. Ariz. 2007), the district court held that the plaintiff's notice of claim satisfied the literal requirements of A.R.S. § 12-821.01(A) by providing a specific amount for which the case could be settled and the facts supporting that amount. The plaintiff satisfied the notice of claim statutory requirements by providing information about the *nature and extent of his physical and emotional injuries*. *Id.* at *4. The statement that "Ray Castaneda experienced difficulty in breathing due to the physical and emotional distress of his home being searched and was transported and to and treated at the Flagstaff Medical Center," is a "fact supporting" his specific settlement amount. *Id.* Even though the Court found that the information provided was "sparse," that sparse information gave a factual foundation supporting the specific settlement amount requested because the City could evaluate the amount claimed. *Id.* The court further held that "a full account of all the injuries claimed by each plaintiff is not required." *Id.*

In *Franklin v. City of Phoenix*, No. CV06-02316, 2007 WL 1463753 (D. Ariz. May 17, 2007), the court held that the statutory requirements of

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reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion of petition in which such decision is cited.

Here, Appellants have cited two unpublished federal district court cases, not as binding precedent on this Court, but to inform the Court of the decisions and highlight the magnitude of the issue in courts throughout Arizona. Based on exception two under ARCAP 28(c), we urge this Court to consider issuing an opinion in this matter to fully address the requirements under the A.R.S. § 12-821.01(A) as no Arizona court has squarely addressed both requirements under the notice of claim statute. Presently, claimants have divergent interpretations and guidance in Arizona state and federal courts. The issues presented by the notice of claim statute are of great legal and public policy concern as the notice of claim is a prerequisite to any claimants having his or her day in court. We respectfully submit these opinions for the purpose offered and have provided the copies of the opinions as required by the rule. (*See* Appendix 5).

A.R.S. §12-821.01(A) could be satisfied with a "*modicum* of data about the type and degree of physical and psychological injury" sustained by the plaintiff. *Id.* at *4. For example, the court stated that facts such as the plaintiff's "sleeplessness, inability to attend to personal affairs, anxiety, and other measures of emotional suffering" are facts supporting a proffered specific settlement amount. *Id.* (The court ultimately found plaintiff's notice of claim insufficient because he failed to provide a specific amount and facts supporting that amount).

The Arizona district court has thus held that a mere "modicum of data" and "sparse information" fulfills the literal requirement that a claimant must provide facts supporting the specific amount for which the claim can be settled. For ABOR to assert that another more rigorous standard applies is flatly wrong. Such an interpretation of the statute is totally unsupported by either the plain text of § 12-821.01 or Arizona case law and would utterly vitiate the policies behind A.R.S. § 12-821.01(A).

ABOR cannot now use A.R.S. § 12-821.01(A) as technical weapon to dismiss claims against it. ABOR does not dispute that the four Notices of Claim contain sufficient facts to understand the basis upon which liability is claimed. ABOR, however, claims that Plaintiffs have not provided "the facts supporting" the amount demanded. ABOR has insisted that plaintiffs, like

Tilousi, are required to state "specific" facts that support an amount for which he or she is willing to settle. (I.R. 200 at 4). There is no such requirement under Arizona law. The only requirement under the statute is that the notice of claim must contain "the facts supporting the amount." The supporting facts are not required to meet any threshold level; as noted above, a mere "modicum of data" will suffice, as will "sparse" facts. ABOR has read a heightened standard into the *Deer Valley* decision even though the *Deer Valley* decision did not even reach the issue of "facts supporting" the specific amount claimed.

The legislature knew how to impose a requirement of "specific" or "sufficient" facts when it wanted to. The Notice of Claim statute itself says that a plaintiff must provide "a specific amount" and "sufficient facts" for liability. The portion of the statute addressing *facts that support that amount* is devoid of any adjectives.

The trial court's proposed heightened sufficiency standard for damages facts must be rejected. Not only would it violate the plain language of A.R.S. § 12-821.01(A); a heightened standard would also blatantly violate the purposes and policies which the legislature intended to promote with the enactment of this statute.

VII. CONCLUSION

This case can not be viewed in a vacuum. ABOR is well-aware and has been aware of the factual foundation underlying the Tilousi Appellants claims for years. Years after the filing of the action and its own factual investigation, years after the procedural quagmire that this case became, ABOR now claims that there were "insufficient" facts to support the settlement amount demanded by the Tilousi Appellants. ABOR relies on *Deer Valley's* dicta and attempts to escape liability and responsibility for its admitted wrongdoing. Instead of following the process established by the Legislature – receiving, accepting and/or rejecting a claimant's notice of claim – ABOR attempts to prevent any judicial resolution of this matter on the merits. As the trial court observed:

> "I find it somewhat ironic on the one hand, ironic that the allegations that are being made here that basically the defendants took advantage of these plaintiffs, and there certainly seems to be some evidence to support that; and then we're in a situation here where it seems to be that they're perhaps doing the same thing once again by now trying – to throw them out of court based upon their (sic) decision, which seems to me is an unfortunate situation as well." (Transcript of August 27, 2007 Hearing at 19).

For the foregoing reasons, the Superior Court's order must be reversed.

RESPECTFULLY SUBMITTED this 7 day of January, 2008.

ALBERT M. FLORES
Attorney for Plaintiffs-Appellants Carletta Tilousi, et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 14, I certify that the attached brief uses proportionally spaced type of 14 points or more, is double-spaced using roman font, and contains 6,004 words.

Dated this 7 day of January, 2008.

ALBERT M. FLORES
Attorney for Plaintiffs-Appellants Carletta Tilousi, et al.

CERTIFICATE OF SERVICE

Original and six copies
hand-delivered this 7 day
of January 2008, to:

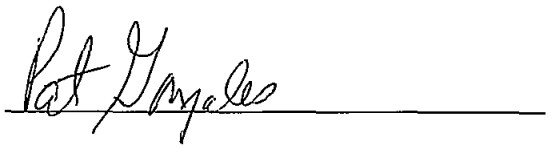
Arizona Court of Appeals
Division One
1501 West Washington
Phoenix, AZ 85007

Two copies mailed the same day to:

Daniel P. Schaack
Assistant Attorney General
Catherine O'Grady
Special Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007

Michael J. Rusing
Rusing & Lopez, PLLC
6262 N. Swan Road, #200
Tucson, AZ 85718
Attorney for Defendant Markow

Gary Birnbaum
Scott Claus
Mariscal, Weeks, McIntyre & Friedlander, P.A.
2901 N. Central Avenue, #200
Phoenix, AZ 85012
Attorneys for Defendants Martin and Benyshek



APPENDIX

1

6/18/03 KT AZ

AUG 2 1 2003

AG/ADM RECEIVED Claim #1

AUG 1 8 2003

Law Offices

Robert J. Lyttle, P.C.
Attorneys at Law

Arizona: P.O. Box 1189, Carefree, Arizona 85377
Oklahoma: 3334 West Main Street, #148, Norman, Oklahoma 85377

Tel: (480) 488-5027
Tel: (405) 292-8010

Robert J. Lyttle (Licensed in OK & DC)
Christopher A. Flores (Licensed in AZ)
Of Counsel: Cesar Luna (Licensed in CA)

Christopher A. Flores
(602) 271-0070
Reply to Arizona Office

August 14, 2003

VIA U.S. MAIL, CERTIFIED MAIL, AND PERSONAL SERVICE

Terry Goddard, Attorney General
State of Arizona
Administration Division
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007

Professor John Martin, Individually and in his Official Capacity
Department of Anthropology
College of Liberal Arts and Sciences
Arizona State University
32 Arizona State University
P.O. Box 872402
Tempe, Arizona 85287-2402

Professor Therese Markow, Individually and in her Official Capacity
Center for Insect Science
University of Arizona
Box 210088
Tucson, Arizona 85721

Professor Daniel Benyshek, Individually and in his Official Capacity
Department of Anthropology
University of Nevada Las Vegas
4505 Maryland Parkway
Box 455003
Las Vegas, Nevada 89154-5003

Re: Notice of Claim - ASU Misuse of Havasupai Blood

To Whom It May Concern:

We represent twenty-nine (29) members of the Havasupai Tribe (hereinafter "Clients") located on the Havasupai Indian Reservation in the Grand Canyon. The names of our Clients are:

1. Rena Uqualla
2. Leota Watahomigie
3. Claudia Watahomigie
4. Arlene Wescogame
5. Orlando Manakaja
6. Patricia A. Watahomigie
7. Carol Ann Rogers
8. Kathleen Siyuja
9. Ingrid Putesoy
10. Sherry Putesoy
11. Lenora Jones
12. Caroline Putesoy
13. Aral Putesoy Kaska
14. Violet Watahomigie
15. Fydel A. Jones
16. Bernice Watahomigie
17. Gloria Siyuja
18. Ruth Havatone
19. Sheila Manakaja
20. Hansen Manakaja
21. Desiree Putesoy
22. Gifford Angel Smith
23. Rosemarie Manakaja
24. Muriel Uqualla
25. Nettie Tilousi
26. Rosella Tilousi
27. Rex Tilousi
28. Carletta Tilousi
29. Mark Putesoy

This letter constitutes our Clients' Notice of Claim against Arizona State University ("ASU"), Professor John Martin, Professor Therese Markow, and Professor Daniel Benyshek. Pursuant to Rule 408 of the Arizona Rules of Evidence, this letter is not admissible in any proceeding since it constitutes evidence of compromise. This letter contains only known facts to date.

Our Clients have reported to us that they participated in an ASU-sponsored diabetes study conducted by Professor John Martin of the ASU Anthropology Department in the early 1990's in Supai Village in which hundreds of blood samples were obtained from individual members of the Havasupai Tribe without any formal written consent. As part of the Professor Martin's study, our Clients provided blood samples to ASU officials to be used exclusively for the diabetes study as promised by ASU's representatives. Based on information and belief, ASU has misused these blood samples for additional studies unrelated to the diabetes study without our Clients' consent causing our Clients severe harm and extreme distress.

ASU has refused to provide our Clients with any information regarding the use, handling, or transfer of the Havasupai blood samples. Despite our written requests on May 14, 2003 and June 20, 2003, ASU officials have been unable or unwilling to disclose the current whereabouts, or current or past uses, of these blood samples. ASU cannot or will not provide us with a full accounting of the handling, transfer, or use of the Havasupai blood samples since obtaining such samples in the early 1990's. ASU has simply left our Clients to worry about the possible uses and locations of their blood samples, the violation of their religious values and beliefs, whether these samples have been lost, and whether they will continue to be used for additional unauthorized purposes. Many of our Clients now fear going to the health clinic, seeking medical attention, or providing blood samples for medical diagnosis or treatment.

ASU has only indicated to us that ASU has initiated a so-called "independent" investigation into the circumstances surrounding the use of the Havasupai blood samples "to discover the facts surrounding what has been done with the Havasupai blood samples after the samples were transferred out of Supai Village." Our Clients have objected to ASU's unilateral selection of Stephen Hart, the former Director of the Arizona Department of Gaming, as the so-called "independent" investigator. Our Clients assert that ASU cannot conduct a legitimate investigation on itself. Our Clients have had no discussions or input with ASU regarding the development or initiation of this investigation. Our Clients have requested in writing from ASU more information regarding the investigation including the scope of the investigation, who will be conducting the investigation, the background of the persons conducting the investigation including any former or current relationships with ASU or its officials, how the investigation will be conducted, the reporting and handling of the results of the investigation, and the funding and payment for such investigation; however, ASU has only responded by stating that "the ASU Office of General Counsel has no prior relationship with Mr. Hart." Because ASU has not made any of its findings public, additional facts may come to light.

ASU has apparently met with the Tribal Council of the Havasupai Tribe on at least two occasions; however, our Clients have been denied access to these closed meetings and have been

provided with no information about these meetings from either ASU or the Tribal Council. The Havasupai Tribe and Tribal Council do not have the right to negotiate with ASU officials to address or settle the individual injuries suffered by our Clients, and any agreement reached between ASU and the Havasupai Tribe does not resolve the claims of our Clients. The blood samples in question came from our Clients, not the Havasupai Tribe.

On or about February 27, 2003, one of our Clients, Carletta Tilousi, the only member of the Havasupai Tribe to have graduated from ASU, attended an oral presentation of a PhD dissertation by ASU student Daniel W. Garrigan. At this presentation, Ms. Tilousi first learned that the blood samples taken from Havasupai people by ASU in the 1990's were likely used not only by the ASU Anthropology Department but also by the ASU Biology Department in multiple additional studies and/or publications unrelated to diabetes including Mr. Garrigan's dissertation as well as research and articles written and/or published by current and former ASU professors such as Therese Markow and others. Unknown to Professor Martin, the ASU Biology Department apparently authorized the use of the Havasupai blood samples for examination, study, and use as part of the PhD dissertation written by Mr. Garrigan as well as other studies. At the presentation, Mr. Garrigan publically admitted that he did not receive the permission of the Havasupai people to use the blood samples as part of his dissertation.

The same day as Mr. Garrigan's presentation, Ms. Tilousi attended a closed meeting of numerous officials from the ASU Biology Department including Professor Martin and officials from the ASU Anthropology Department, as well as Daniel Benyshek from the University of Nevada Las Vegas, and Therese Markow from the University of Arizona (formerly with ASU). At the meeting, Professor Martin and Professor Benyshek both insisted that no written consent forms were ever obtained, and that the verbal consent from each individual was based on Professor Martin's and Professor Benyshek's promise that the blood samples would only be used for Professor Martin's diabetes study. Professor Martin clearly and emphatically stated that ASU Biology Department officials including Therese Markow had no authorization to use the Havasupai blood samples for any other study than Professor Martin's specific diabetes study, that the ASU Biology Department had misused the blood samples without his knowledge, and that such use amounted to a betrayal of trust with the Havasupai people and a violation of the original agreement.

On May 8, 2003, the Tribal Council of the Havasupai Tribe unanimously approved an Order Banishing Arizona State University from the Havasupai Reservation. On June 3, 2003, ASU Office of General Counsel wrote to us indicating that Stephen Hart was selected as the investigator working for and paid by ASU to "discover the facts" surrounding this matter. ASU officials will have a difficult time conducting an investigation when they have been excluded from the Havasupai Reservation.

State law provides a limited period of time in which to file a Notice of Claim. This Notice of Claim is based on the facts which have been made public thus far. ASU has refused to provide us with any substantive information regarding this matter nor has ASU released the findings of its so called "independent" investigation to the public or others. In the event that additional facts

come to light, we reserve the right to bring additional claims based upon those facts.

Our Clients believe that ASU has misused their blood samples for unauthorized purposes causing them severe harm, extreme distress, and emotional trauma. The conversion and improper use of these blood samples by ASU officials constitutes a breach of ASU's fiduciary duty owed to our Clients, violates our Clients' privacy rights as well as their cultural, religious, and legal rights. ASU may also have violated State and Federal laws including HIPPA administered by the U.S. Department of Health and Human Services regarding the sharing of medical information and records as well as the storage, handling, use, and transfer of blood samples.

Our Clients intend to pursue any relevant State law and/or Federal claims in this matter. These claims include, but are not limited to, violation of civil rights, 42 U.S.C. § 1981, 1982, 1983, 1985, negligence, gross negligence, intentional torts, intentional and negligent infliction of emotional distress, and violations of state and Federal constitutional rights. Our Clients will also seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

We demand that ASU immediately cease all use and/or transfer of our Clients' blood samples including the publication or acceptance by ASU of Mr. Garrigan's dissertation as well as the use of the blood samples or related information for any other purpose. In addition, our Clients hereby exercise their right revoke any and all use, study, or transfer of these blood samples for any purpose. We further demand that ASU conduct a full and truly *independent* investigation into this matter with our Clients' input and participation, and that the blood samples be identified, located, secured, and returned to our Clients. Finally, we demand that ASU locate, secure, and provide us with all information regarding ASU's possession, use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writings, and all other related documents or evidence, and that ASU pay for all damages and costs caused by ASU's conduct.

For the purposes of this letter, the account above only constitutes a summary of the events that transpired. In the event of future litigation, it is not a substitute for the sworn testimony of our Clients or any other witnesses. If this letter is used in any way in subsequent litigation, the fact finder should be advised that this letter contains only enough facts to permit the public entity to ascertain the basis upon which liability is claimed under A.R.S. § 12-821.01. Our Clients are expected to give a more detailed and specific version than this cursory letter. In the event that you force litigation, we will show the ASU engaged in illegal and unethical conduct that culminated in the egregious violation of the rights of our Clients causing our Clients severe harm and extreme distress.

Our Clients would prefer to allow a jury to determine how much ASU and others defendants should pay to compensate our Clients for their injuries. However, in conformance with the State statute, our Clients are required to state a settlement amount. Consequently, please be advised that our Clients would settle their claims at this early juncture for $45,000. per Client.

Sincerely,

Christopher A. Flores, Attorney

c: Havasupai Clients
File

APPENDIX

2

Client #1
Lawsuit #1

Law Offices

Robert J. Lyttle, P.C.
Attorneys at Law

Arizona: P.O. Box 1189, Carefree, Arizona 85377
Oklahoma: 3334 West Main Street, #148, Norman, Oklahoma 85377

Tel: (480) 488-5027
Tel: (405) 292-8010

Robert J. Lyttle (Licensed in OK & DC)
Christopher A. Flores (Licensed in AZ)
Of Counsel: Cesar Luna (Licensed in CA)

Christopher A. Flores
(602) 271-0070
Reply to Arizona Office

November 6, 2003

Paul Ward, Vice President and General Counsel
Office of General Counsel
Arizona State University
Administration Building B-Wing, Room B256
Tempe, Arizona 85287-2003
SENT VIA FAX AND REGISTERED MAIL

Re: 15 Additional Clients - Havasupai Blood Samples

Dear Mr. Ward:

As a result of recently released information regarding the Havasupai blood samples used by ASU since 1990 including new information provided by Arizona State University ("ASU") officials to the Havasupai Tribal Council on October 24, 2003, we have been retained by fifteen (15) additional members of the Havasupai Tribe who believe their blood samples were misused by ASU. (*See*, attached list). We now represent a total of forty-four (44) members of the Havasupai Tribe.

Our clients, including the 15 new clients, have reported to us that they participated in an ASU-sponsored diabetes study in the 1990's in which hundreds of blood samples were obtained from individual members of the Havasupai Tribe without full or proper written consent. As part of the study, our clients provided blood samples to ASU officials to be used exclusively for the diabetes study as promised by ASU's representatives.

As you know, on October 24, 2003, ASU confirmed to the Havasupai Tribal Council that the Havasupai blood samples were improperly collected and mishandled by ASU officials, and used for unauthorized purposes including various studies to determine if ancestors of modern-day Havasupai people traveled across the Bearing Strait land bridge from Asia eons ago. Clearly, these unauthorized uses of the blood samples are totally unrelated to the diabetes study originally

promised by ASU officials. Many of our clients have documentation showing that the blood samples were obtained by ASU officials in the 1990's for the "Diabetes Study - Markow".

Our clients believe that ASU has misused their blood samples for unauthorized purposes causing them harm, extreme distress, and emotional trauma. The conversion and improper use of these blood samples by ASU officials violates our client's privacy as well as their cultural, religious, and legal rights. ASU may have also violated State and Federal laws and regulations regarding the sharing of medical information and records as well as the storage, handling, and transfer of blood samples. Our clients demand that ASU immediately cease all use and/or transfer of the Havasupai blood samples including the 15 new clients indicated in this letter. In addition, our clients hereby exercise and reiterate their right revoke any and all use, study, or transfer of these blood samples for any purpose. We further demand that the blood samples be identified, located, secured, and returned to our clients. Finally, we demand that ASU locate, secure, and provide us with all information regarding ASU's possession, use, and transfer of the Havasupai blood samples including all documents, studies, reports, writings, and all other related evidence, and that ASU pay for all damages and costs caused to our clients.

Thank you for your prompt attention to this matter. Please feel free to call me at (602) 271-0070 so that we may discuss this matter.

Sincerely,

Christopher A. Flores, Attorney

c: Robert J. Lyttle, Attorney
Havasupai Clients
File

15 New Clients

Floranda Uqualla
Bemus Uqualla
Gretchen Putesoy
Ziggy Jones
Daisy Jones
Dennie Wescogame
Jeffery Manakaja
Germaine Paya Watabomigie
Debbie D. Uqualla
Roland Manakaja
Haven J.H. Manakaja
Sage Qwapta Manakaja
Hope Cedar Manakaja
Raven Juniper Manakaja
Vivian Wescogame

APPENDIX

3

Law Offices

Robert J. Lyttle, P.C.
Attorneys at Law

Arizona: P.O. Box 1189, Carefree, Arizona 85377 — Tel: (480) 488-5027
Oklahoma: 3334 West Main Street, #148, Norman, Oklahoma 85377 — Tel: (405) 292-3010

Robert J. Lyttle (Licensed in OK & DC)
Christopher A. Flores (Licensed in AZ)
Of Counsel: Cesar Luna (Licensed in CA)

Christopher A. Flores
(602) 271-0070
Reply to Arizona Office

December 29, 2003

Paul Ward, Vice President and General Counsel
Office of General Counsel
Arizona State University
Administration Building B-Wing, Room B256
Tempe, Arizona 85287-2003

Richard Albrecht
Office of the Attorney General
State of Arizona
Administration Division
1275 West Washington
Phoenix, Arizona 85007

Re: New Clients, and Attachments to Draft Report

Dear Mr. Ward and Mr. Albrecht:

Please be informed that we have been retained by two additional members of the Havasupai Tribe who recently learned that their blood samples were likely misused by ASU. One of the new clients who lives in Nevada first learned about this matter this month. (*See*, attached names). The new clients have the same or similar claims as our other clients as outlined in our earlier correspondence, and they hereby assert such claims.

We have also received from your office a copy of the report entitled, "Preliminary Investigative Findings Concerning the Medical Genetics Project at Havasupai". The Report includes a number of appendices, as well as "Document Binders" numbers 1 through 8. While we received the appendices, we did not receive a copy of the Document Binders, therefore, *please send a copy of the Document Binders as your earliest convenience.*

Please feel free to call me if have any questions or need any additional information. Thank you.

Sincerely,

Christopher Flores by PJK.

Christopher A. Flores, Attorney

c: 2 New Clients
File

2 New Clients:

Lucinda Watahomigie

Genevieve Jackson

APPENDIX

4

3-5-04
11:35 P.M.
Claim # 3

LAW OFFICES OF
ALBERT M. FLORES
A PROFESSIONAL CORPORATION
337 NORTH FOURTH AVENUE
PHOENIX, ARIZONA 85003-1871

(602) 271-0070 FAX (602) 882-1822

March 4, 2004

VIA PERSONAL SERVICE

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

Chris Herstam, President
University of Arizona Board of Regents
2020 North Central Avenue, Suite 230
Phoenix, Arizona 85004

Dr. David Ortiz, Chair
University of Arizona Committee on Ethics & Commitment
University of Arizona - Social Sciences
1145 E. South Campus Drive
Tucson, Arizona 85271

Judith Leonard, Vice President and General Counsel
Office of General Counsel
University of Arizona
Administration Building, Room 103
1401 E. University Blvd.
Tucson, Arizona 85721-0066

Professor Therese Ann Markow, Individually and in her Official Capacity
Center for Insect Science - Biological Sciences West
University of Arizona
1041 E. Lowell Street
Tucson, Arizona 85721

Professor Michael Hammer, Individually and in his Official Capacity
University of Arizona - Life Sciences South
1007 E. Lowell Street
Tucson, Arizona 85721

Professor Tatiana Karafet, Individually and in her Official Capacity
University of Arizona - Biological Sciences West 239
1041 E. Lowell Street
Tucson, Arizona 85721

Professor Stephen Zegura, Individually and in his Official Capacity
University of Arizona - Anthropology Department
1009 E. South Campus Drive
Tucson, Arizona 85721

Re: Notice of Claim - UA Misuse of Havasupai Blood

To Whom It May Concern:

My co-counsel, Robert Lyttle, and I represent fifty-two (52) members of the Havasupai Tribe (hereinafter "clients") located on the Havasupai Indian Reservation in the Grand Canyon. The names of our clients are: (1) Carletta Tilousi, (2) Daisy Jones, (3) Fydel Jones, on behalf of himself and (4) Alyssa L. Jones (a minor child), and (5) Paulina K. Jones (a minor child), (6) Lenora Jones, (7) Haven J.H. Manakaja, (8) Jeffery Manakaja, (9) Orlando Manakaja (10) Roland Manakaja, on behalf of himself and (11) Hope Cedar Manakaja (a minor child), (12) Raven Juniper Manakaja (a minor child), and (13) Sage Qwapta Manakaja (a minor child), (14) Rosemarie Manakaja, (15) Sheila Manakaja, on behalf of herself and (16) Hansen Manakaja, JR., (a minor child), (17) Aral Kaska Putesoy, (18) Caroline Putesoy, (19) Desiree Putesoy, Fannie Putesoy on behalf of (20) Genevieve Jackson (a minor child), (21) Gretchen Putesoy, on behalf of herself and (22) Ziggy Jones (a minor child), (23) Ingrid Putesoy, (24) Mark Putesoy, (25) Sherry Dee Putesoy, (26) Carol Ann Rogers, (27) Gloria Siyuja, (28) Kathleen Siyuja (29) Gifford Angel Smith, (30) Ruth Havatone, (31) Edmond Tilousi (32) Rex Tilousi, on behalf of himself and (33) Nettie Tilousi (a minor child) (34) Rosella Tilousi, (35) Bernus Uqualla, (36) Debbie D. Uqualla, (37) Floranda Uqualla, (38) Muriel Uqualla, (39) Rena Uqualla, (40) Bernice Watahomigie, (41) Claudia Watahomigie, (42) Germaine Paya Watahomigie, (43) Leota Watahomigie, (44) Lucinda Watahomigie, (45) Patricia Watahomigie, (46) Violet Watahomigie,

(47) Arlene Wescogame,(48) Dennie Wescogame, (49) Vivian Wescogame, (50) Dianna Uqualla, (51) Carrie Goldbaum, (52) Eljean Hanna, (53) Grace Hanna, (54) Flora Wright, (55) Natalie Wright and (56) Matthew Putesoy.

This letter constitutes our clients' Notice of Claim against the University of Arizona ("UA"), Professor Therese Markow ("MARKOW"), and Professor Michael Hammer ("HAMMER"), Professor Tatiana Karafet ("KARAFET"), and Professor Stephen Zegura ("ZEGURA"). Pursuant to Rule 408 of the Arizona Rules of Evidence, this letter is not admissible in any proceeding since it constitutes evidence of compromise. This letter contains only known facts to date.

In January 2004, Attorney Stephen Hart of the law firm of Burch & Cracchiolo, P.A. issued a Final Report ("Final Report") on the acquisition, use, transfer, loss, and destruction of hundreds of blood samples, data, and related information including hand prints and genealogy research obtained from Members of the Havasupai Tribe. In 2003, Arizona State University ("ASU") hired Mr. Hart to conduct a thorough investigation into the events surrounding the Diabetes Project initiated in Havasupai in the 1990's. We have now reviewed the Final Report and attached documents which we received in late January 2004. We believe the Final Report clearly shows that not only did ASU commit numerous violations of law, but also UA and its professors engaged in extensive misconduct which has caused serious harm to our clients.

In 1989, ASU Professors John Martin ("MARTIN") and Markow, helped design a project to study diabetes ("Project" or "Diabetes Project") among the Members of the Havasupai Indian Tribe ("Tribe"). These professors presented the Project to the Havasupai people and the Havasupai Tribal Council strictly as a diabetes project designed to assist the Tribe with addressing a pressing medical issue in the Tribe – diabetes. These professors presented the Project as a diabetes study only, when in truth and in fact they knew or should have known that such representation was false and with the intent to obtain the Havasupai blood samples for non-diabetes purposes.

From 1990 through 1994, MARTIN and MARKOW obtained and collected, or caused to be obtained and collected, nearly four hundred (400) blood samples from individual Members of the Havasupai Tribe including our clients without obtaining informed consent, without ASU Institutional Review Board ("IRB") approval, and in violation of Federal and State laws and regulations. On information and belief, in 1995, MARKOW transferred from ASU to the UA and took the Havasupai blood samples with her to UA.

Once having obtained the Blood Samples from our clients and others, MARKOW

admittedly mishandled the blood samples including the destruction, loss, and improper use and transfer of the blood samples and related information to the extent that many blood samples are unaccounted for at this time. For example, MARKOW provided the blood samples and related data and information, both directly and indirectly, to other UA professors including HAMMER, KARAFET, and ZEGURA, as well as out-of-state professors and laboratories. These UA professors including MARKOW used the Havasupai blood samples in multiple research projects and publications without the UA Committee on Ethics and Commitment's approval or oversight and without informed consent of our clients or others similarly situated. At least fifteen (15) of these publications deal with non-diabetes subjects including schizophrenia, inbreeding, and theories about ancient human population migrations from Asia to North America, all to the harm and detriment of our clients and others similarly situated.

The uncontrolled use and transfers of our clients' blood samples and data has resulted in a breach of duties imposed by Federal and State laws applicable to UA and its professors as well as rules and protocol principals in the area of human subject research. As a result, UA and its professors have benefitted financially and otherwise.

The acts, omissions, and conduct of UA and its professors constitute negligent, grossly negligent, reckless, intentional, knowing, extreme, and outrageous conduct against our clients and others similarly situated. UA and its professors have breached the fiduciary duty owed to our clients, have failed to obtain informed consent from our clients, have committed fraud and misrepresentation, have inflicted intentional and negligent infliction of emotional distress on our clients, have violated the civil rights of our clients, have converted our clients blood samples for their own unauthorized use, and have engaged in negligence, as well as other serious violations of law. These actions have violated our clients' cultural, religious, and legal rights and have caused them severe emotional distress.

Our clients intend to pursue all relevant State and/or Federal claims in this matter. Our clients will seek compensatory, general, specific, punitive and other relevant damages as well as attorney's fees under the applicable causes of action.

Our clients demand that UA immediately cease all use and/or transfer of our clients' blood samples, data, and related information. Our clients further demand that UA locate, secure, and provide us with all information regarding UA's possession, use, and transfer of the Havasupai blood samples including all documents, studies, grant proposals, reports, writings, and all other related documents or evidence, and that UA pay for all damages and costs caused by its conduct.

For the purposes of this letter, the account above only constitutes a summary of the events that transpired and that are known to date. In the event of future litigation, it is not a substitute for the sworn testimony of our clients or any other witnesses. If this letter is used in any way in subsequent litigation, the fact finder should be advised that this letter contains only enough facts to permit the public entity to ascertain the basis upon which liability is claimed under A.R.S. § 12-821.01.

We are prepared to let a jury determine how much UA and other defendants should pay to compensate our clients for their injuries. However, in conformance with the State statute, our clients are required to state a settlement amount. Consequently, please be advised that our clients would settle their claims at this early juncture for ten million dollars, $10,000,000.

Sincerely,

Albert M. Flores

c: Havasupai Clients
File

APPENDIX

5

CCastaneda v. City of Williams
D.Ariz.,2007.
Only the Westlaw citation is currently available.
United States District Court,D. Arizona.
Steven CASTANEDA et al., Plaintiffs,
v.
CITY OF WILLIAMS et al., Defendants.
No. CV07-00129-PCT-NVW.

June 12, 2007.

Scott Adam Ambrose, Ambrose Law Firm PC, Scottsdale, AZ, for Plaintiffs.
Lori V. Berke, Shughart Thomson & Kilroy PC, Phoenix, AZ, Samantha Blencke Kelty, Steven Bruce Horton, Kenneth Harold Brendel, Mangum Wall Stoops & Warden PLLC, Flagstaff, AZ, for Defendants.

ORDER

NEIL V. WAKE, United States District Judge.

*1 The court has considered Defendant City of Williams' Motion To Dismiss (doc. # 17), Plaintiffs' Response (doc. # 22), and the Reply (doc # 26).

Plaintiffs commenced this action in the Coconino County Superior Court on December 12, 2006. (Doc. # 1 Ex. 1.) The case was removed on January 11, 2007.(*Id;* doc. # 11.) In this Motion, Defendant City of Williams ("City") assails the legal sufficiency of Plaintiffs' federal and state-law claims.[FN1] The parties are familiar with the factual background of this case, which will not be rehearsed here. The City's Motion will be denied for the reasons set forth below.

> FN1. Plaintiffs have withdrawn the count of perjury (doc. # 22 at 14), and have stipulated that they will not pursue punitive damages against the City of Williams (*id.* at 14). These aspects of Defendant's Motion will be granted. (Doc. # 17 at 2.)

I. Legal Standard

A claim must be supported by "a short and plain statement" with enough heft to "show that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2). This Rule is designed to "give the defendant fair notice of what the ... claim is and the grounds upon which it resets."*Conley v. Gibson,* 355 U.S. 41, 47 (1957). To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact."*Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007) (citations and internal quotations omitted)."While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."*Id.* at 1964 (citations and internal quotations omitted)."[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."*Id.* at 1968 (abrogating a literal reading of *Conley,* 355 U.S. at 45-46). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim that is "plausible on its face." *Id.* at 1973.When assessing the sufficiency of the complaint, all factual allegations are taken as true and construed in the light most favorable to the nonmoving party, *Iolab Corp. v. Seaboard Sur. Co.,* 15 F.3d 1500, 1504 (9th Cir.1994), and all reasonable inferences are to be drawn in favor of that party as well. *Jacobsen v. Hughes Aircraft,* 105 F.3d 1288, 1296 (9th Cir.1997).

II. Plaintiffs' Section 1983 Claim Was Timely

Plaintiffs' federal right of action under 42 U.S.C. § 1983 against the City of Williams accrued, at the earliest, on April 18, 2005, when Defendant Jason Moore first issued a citation to Plaintiff Steven Castaneda for "Exhibition of Speed." (Doc. # 14 at 3); *see Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir.1996) (a federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action). Plaintiffs initiated this action on December 12, 2006, well within the two-year limitations period for section 1983 claims in this State. *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir.1999).

III. Prima Facie Case for Causation under Section 1983

*2 The City contends that Plaintiffs have "not alleged a prima facie case for municipal liability" under section 1983"because they fail[ed] to allege that the unconstitutional municipal practice ... was the moving force behind the alleged constitutional violation."(Doc. # 26 at 3.) This argument lacks merit.

"In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice."*Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir.2002) (citation and internal quotations omitted). A section 1983 plaintiff must also allege that the challenged policy, custom, or practice was the cause in fact and the proximate cause of the constitutional deprivation. *Trevino v.* Gates, 99 F .3d 911, 918 (9th Cir.1996) (discussing section 1983 causation requirements in a summary judgment posture).

Plaintiffs have satisfied these minimum pleading requirements. The First Amended Complaint identifies the offensive policy, custom, or practice, "The City of Williams ... tolerated misconduct of its police officers, and encouraged misconduct by failing to adequately supervise, discipline or train [its] police officers," and it further suggests that Defendant Moore's offensive conduct conformed to this policy. (Doc. # 14 at 9.) Plaintiffs next allege that the City of Williams' "exercise of these established policies and customs ... violated Plaintiffs' ... clearly established rights under the United States Constitution against unreasonable searches and seizures of [their] person ... home and property."(*Id.* at 9.) The necessary inference of causation between the polices and customs of the City of Williams and the constitutional injuries sustained by Plaintiffs is supplied by the portions of the pleadings quoted above. The operative Complaint contains "enough factual matter (taken as true) to suggest" that Plaintiffs suffered actionable constitutional deprivations as a result of the City of Williams' official policy, custom, or practice of failing to adequately supervise, discipline or train its police officers. *Twombly*, 127 S.Ct. at 1964;*see Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 691 (1978). Therefore, Plaintiffs have "nudged their [section 1983] claims across the line from conceivable to plausible," and this is all that is required from them at this time.*Twombly*, 127 S.Ct. at 1973;*cf. Huffman v. County of Los Angeles*, 147 F.3d 1054, 1059 (9th Cir.1998) (testing sufficiency of the evidence of causal connection between official policy and alleged constitutional violation in a section 1983 municipal liability case).

IV. State-Law Recovery against the City is Limited to a One-Year Limitations Period

Counts six through 10 of the First Amended Complaint seek relief against the City on state-law grounds. (Doc. # 14 at 11-12.) These claims are subject to a one-year limitations period. A.R.S. § 12-821 ("All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterwards."); A.R.S. § 12-821.01(B) ("[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should knows the cause, source, act, event, instrumentality or condition which caused or contributed to the damage); *see Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995).

*3 Plaintiffs may not assert any state-law theory of liability against the City of Williams that accrued more than one year before the filing of this action on December 12, 2006. However, the "gravamen" of Plaintiffs' Complaint relates to events occurring on or after December 15, 2005. (Doc. # 22 at 14.) For example, the state-law claims of Ray and Debra Castaneda accrued on December 15, 2005, when their residence was searched and their property and persons were seized. (*Id.* at 14.)Plaintiff Steven Castaneda specifically "concede[s] that with respect to [his] state law claims only, [he is] precluded from seeking damages for any event prior to December 11, 2005."(*Id.* at 14.)Plaintiffs' state-law claims were timely filed on December 12, 2006, "within one year after the cause of action accrue[d]."A.R.S. § 12-821.

V. Plaintiffs' Notice of Filing Was Sufficient

A. The Statutory Requirements

Defendant City of Williams finally urges the court to dismiss all state-law claims for failure to comply with Arizona's notice of claim statute, A.R. S. § 12-821.01(A). (Doc. # 17 at 8-10.) To maintain an action against a public entity or a public employee in

Arizona, a putative litigant must first file a claim with persons authorized to accept service for the public entity or employee within 180 days of the accrual of that litigant's cause of action.A.R.S. § 12-821.01(A)."The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed."A.R.S. § 12-821.01(A). The statute also requires the putative litigant to include "a specific amount for which the claim can be settled and the *facts supporting that amount"* in his notice of claim. A.R.S. § 12-821.01(A) (emphasis added).

B. The *Houser* Decision

In *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 299, 152 P.3d 490, 496 (2007), the Arizona Supreme Court determined that the notice of claim statute must be strictly construed. Section 12-821.01(A) "clearly" and "unequivocally" defines "the specific requirements that must be met for a claimant to file a valid claim with a government entity."214 Ariz. at 299, 152 P.3d at 496 (surveying legislative history). The *Houser* court dismissed the plaintiff's state-law cause of action for failure to include a sum specific in the claim letter. However, in the course of its decision, the court observed that the plaintiff also failed to "provide *[any]* facts supporting the amount claimed."*Id.* at 297 n. 3, 152 P.3d at 494 n. 3 (emphasis in original).

To satisfy the literal terms of the statute, claimants must "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."*Houser*, 214 Ariz. at 296, 152 P.3d at 493. This statutory "requirement ensures that claimants will not demand unfounded amounts that constitute quick unrealistic exaggerated demands."*Id.* at 296, 152 P.3d at 493 (citation and internal quotations omitted)."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."*Id.* at 296, 152 P.3d at 493. *Houser* enforces the clear and unequivocal intent of the Arizona legislature. It does not work a "sea change" in the applicable law as Plaintiffs mistakenly contend. *Simmons v. Navajo County*, 2007 WL 1200940 (D.Ariz.2007); (doc. # 22 at 10-12).

C. Plaintiffs' Notice of Claim

*4 Plaintiffs' former counsel submitted a notice of claim letter to the City of Williams on June 8, 2006. (Doc. # 17 Ex. A.) The letter was filed "within 180 days of the accrual" of the state-law causes of action relating to the events of December 15, 2005. The notice of claim contains "facts sufficient to permit the [City of Williams] to understand the basis upon which liability is claimed."A.R.S. § 12-821.01(A); (Doc. # 17 Ex. A at 2 (discussing execution of search warrant at Plaintiffs' residence and false arrest of Steven Castaneda).) The letter includes "a specific amount for which the claim can be settled," $50,000, and it contains *some* "facts supporting that amount," i.e., "Ray Castaneda experienced difficulty in breathing due to the physical and emotional distress of his home being searched and was transported to and treated at the Flagstaff Medical Center."A.R.S. § 12-821.01(A); (doc. # 17 Ex. A at 2).

Plaintiffs provided the City with information, however sparse, about the nature and the extent of Ray Castaneda's "physical and emotional" injuries. This factual foundation satisfies the literal requirements of the statute because it permitted the City "to evaluate the amount claimed." *Houser*, 214 Ariz. at 296, 152 P.3d at 493. A full account of all the injuries claimed by each plaintiff is not required. *Houser's* footnote three, which faults the plaintiff for failing to "provide *any* facts supporting the claimed amounts," has no application here." *Id.* at 297 n. 3, 152 P.3d at 494 n. 3 (emphasis in original); *see Florian v. Perkinson*, 2007 WL 1317263 (D.Ariz.2007).

The June 8, 2006 notice of claim letter did not identify every theory of common law liability ultimately asserted by Plaintiffs in their First Amended Complaint. However, as the City itself concedes, the June 8, 2006 letter does not limit Plaintiffs to the legal theories identified therein. (Doc. # 26 at 10.) Section 12-821.01(A) makes factual disclosure, not artful pleading, a precondition to suit. The claim letter is not a prelude to substantive legal briefing but is rather a tool to be used by public entities to "investigate and assess liability," facilitate "the possibility of settlement prior to litigation," and assist "in financial planning and budgeting." *Houser*, 214 Ariz. at 294, 152 P.3d at 491 (citation and internal quotations omitted). Plaintiffs' notice of claim contained "facts sufficient to permit the [City of Williams] to understand the basis upon which liability [for the events of December 15, 2005] is claimed."A.R.S. § 12-821.01(A). It follows that

Plaintiffs may prosecute any and all claims arising out of the operative facts identified by them, including malicious prosecution.

IT IS THEREFORE ORDERED that Defendant City of Williams' Motion to Dismiss (Doc. # 17) is granted as to the count of perjury and as to the claim for punitive damages against the City. The Motion is otherwise denied.

D.Ariz.,2007.
Castaneda v. City of Williams
Slip Copy, 2007 WL 1713328 (D.Ariz.)

END OF DOCUMENT

CFranklin v. City of Phoenix
D.Ariz.,2007.
Only the Westlaw citation is currently available.
United States District Court,D. Arizona.
Charles Evan FRANKLIN, Plaintiff,
v.
CITY OF PHOENIX, et al., Defendants.
No. CV-06-02316-PHX-NVW.

May 17, 2007.

Anne E. Findling, Joel B. Robbins, Robbins & Curtin PLLC, Phoenix, AZ, Harberson III PC, Florence, AZ, for Plaintiff.
Lori V. Berke, Shughart Thomson & Kilroy PC, Phoenix, AZ, for Defendants.

ORDER

NEIL V. WAKE, United States District Judge.
*1 Pending before the court is Defendant City of Phoenix's Motion to Dismiss State Law Claims and Punitive Damages Claim (doc. # 28), the Response (doc. # 38), and the Reply (doc. # 42).

I. Background

Plaintiff Charles Evan Franklin ("Franklin") alleges the following facts, which the court takes as true for purposes of Defendant City of Phoenix's ("City of Phoenix" or "City") Motion to Dismiss. Fed.R.Civ.P. 12(b)(6); *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir.1994); *Jacobsen v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir.1997).

On September 27, 2004, Franklin, an African-American male then 56 years old, was stopped by Phoenix Police Officer Lisa Smith while riding his bicycle on the wrong side of a residential street in violation of Arizona law. (Doc. # 38 at 6.) Franklin was on his way to a nearby field where he exercised and practiced his golf swing. (*Id.* at 1.) Officer Smith mistook Franklin's golf club for a weapon. (*Id.* at 1.) After "cut[ting] Mr. Franklin off with her vehicle, causing him to fall off his bike," Smith checked for outstanding warrants for Franklin's arrest, and summoned two additional Phoenix police officers to the scene. (*Id.* at 1-2.)Franklin objected to Officer Smith's treatment, "declaring that he had no warrant."(*Id.* at 2.) Upon arrival, Officers Blair and Wardian perceived that Franklin had made a "hostile gesture" toward Officer Smith, and they "began beating on Franklin." (*Id* . at 2.) Franklin was arrested and transported to the Phoenix police station, where officers confirmed that Franklin had no outstanding warrants against him.(*Id.* at 2.) Franklin was charged with refusing to comply with a lawful order of a police officer, knowingly providing false information to a police officer, and a civil traffic violation. (*Id.* at 2.)

On March 23, 2005, Franklin, represented by counsel, submitted a notice of claim to the Phoenix Police Department, declaring his intention to sue the individual police officers involved in his arrest, the Phoenix Police Department, and the City of Phoenix for federal civil rights violations and various common law torts. (Doc. # 28 at 3-4; Ex. A.) Franklin neglected to send a notice of claim to the City of Phoenix. (*Id.* at 3-4.)In this letter, Franklin demanded $50,000 from the Phoenix Police Department to compensate him for his emotional damages, past and future medical expenses, possible economic losses, punitive damages, and "general damages." (*Id.* Ex. A, 1-2.) Franklin provided no factual support for the proposed settlement amount, however.(*Id.* Ex. A, 1-2.)

On December 6, 2005, an Arizona jury acquitted Franklin on both criminal counts, but found him liable for the civil traffic violation. (*Id.* at 2.)

On January 27, 2006, Franklin, represented by new counsel, filed a notice of claim with the City of Phoenix. (*Id.* at 4.) This letter incorporated the "factual and legal allegations" contained in Franklin's prior filing with the Phoenix Police Department by reference. (*Id.* Ex. B, 2 (including the March 23, 2005 letter as an attachment).) A copy of the letter was also sent to the Phoenix Police Department and the arresting officers. (*Id.* Ex. B, 1.) Noting his recent acquittal on all criminal charges, Franklin increased his demand from $50,000 to $200,000. Once more, Franklin failed to substantiate the settlement amount with facts relating to the actual damages sustained by him as a result of the alleged false arrest and malicious prosecution. (*Id.* Ex. B, 2.)

*2 Franklin initiated this action on September 27,

2006, asserting federal civil rights and Arizona common law claims against the City, the Phoenix Police Chief, and the police officers involved in his arrest. (Doc. # 51.) The City of Phoenix now moves to dismiss all state law claims and punitive damages claims pursuant to Fed.R.Civ.P. 12(b)(6). (Doc.28 at 2; 42 at 2.) Franklin failed to comply with the one-year statute of limitations prescribed by A.R.S. § 12-821, and he did not satisfy the statutory preconditions to municipal liability imposed by A.R. S. § 12-821.01(A). The Motion will be granted therefore.

II. State Law Claims Untimely

Franklin, represented by still new counsel, seeks to hold the City liable under Arizona law for malicious prosecution and intentional infliction of emotional distress ("IIED"). (Doc. # 51 at 8-9.)

Section 12-821, Arizona Revised Statutes, provides, "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterwards."Franklin's cause of action for malicious prosecution did not accrue until December 6, 2005, the date the underlying action terminated in his favor. *Glaze v. Larsen*, 207 Ariz. 26, 29, 83 P.3d 26, 29 (2004). That claim was timely filed on September 27, 2006. The remaining state law claim for intentional infliction of emotional distress accrued on September 27, 2004, the date of Franklin's arrest. This claim will be dismissed as out-of-time. Fed.R.Civ.P. 12(b)(6).[FN1]

> FN1. The court will disregard the claim for defamation, discussed in a cursory manner in Franklin's Response, as that theory was not urged in the initiatory pleadings. (Doc.38 at 1, 3, 6-7; 5.)

Conceding that Section 12-821 otherwise compels dismissal, Franklin attempts to salvage his state law claim for intentional infliction of emotional distress under the "continuing tort" doctrine. (Doc. # 38 at 3-4, 7 n. 1.) This argument lacks merit. In Arizona, "a cause of action does not accrue," and the statute of limitations does not begin to run, "until the plaintiff knows or with reasonable diligence should know the facts underlying the cause ."*Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995) (citation omitted). This "discovery rule" applies with equal force where, as here, a litigant brings suit against a public entity or a public employee. A.R.S. § 12-821.01(B) ("[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should knows the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.") While Franklin did not know the full extent of his damages at the time of his encounter with the Phoenix police, he realized that he had been damaged, and he knew the cause of that damage at the time of his arrest. Therefore, Franklin's cause of action for IIED accrued on September 27, 2004, when he knew both the "who" and the "what" underlying his claim. A.R.S. § 12-821.01(B).

When a litigant seeks to recover for repeated tortious acts inflicted over a period of years, causing a universe of damages that cannot be allocated to any particular act, the Arizona courts have shown a willingness to delay the accrual of a cause of action "until the date of the last tortious act."*Floyd v. Donahue*, 186 Ariz. 409, 413, 923 P.2d 875, 879 (Ct.App.1996) (citing *Garcia v. Sumrall*, 58 Ariz. 526, 533, 121 P.2d 640, 643 (1942) (trespass to property)); *see Henshaw v. Salt River Valley Canal Co.*, 9 Ariz. 418, 421, 84 P. 908, 909-10 (1906) (expressing a desire to honor both the "purpose" and the "effect" of statutes of limitations). But the factual predicate for the "continuing tort" exception is absent here. Rather, each instance of "extreme and outrageous" conduct endured by Franklin at the hands of the Phoenix police caused a single set of damages. The officers committed separate torts, carrying separate as well as cumulative injury. *See Floyd*, 186 Ariz. at 413, 923 P.2d at 879 (analyzing repetitive but discrete instances of sexual abuse). The claim for intentional infliction of emotional distress, having accrued on September 27, 2004, must share the fate of its state law brethren under A.R.S. § 12-821.

III. The Statutory Notice of Claim Was Insufficient

*3 The City of Phoenix urges dismissal of Franklin's remaining state law claim for malicious prosecution under A.R.S. § 12-821.01(A). Franklin failed to comply with this statute, which "clearly" and "unequivocally" defines "the specific requirements that must be met for a claimant to file a valid claim with a government entity."*Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 299, 152 P.3d 490, 496 (2007) (surveying legislative history).

Therefore, Franklins malicious prosecution claim is "barred and no action may be maintained thereon."A.R.S. § 12-821.01(A)

To maintain an action against a public entity or a public employee in Arizona, a putative litigant must first file a claim with persons authorized to accept service for the public entity or employee within 180 days of the accrual of that litigant's cause of action. A.R.S. § 12-821.01(A)."The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed."A.R.S. § 12-821.01(A). Franklin submitted his letter to the City of Phoenix on January 27, 2006, within 180 days of the accrual of the relevant state law claim. (Doc. # 28 Ex. B.) The statutory notice contained a factual recitation sufficient to permit the City to understand the nature of Franklin's claim. (*Id.* Ex. B.)

However, A.R. S. § 12-821.01(A) also requires putative litigants to include "a specific amount for which the claim can be settled *and the facts supporting that amount"* in their statutory notices. (emphasis added). In *Houser,* the Arizona Supreme Court interpreted the emphasized language as requiring claimants to "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."214 Ariz. at 296, 152 P.3d at 493. The statutory "requirement ensures that claimants will not demand unfounded amounts that constitute quick unrealistic exaggerated demands."*Id.* at 296, 152 P.3d at 493 (citation and internal quotations omitted)."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."*Id.* at 296, 152 P.3d at 493.

In *Houser,* the Arizona Supreme Court dismissed the plaintiff's state law action for failure to include a sum specific in the claim letter. However, in the course of its decision, the court observed that the plaintiff failed to "provide facts supporting the amount claimed."*Id.* at 297 n. 3, 152 P.3d at 494 n. 3. The considered dictum of the Arizona Supreme Court applies here. Franklin was required to submit some factual foundation for the $200,000 amount identified by him so that the City of Phoenix could "realistically consider [his] claim." *Id.* at 296, 152 P .3d at 493. Franklin's letters, like the claim letter at issue in *Houser,* did "not provide *any* facts supporting the claimed amounts for emotional distress and for damages to ... reputation ."*Id.* at 297 n. 3, 152 P.3d at 494 n. 3 (emphasis in original). This shortcoming is fatal to Franklin's sole remaining state law claim. *See Florian v. Perkinson,* 2007 WL 1317263 (D.Ariz.2007) (notice of claim failed to identify both the settlement amount and facts supporting that amount); *Simmons v. Navajo County,* 2007 WL 1200940 (D.Ariz.2007)(*Houser* enforces the clear and unequivocal intent of the Arizona legislature and does not represent a "sea change" in the applicable law).

*4 Neither the January 27, 2006 letter to the City of Phoenix, nor the March 23, 2005 letter to the Phoenix Police Department attached thereto, contained facts that support the proffered settlement amount of $200,000. (Doc. # 28 Ex. B, 2.) Both letters conveyed background information about Franklin's encounter with the police officers. (*Id.* Ex. A, B.) The January 27, 2006 letter specifically informed the City about the favorable disposition of the criminal indictments. (*Id.* Ex. B.) By referring to the March 23, 2005 letter, the City of Phoenix could have educated itself as to the *types* of damages, both compensatory and punitive, that Franklin would likely seek at trial. (*Id.* Ex. A at 2.) But neither letter contained any facts that might illuminate the nature and extent of Franklin's injuries. Without such information, the City of Phoenix could only speculate as to credibility of Franklin's settlement offer, which increased several fold between March 2005, and January 2006. This is the evil to which A.R. S. § 12-821.01(A) is directed. *Houser,* 214 Ariz. at 296, 152 P.3d at 493.

In his Response, Franklin suggests that disclosure of the factual predicates for the state law claims was itself sufficient to support the $200,000 demand. He argues that it would be particularly unfair to force him to "itemize" his emotional damages when the "stress" and "embarrassment of having been falsely accused" is "self-evident." (Doc. # 38 at 6.) Franklin's emotional damages could not have been measured with precision on January 27, 2006, just weeks after the underlying prosecution was terminated in his favor. But the statute does not require such precision. The plain language of Section 12-821.01(A) would have been satisfied with a modicum of data about the type and degree of physical and psychological injury sustained by Franklin at the hands of the Phoenix police. (*See, e.g.,* doc. # 51 at 4-6.) More than a year after his arrest, Franklin was well situated to provide the City with that information. For example, Franklin could

have identified the amount of medical expenses incurred by him as of the date of the letter. Franklin could also have disclosed the factual foundation for the claimed "psychological trauma," such as sleeplessness, inability to attend to personal affairs, anxiety, or other measures of emotional suffering. What is more, Franklin could have substantiated his "possible economic losses" by disclosing his lost wages and attorney's fees to date, and providing an estimate as to future economic losses proximately caused by the police officers' conduct. "General damages" of the type alleged by Franklin is his March 23, 2005 notice of claim are plainly insufficient. (Doc. # 28, Ex. A at 2.) The remaining state law claim for malicious prosecution must be dismissed. A.R. S. § 12-821.01(A).

IV. Punitive Damages Dismissed

The City of Phoenix finally urges the court to dismiss Franklin's claim for punitive damages as to both Franklin's state and federal causes of action. (Doc. # 28 at 2.) Franklin stipulates to the dismissal of his claim for punitive damages against the City, as demonstrated by the Second Amended Complaint. (Doc.38 at 1; 51 at 9.)

*5 IT IS THEREFORE ORDERED that Defendant City of Phoenix's Motion to Dismiss State Law Claims and Punitive Damages Claim (doc. # 28) is granted.

IT IS FURTHER ORDERED that Plaintiff Franklin's request to certify the question of the adequacy of his notice of claim to the Arizona Supreme Court (doc. # 38 at 15) is denied.

D.Ariz.,2007.
Franklin v. City of Phoenix
Slip Copy, 2007 WL 1463753 (D.Ariz.)

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