No. CV-23-0284-PR

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

CITY OF MESA and GUSTAVO WILLIAMS,
Petitioners,

v.

THE HONORABLE TIMOTHY RYAN,
Judge of the Superior Court of the State of Arizona in and for the County of Maricopa,
Respondent Judge,

PHILIP ROGERS,
Real Party in Interest.

Maricopa County Superior Court: No. CV2022-014378

Court of Appeals, Division 1: No. 1 CA-SA 23-0154

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

There is no good reason for this Court to grant review in this case. The usual factors that favor review are not present: Plaintiff is not asking for an Arizona Supreme Court decision to be limited or overturned; there are no conflicting lower court decisions; the Court of Appeals' opinion below clearly controls the narrow legal issue presented in this case; and the Court of Appeals' decision was well-reasoned, well-cited, and faithful to the statutory text and this Court's precedents. *See* Ariz. R. Civ. App. P. 23(d)(3) (listing the factors that favor review). Plaintiff, moreover, does not offer any persuasive reason for why this Court's review is needed. And because Plaintiff has not presented a sufficient reason for this Court to accept review, his petition for review should be denied.

ISSUE PRESENTED

Whether the Court of Appeals properly held that a notice of claim that demands "$1,000,000 or the applicable policy limits, whichever are greater" fails to satisfy A.R.S. § 12-821.01(A)'s "specific amount" requirement.

FACTS RELEVANT FOR REVIEW

On November 19, 2021, City of Mesa police officer Gustavo Williams hit Plaintiff with his patrol vehicle. *City of Mesa v. Ryan*, ___ Ariz. ___, ___ ¶

2 (App. 2023). Plaintiff alleges this accident caused him to suffer injuries and that Officer Williams is liable for his resulting injuries and damages. *Id.* at ¶¶ 2, 4. Plaintiff also alleges that the City of Mesa is vicariously liable for Officer Williams's alleged negligence. *Id.* at ¶ 4.

Because Plaintiff's cause of action accrued on the day of the accident, his deadline to serve Defendants with notices of claim was May 18, 2022 (180 days later). *Id.* at ¶ 3 (citing A.R.S. § 12-821.01). Plaintiff served the City of Mesa with a notice of claim on May 16, 2022. *Id.* Plaintiff served Officer Williams with a notice of claim on May 18, 2022—the last possible day. *Id.* In both notices of claim, Plaintiff made the following demand: "[T]his matter can be settled at this time for $1,000,000 or the applicable policy limits, whichever are greater." *Id.* at ¶ 4.

Over a month later, well after the notice-of-claim statute's 180-day deadline had passed, Plaintiff sought to amend his notices of claim to remove the reference to "the applicable policy limits." *Id.* at ¶ 5. His amended notices stated: "[O]ur client…has authorized us to [settle] any and all claims arising from this incident against Officer Williams, the City of Mesa, Mesa Police Department, or any other officer or employee for the total

sum of $1,000,000."[1] *Id.* Plaintiff, however, did not serve this amended notice to Defendants; instead, he simply emailed the untimely amended notice to an employee in the City Attorney's Office who is not authorized to accept service on behalf of the City or it employees.

After Plaintiff filed suit, Officer Williams and the City of Mesa moved to dismiss Plaintiff's complaint, arguing that his original notices of claim did not satisfy A.R.S. § 12-821.01(A) because they failed to state "a specific amount for which the claim could be settled." *Id.* at ¶ 6. The trial court denied Defendants' motion to dismiss, ruling that Plaintiff's notices of claim "satisfied [the] requirement" of stating "a specific amount for which the claim [could] be settled and the facts supporting that amount," though the court did not explain how or why the notices satisfied this requirement. *Id.* Defendants then filed a Petition for Special Action with the Court of Appeals. *Id.* at ¶ 7. The Court of Appeals accepted jurisdiction and

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[1] Of note, even in this amended notice of claim, Plaintiff's attorneys did not offer to settle his claim; they merely noted that their client had "authorized" them to settle his claim. Plaintiff, moreover, never served this amended notice on Defendants—so even if the relation-back rule somehow applied to notices of claim, it wouldn't matter here, because Plaintiff did not follow the proper procedures for serving this amended notice.

unanimously granted relief,[2] holding that Plaintiff's notices of claim failed to satisfy the notice-of-claim statute's "specific amount" requirement. *Id.* at ¶¶ 1, 7, 21. This appeal followed.

<u>THERE IS NO GOOD REASON TO GRANT REVIEW</u>

There is no need for this Court to grant review, and Plaintiff does not offer any persuasive reason for granting review in his petition. The usual factors that favor granting review are not present: Plaintiff is not asking for an Arizona Supreme Court decision to be limited or overturned; there are no conflicting decisions from the Court of Appeals; the decision below controls the narrow legal issue presented in this case; and the Court of Appeals' well-reasoned decision was faithful to the statutory text and existing precedent.

Plaintiff really offers only one reason for this Court to grant review: because, in his view, the Court of Appeals' decision was incorrect. *Petition for Review* at 9–12. But this is not a reason to grant review. Every litigant who files a petition for review believes the lower court got it wrong. To warrant this Court's attention, Plaintiff needs to do more than claim that the lower court reached the wrong conclusion.

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[2] The panel assigned to this case consisted of Chief Judge David Gass, Judge Michael Brown, and Judge Andrew Jacobs (author).

But, in any event, this Court does not need to step in because the Court of Appeals properly applied the law and issued a well-reasoned opinion. The notice-of-claim statute requires claimants to offer governmental entities a "specific amount for which the[ir] claim can be settled." A.R.S. § 12-821.01(A). And this Court has made clear that "[t]his language unmistakably instructs claimants to include a *particular and certain* amount of money that, if agreed to by the government entity, will settle the claim." *Deer Valley Unif. Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 9 (2007) (emphasis added).

Plaintiff did not offer a "particular and certain" amount of money. *See id.* Instead, he demanded $1 million <u>*or*</u> some other undefined, unknown amount of money. Because Plaintiff's demand was confusing, disjunctive, and vague, he did not satisfy the notice-of-claim statute's "specific amount" requirement, and the Court of Appeals properly directed the trial court to dismiss his case.

A. <u>None of the typical reasons for granting review is present</u>.

This Court usually grants review only if clarification is badly needed or if the lower court clearly reached the wrong conclusion on an important issue of law. *See* Ariz. R. Civ. App. P. 23(d)(3) (listing factors that favor granting review). More specifically, this Court typically grants review only

if one or more of the following factors are present: (i) there is no Arizona decision that controls the point of law in question; (ii) an Arizona Supreme Court decision should be limited or overturned; (iii) there are conflicting decisions from the Court of Appeals; or (iv) important issues of law have been incorrectly decided. *Id.*

None of these factors is present here. The decision below squarely controls the point of law at issue, and it is in line with existing precedent.[3] Plaintiff is not asking for an Arizona Supreme Court decision to be limited or overturned. There are no conflicting lower court decisions. And the Court of Appeals' decision was well-reasoned, well-cited, and faithful to the statutory text and this Court's precedents.

B. <u>The Court of Appeals' decision is well-reasoned, well-cited, and faithful to the statutory text and controlling precedent</u>.

Realizing that none of the usual reasons for granting review is present, Plaintiff argues that this Court should grant review because he believes the lower court's decision is wrong and because this case presents an issue of

[3] And as Plaintiff observes in his petition, there are hundreds of cases discussing the notice-of-claim statute available on Westlaw. *Petition for Review* at 5. There is no shortage of appellate guidance on this statute, and further guidance from this Court is not needed here.

law.[4] *Petition for Review* at 9, 15. But these are not persuasive reasons for this Court to grant review. Every litigant who files a petition for review believes the lower court's decision was wrong, and every case at the appellate level presents an issue of law. Because Plaintiff has not offered any persuasive reason for this Court to grant review, his petition should be denied.

The Court of Appeals, moreover, reached the correct conclusion in this case. This Court has made clear that the notice-of-claim statute "unmistakably instructs claimants to include a *particular and certain* amount of money that, if agreed to by the government entity, will settle the claim." *Deer Valley*, 214 Ariz. at 296 ¶ 9 (emphasis added). Plaintiff clearly did not satisfy this requirement here.

Instead of demanding a specific, sum-certain amount of money, Plaintiff demanded the greater of $1 million <u>or</u> the City's "applicable policy limits." But the City has multiple insurance policies and multiple policy limits that could potentially be "applicable" to this case. The City has a self-

[4] In arguing against the Court of Appeals' decision, Plaintiff largely relies on two unpublished decisions from the Court of Appeals. *Petition for Review* at 10–12. But these unpublished decisions have no precedential value, the Court of Appeals directly addressed these decisions in its opinion below, and these decisions regarding calculating interest do not contain any persuasive arguments or issues that warrant this Court's attention.

insured retention policy, an auto-liability policy, and an excess-carrier policy. *Petition for Special Action* at 15. And within this excess-carrier policy, there are different "layers" of coverage that are applicable only under certain circumstances—and the City's insurance carrier, not the City, determines whether these circumstances are present and determines which "layer" of coverage applies to a particular claim. *Id.* Given the City's insurance structure and the Plaintiff's ambiguous demand, he could have been asking for anywhere from $1 million to $54 million, with multiple different potential amounts in between.[5] *Id.* at 10 n.2.

Plaintiff doesn't even attempt to grapple with the Court of Appeals' reasoning on this point. According to Plaintiff, he "supplied a method for determining or calculating" the amount he was demanding. *Petition for*

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[5] Throughout this litigation, Plaintiff has repeatedly shifted his position on the amount of money he was demanding. To the trial court, Plaintiff averred that he was demanding only the City's $1 million auto-liability policy limits. *Reply in Support of Petition for Special Action* at 10–12, 13 n.4. But to the Court of Appeals, he averred that he was demanding the aggregate total of all the City's insurance policies (potentially $54 million). *Id.* And to this Court, he avers that the original notices of claim were demanding $54 million but his amended notice was "reaffirm[ing]" a demand of $1 million. *Petition for Review* at 6, 7. If, after months of litigation and briefing, Plaintiff still can't decide how much he was demanding, then it's not clear how the City was supposed to know how much he was demanding.

Review at 11. As Plaintiff tells it, "[a]ll that the claims personnel for the City of Mesa had to do to determine the amount of the policy limits was to look at the declarations pages for its insurance policies," unless "the claims personnel were too busy to look at a few documents…" *Id.* at 12.

The Court of Appeals, however, directly addressed this argument and persuasively explained why it was wrong. *See Ryan*, ___ Ariz. at ___ ¶¶ 17–19. Plaintiff demanded the City's "applicable" policy limits. *Id.* at ¶ 17. As Judge Jacobs explained:

> [Plaintiff's] argument fails because whether an insurance policy applies is not a calculation at all. To the contrary, it is a legal question. Worse, it is often a complicated legal question. Whether a policy is "applicable" is a question that can take years to litigate in an action for declaratory judgment.

Id. at ¶ 18 (internal citations omitted).

Plaintiff does not address this argument. Instead, apparently relying on unfounded assumptions, Plaintiff simply concludes that "[a]ll…the City of Mesa had to do…was to look at the declarations pages for its insurance policies." *Petition for Review* at 12. But a declarations page does not tell you whether an insurance policy *applies* to a given claim. *See Ryan*, ___ Ariz. at ___ ¶¶ 17–19. The City has multiple insurance policies that potentially could

have been "applicable" to this case, and one of those policies has different "layers" of coverage that apply only under certain circumstances—and the City's insurance carrier, not the City, determines when those layers are triggered. *See id.* at ¶¶ 6, 19. This "illustrates that Mesa did not control the answer to this question, that it was not a math problem, and that determining the 'applicable' limit might require an action for declaratory judgment, as is commonly the case." *Id.* at ¶ 19. Because Plaintiff demanded an unknown amount of money in his notices of claim, he did not satisfy the notice-of-claim statute's "specific amount" requirement, and the Court of Appeals properly directed the trial court to dismiss his case.

This Court has correctly observed that "[c]ompliance with [the notice-of-claim] statute is not difficult." *Deer Valley*, 214 Ariz. at 296 ¶ 9. The statute "simply requires that claimants identify the specific amount for which they will settle and provide facts supporting that amount." *Id.* Plaintiff, however, disagrees, claiming that "there is no comment this Court has ever made that is more ironic" because, in his opinion, complying with this statute is "often difficult" even for "great lawyers." *Petition for Review* at 5.

This argument is a bit head-scratching given the facts of this case. All Plaintiff had to do in this case was give the City a specific dollar amount that could have settled his basic personal-injury claim. Any amount of money would have sufficed. This is not a difficult requirement at all. And the City of Mesa, like most public entities in Arizona, makes complying with this requirement as easy as it could possibly be because it provides an easy-to-fill-out notice of claim form on its website (link) that contains the following section:

WHAT IS THE SPECIFIC AMOUNT FOR WHICH YOUR CLAIM CAN BE SETTLED?

$______________

All Plaintiff had to do was to provide a specific amount. Instead, he gave the City an ambiguous, confusing, disjunctive demand that asked for the greater of $1 million or some other unknown amount of money related to private insurance carriers. For this reason, the Court of Appeals properly concluded that Plaintiff's notices of claim did not satisfy A.R.S. § 12-821.01(A).

C. **<u>Plaintiff's new relation-back argument is not worthy of review</u>.**

Plaintiff, for the first time in this litigation, asserts in his petition that his (untimely) amended notice of claim should "relate back" to the date of his (timely) original notice of claim. *Petition for Review* at 5–6, 13–15. Plaintiff did not make this argument to the trial court or to the Court of Appeals. To the contrary, Plaintiff has consistently argued that his amended notice of claim was not untimely at all because "the statutory discovery rule of A.R.S. § 12-821.01(B) applied." *See Ryan*, ___ Ariz. at ___ ¶ 20.

"Issues and arguments raised for the first time on appeal are generally untimely and deemed waived." *ADP, LLC v. Ariz. Dep't of Revenue*, 254 Ariz. 417, 425 ¶ 25 (App. 2023). Because Plaintiff's relation-back argument was not raised, briefed, or argued to the lower courts, Plaintiff has waived the right to present it to this Court. *See Paloma Inv. Ltd. Partnership v. Jenkins*, 194 Ariz. 133, 137 ¶ 17 (App. 1998) ("New arguments may not be raised for the first time on appeal.").

The Court of Appeals, moreover, has held on multiple occasions that amended notices of claim served after the statute's 180-day deadline cannot cure deficiencies in previously served notices of claim. *See, e.g.*, *Pinal Cnty. v. Fuller*, 245 Ariz. 337, 343 ¶ 21 (App. 2018); *Turner v. City of Flagstaff*, 226

Ariz. 341, 344 ¶ 15 (App. 2011); *Haab v. Cnty. of Maricopa*, 219 Ariz. 9, 14 ¶ 24 (App. 2008). To judges, lawyers, and governmental entities in Arizona, this is not an open issue of law—and there is no need for this Court to upend this well-settled rule.

In any event, Plaintiff's relation-back argument is not persuasive, is contrary to well-established law, and is not worthy of this Court's review. Plaintiff baldly asserts that there is "no reason why the relation-back doctrine should not apply" in this case. *Petition for Review* at 13. But there are multiple reasons why Plaintiff's amended notice of claim does not relate back.

For one, the relation-back rule usually applies only if the claimant is seeking to add a claim or change the party against whom a claim is asserted. *See* Ariz. R. Civ. P. 15(c). That is not what Plaintiff was doing here. In his amended notice, Plaintiff simply "cut half of the content from a demand he had already made…" *Ryan*, ___ Ariz. at ___ ¶ 20. Plaintiff, moreover, "point[ed] to no new facts" in his amended notice that might excuse his untimeliness or explain why he was altering the language of his demand. *Id.* Plaintiff was not seeking to add a claim or change a party based on new information; he was clearly trying to cure his original notice's obvious

defects well after the notice-of-claim statute's 180-day deadline had passed.[6]

Worse, Plaintiff never served this amended notice on Defendants; he simply emailed the new notice to an employee at the City Attorney's Office who is not authorized to accept service on behalf of the City or its employees. Assuming the relation-back rule might apply to some notices of claim, it clearly does not apply here. This case is not the proper vehicle to address this issue.

Further, applying the common-law relation-back doctrine to notices of claim does not make sense because notices of claim are governed by statute, A.R.S. § 12-821.01, and this Court does not have the authority to rewrite, alter, or augment clear statutory language. *See State v. Sepahi*, 206 Ariz. 321, 324 ¶ 15 (2003) (noting that augmenting or adding to a statute "is to alter the statute and legislate, and not to interpret"). The Arizona courts, moreover, have long recognized that suits against the government are not to be treated the same as suits against private parties, *Rogers v. Bd. of Regents of Univ. of*

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[6] At one point in his petition, Plaintiff discusses a "March 12, 2022 notice of claim" and a "July 14, 2023 amended notice of claim." *Petition for Review* at 7. Defendants do not know what Plaintiff is referring to. The notices of claim in this case were from May 16, May 18, and June 23, 2022. *See Ryan*, ___ Ariz. at ___ ¶¶ 3, 5.

Ariz., 233 Ariz. 262, 269 ¶¶ 24–26 (App. 2013) (collecting cases), because the Arizona Constitution "specifically empowers the legislature to enact statutes of limitations and procedures that…treat lawsuits against the [government] differently from other lawsuits," *Stulce v. Salt River Project*, 197 Ariz. 87, 93 ¶ 22 (App. 1999). If the legislature wanted the relation-back rule to apply to notices of claim, it would have said so—and it can always amend this statute in the future. Plaintiff's relation-back argument should be directed to the legislature, not this Court.

CONCLUSION

There is no need for this Court to grant review. The usual factors that make review desirable are not present here: Plaintiff is not asking for an Arizona Supreme Court decision to be limited or overturned; there are no conflicting lower court decisions; the Court of Appeals' opinion below controls the narrow legal issue presented in this case; and the Court of Appeals' decision was well-reasoned, well-cited, and faithful to the statutory text and this Court's precedents.

Additionally, the Court of Appeals properly applied the notice-of-claim statute in this case. Plaintiff was required to include in his notice of claim a specific, sum-certain amount of money that would settle his claim.

He did not. Instead, he demanded $1 million <u>or</u> some other undefined, unknown amount of money. Because Plaintiff failed to satisfy this simple requirement, the Court of Appeals properly concluded that his notice of claim was deficient.

ACCORDINGLY, because the usual reasons for granting review are not present and the Court of Appeals' decision below was well-reasoned, well-cited, and faithful to the statutory text and this Court's precedents, Defendants respectfully ask this Court to *deny* Plaintiff's petition for review.

DATED this 28th day of December 2023.

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