ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

CITY OF PHOENIX, CITY OF PHOENIX EMPLOYEES' RETIREMENT SYSTEM BOARD v. MARY ANN PEREZ et al
CV-08-0159-PR

PARTIES AND COUNSEL:

Petitioners: Real Parties in Interest Mary Ann Perez et al are represented by Phil Robbins, Peter Sorensen, and Paul Johnson, Jennings, Strouss & Salmon.

Respondent: The City is represented by J. Mark Ogden, R. Shawn Oller and J. Greg Coulter, Littler Mendelson. The City of Phoenix Retirement Board is represented by Marc Lieberman, Paige Martin, and Jennifer Kraham, Kutak Rock.

Amici Curiae: The Arizona Trial Lawyers Association is represented by Dave Abney of the Law offices of Charles M. Brewer and by Stanley G. Feldman, Haralson, Miller, Pitt, Feldman & McAnally. The Arizona Center for Law in the Public Interest and The Goldwater Institute are represented by Tim Hogan and Joy Herr-Cardillo.

FACTS:

In 2002, eight current or former City employees submitted a notice of claim to the City declaring their intention to file a lawsuit, as claimants and as representatives of a class, against the City for its alleged failure to permit claimants and similarly situated current and former Head Start employees to "participate in the benefits the City of Phoenix provides to its employees, including the retirement and pension plan, deferred compensation plan, annual leave, sick leave and healthcare benefits." The notice of claim demanded: (1) A sum of money representing the difference between what each Claimant and each class member was entitled to receive as benefits by comparison to those benefits each Claimant and each class member actually received, *in an amount not less than 10 million dollars;* (2) Funds representing contributions that should have been made by the City to the City of Phoenix Retirement Plan on behalf of each Claimant and each member of the classes represented by the Claimants, in an amount which Claimants believe is *greater than 50 million dollars and less than 100 million dollars*; and (3) An award of claimants' attorneys' fees and costs *in an amount not less than $1,500,000.00.* (Emphasis added.)

Plaintiffs filed an amended notice of claim adding eight additional named representatives. However, their "demand for resolution" remained unchanged. When the City did not respond to the amended notice within sixty days, it was deemed denied by statute. On October 21, 2002, plaintiffs filed a class-action complaint against the City seeking declaratory and monetary relief. They alleged that each plaintiff was employed by the City but nonetheless was denied participation in the benefits program, including the Retirement Plan, adopted by the City for its employees. They further alleged the City "knowingly and willfully concealed the fact that it is the employer of Head Start employees, and ... deliberately misrepresented the material facts concerning the employment relationship[.]"

According to the complaint, in January 2002, the City "determined to transition" the program "to make each delegate agency the employer of Head Start employees in each program" rather than the City, and plaintiffs thereafter discovered that they had indeed been employees of the City despite its representations to the contrary. The superior court granted class certification in 2003. As presently constituted, the class consists of approximately 1,167 members.

More than four years into the litigation, the City filed a motion for summary judgment on damages, seeking judgment in its favor as a matter of law because claimants "failed to comply with the mandatory requirements of §12-821.01(A) before filing suit[.]" Citing a new case, *Houser*, which held that a claim letter that did not include a specific amount for which the claim could be settled was insufficient, the City argued that neither notice of claim submitted by plaintiffs provided "a specific amount" for which the claim could be settled and both letters failed to set forth sufficient facts to support the amounts requested as required by statute.

In response, plaintiffs countered that the City had waived its notice of claim defense and that *Houser* should be limited to individual claims and should only be applied prospectively.

After hearing argument from both sides, the superior court denied the City's motion for partial summary judgment. Although it agreed with the City that *Houser* applied retroactively, the court held the case did not apply to class actions, reasoning: "The factual situations surrounding the case at hand and that in [*Houser*] are drastically different so that strictly adhering to the language of the Statute would prevent this type of case from ever moving forward.... [I]t was not the Supreme Court's intention to prevent class action law suits against government entities when deciding [*Houser*]."

The court further noted that potential class action suits at this stage have an unpredictable number of plaintiffs and potential class members because the class has not yet been certified and all the potential class members are not yet known to the named plaintiffs. Further, when they filed the claim Plaintiffs could not quantify their damages because they were not privy to the City's accounting practices. Sufficient facts were included to validate the claims and the relief sought. Concluding that the overall purpose of the statute - to give notice of the claim – had been satisfied, the court denied the City's motion for summary judgment.

The City filed a special action contending the superior court erred by denying its motion for summary judgment on damages because the notices of claim are statutorily non-compliant. There is no exception to the "specific amount" requirement for class-action claims.

The court of appeals accepted special action jurisdiction, and concluded that, as a matter of first impression, the notice of claim requirements for claims against public entities and public employees apply to class action claims. A claimant must identify an amount for which each claimant would be willing to settle. Accordingly, the court concluded that plaintiffs' amended notice of claim fails to "contain a specific amount for which the claim can be settled" and therefore does not comply with the statute. The court vacated the superior court's order denying the City's motion for partial summary judgment and remanded for further proceedings consistent with this opinion.

Claimants seek review here, asserting the opinion imposes an impossible requirement on class action plaintiff's pre-suit – at that juncture in a class action, damages are impossible to identify as a sum-certain. The class has not been certified as a class action and the court has not approved settlement.

ISSUES:

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

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