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

SUPPLEMENTAL RESPONSE IN SUPPORT OF RESPONSE TO PETITION FOR REVIEW

Duncan J. Stoutner (#020699)
CITY OF MESA ATTORNEY'S OFFICE
P.O. Box 1466
Mesa, Arizona 85211
(480) 644-2343
duncan.stoutner@mesaaz.gov

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ARGUMENT

Pursuant to the Court's Order (May 7, 2024), the City of Mesa submits this Supplemental Brief in Support of its Response to Plaintiff's Petition for Review.

I. Arizona Law Required Plaintiff To Include A "Specific Amount" In His Notice Of Claim.

"The notice of claim statute is clear and unequivocal: The statute instructs that a claim '*shall* also contain a *specific amount* for which the claim *can be settled . . . .*'" *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296 ¶ 9, 152 P.3d 490, 493 (2007) (emphasis in original).

"This 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." *Id*. (emphasis added); *Falcon ex rel. Sandoval v. Maricopa Cnty*., 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006) (". . . substantial compliance do[es] not excuse failure to comply with the statutory requirements of A.R.S. § 12–821.01(A)").

Here, Plaintiff's notice of claim did not satisfy the statutory requirement—it did not contain "a particular and certain amount of money" that would settle the claim. *Deer Valley*, 214 Ariz. at 296 ¶ 9, 152 P.3d at 493.

Instead, and as discussed below, Plaintiff made a disjunctive request by providing alternative and non-specific demands. [Appendix to Petition for Special Action ("Appendix") at 005 (Plaintiff stated that "this matter can be settled at this time for $1,000,000 or the applicable policy limits, whichever are greater")]

But a disjunctive request like Plaintiff's does not satisfy the specificity requirements of the notice of claim statute. Without a "particular and certain amount of money," Plaintiff's notice of claim failed to comply with Arizona law. *Deer Valley*, 214 Ariz. at 296 ¶ 9, 152 P.3d at 493.

II. Under These Facts, Asking For "Applicable Policy Limits" Did Not Identify A "Specific Amount."

First, demanding the City's "applicable policy limits" did not identify a "particular and certain amount of money" that could settle the claim. *Id*. Neither Plaintiff nor the City, based on the contents of Plaintiff's notice of claim, could readily calculate the amount that would settle the claim.

A. Plaintiff Implicitly Concedes That He Did Not Identify A Specific Amount.

In this lawsuit, Plaintiff has taken different positions on what he meant by demanding "applicable policy limits." If Plaintiff himself did not know

what the "specific amount" was (even after litigation started), it was impossible for the City to agree to Plaintiff's proposal.

Specifically, in the Superior Court, Plaintiff argued that, by requesting the "applicable policy limits," Plaintiff intended to ask for the City's automobile liability limits ($1 million). [Appendix at 054 (arguing that "Plaintiff's Notice of Claim only demands the policy limits of a single insurance policy, the automobile liability policy which he was aware of . . .")]

In the Court of Appeals, Plaintiff changed his mind. Now, the "applicable limits" language meant over $50 million in insurance coverage. [Response to Petition for Special Action (8/9/2023), at 21 (Plaintiff argued that "the City chose not to settle for $54 million")]

The "specific amount," as required by statute, cannot have such disparate meanings dependent only on when Plaintiff is making the argument. A.R.S. § 12-821.01(A).

And Plaintiff has implicitly conceded that fact. Months after filing the defective notice of claim, Plaintiff drafted an "amended" notice of claim (outside of the statutory time limit). [Appendix at 76] In that new notice of claim, Plaintiff limited his demand to $1 million (deleting reference to the

City's "applicable policy limits"). [*Id.*] Plaintiff's amendment implicitly acknowledges that his prior request for "policy limits" did not meet the specificity requirements of the underlying statute.

Subsequent argument and litigation cannot retroactively supply information that the notice of claim needed to include. A.R.S. § 12-821.01(A) (information required by the statute must be included contemporaneously in the notice of claim).

B. "Applicable Policy Limits" Is Not A Specific Amount.

Second, demanding "applicable policy limits" did not identify a "specific amount." A.R.S. § 12-821.01.

The City obviously knows what insurance policies it has purchased and the monetary limits of those policies. But, as discussed by the Court of Appeals, what portion of those policies is applicable to Plaintiff's claim is not a straightforward calculation.

Specifically, "whether an insurance policy applies is not a calculation at all. To the contrary, it is a legal question." *City of Mesa v. Ryan in & for Cnty. of Maricopa*, 256 Ariz. 350 ¶ 18, 539 P.3d 142, 147 (Ct. App. 2023) (citations omitted); *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982) ("[t]he interpretation of an insurance contract is a

question of law to be determined by the Court independent of the findings of the trial court"). This is especially true considering the conditions and exclusions that will govern insurance coverage. *Id*. ("Worse, it is often a complicated legal question").

Beyond the legal question of coverage, the practical application of Plaintiff's demand in this circumstance was not a straightforward calculation.

For example, for personal injury claims, the City has a $3 million self-insured retention ("SIR"). Similar to a deductible, the City is financially responsible for exhausting the SIR before a personal injury claim could be covered by insurance. [Appendix at 048] The SIR is not an "insurance policy"; it is an amount that must be paid by the City before coverage will apply (assuming the underlying liability falls within the ambit of coverage and an exclusion does not apply to negate coverage). [*Id*.]

After that, the City has a $1 million policy for automobile liability. [*Id*.] The $1 million policy would apply (assuming coverage and no exclusions) only after the $3 million SIR had been exhausted. And after that, the City has multiple insurance policies (generally structured in layers of $10 million) that may apply to personal injury claims against the City. [*Id*.] Those excess

liability policies would apply (assuming coverage and no exclusions) only after the $3 million SIR and the $1 million automobile liability policy had been exhausted.

For any policy to apply to Plaintiff's claim, the City would first have to exhaust its $3 million SIR. [*Id.*] Then depending on the facts of the claim, the type of coverage, and possible exclusions, insurance may or may not apply to Plaintiff's claims.

Based on the City's insurance structure, a request for "policy limits" does not specify what amount Plaintiff was demanding.

For example, when asking for "policy limits," was Plaintiff asking for the $1 million in automobile liability coverage? This is what Plaintiff argued to the Superior Court. [Appendix at 054] But, that amount is only available after the City pays its $3 million SIR. [Appendix at 048] Plaintiff never asked for the City's SIR (and the SIR is not an applicable insurance policy). [Appendix at 028]

Was Plaintiff asking for $4 million (the sum of the City's SIR and the $1 million automobile liability policy)? But again, Plaintiff never asked for the City's SIR. [*Id.*]

Was Plaintiff asking for $11 million (the sum of the City's $1 million automobile liability policy and $10 million in excess insurance). That amount is only available after the City exhausts its $3 million SIR. Plaintiff never asked for the City's SIR. [*Id.*]

Was Plaintiff asking for $51 million (the sum of the City's $1 million automobile liability policy and $50 million in excess liability insurance)? That amount is only available after the City pays its $3 million SIR. Plaintiff never asked for the City's SIR. [*Id.*]

Was Plaintiff asking for $54 million (the sum of the City's SIR, the City's $1 million automobile liability policy, and $50 million in excess insurance policies)? This is what Plaintiff argued to the Court of Appeals. [Response to Petition for Special Action (8/9/2023), at 21 (Plaintiff argued that "the City chose not to settle for $54 million")] But, Plaintiff never asked for the City's SIR, and he never referenced these policies with any level of specificity. [*Id.*]

Regardless of the amount that Plaintiff chooses now, Plaintiff's notice of claim (by its express terms) never made any request that specified the amount that would settle the claim. [Appendix at 028]

Plaintiff's request for "applicable policy limits"(regardless of whether that was in any way proportionally related to Plaintiff's alleged injuries) simply does not satisfy that requirement because it did not identify a "specific amount" that could settle the claim. A.R.S. § 12-821.01.

Plaintiff's argument that the City simply could have added the limits of all of its liability policies (to identify the specific amount) is inadequate to meet the statutory requirements. Specifically, the fact that the City purchased policies that (depending on coverage requirements, payment of the City's SIR, and possible exclusions) *could* provide coverage does not resolve the issue about whether those policies are applicable and whether those policies can be used to calculate the required "specific amount."

Similar to contract law, by relying on such ambiguous and legally inconclusive language in his notice of claim, it was impossible for the City and Plaintiff to have a meeting of the minds as to the meaning of Plaintiff's notice of claim. Restatement (Second) of Contracts § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it").

To that end, when demanding "policy limits," was Plaintiff asking for $1 million, $4 million, $51 million, $54 million, or something else entirely? The fact that Plaintiff's language could be interpreted in multiple ways confirms that Plaintiff did not state a "specific amount" as required by statute. Indeed, if the City had said "yes" to Plaintiff's notice of claim, what amount would the City have agreed to? Based on Plaintiff's notice of claim, it is impossible to tell.

Failing to include the required "specific amount," there was no meeting of the minds as to the amount of Plaintiff's demand, and Plaintiff's notice of claim therefore failed to satisfy statutory requirements. A.R.S. § 12-821.01.

III. Plaintiff Specified That $1,000,000 Would Not Settle The Case If Insurance Was Greater.

The Court of Appeals correctly held that, listing $1 million in the notice of claim as an alternative (depending on the amount of the City's "policy limits"), did not satisfy the statutory requirements for a notice of claim. [Appendix at 028]

The notice of claim specified that Plaintiff would *not* settle for $1 million if "applicable" insurance was greater. Rather, that offer "was one of

two alternative amounts, [only] the greater of which would suffice." *City of Mesa*, 256 Ariz. 350 ¶ 11, 539 P.3d at 145.

By making the offer in those terms (specifying that, depending on the circumstances, Plaintiff would *not* accept the $1 million), Plaintiff's notice of claim fails to include a "specific amount" that the City could pay to settle Plaintiff's claim.

Pursuant to the statute, Plaintiff only had to list a "specific amount" to satisfy his burden under the notice of claim statute. *Deer Valley*, 214 Ariz. at 296 ¶ 9, 152 P.3d at 493 (claimant must identify a "particular and certain amount of money"). Having failed to do so, Plaintiff's notice of claim does not satisfy the legislature's mandate in the notice of claim statute. A.R.S. § 12-821.01(A) (notice of claim requires a "specific amount").

IV. Public Policy Supports Clear Statutory Requirements.

Here, the legislature provided a clear requirement for a notice of claim: the notice of claim "shall also contain a specific amount for which the claim can be settled . . . ." A.R.S. § 12-821.01(A).

Recognizing the clear legislative mandate, this Court has confirmed that the notice of claim requirements (including the specific amount) are "clear and unequivocal." *Deer Valley*, 214 Ariz. at 296, 152 P.3d at 493 ("This

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").

In accordance with well-established law, Plaintiff only had to list a specific amount in his notice of claim to satisfy the statutory requirements. Because he failed to do so, his notice of claim is fatally defective.

Efforts to introduce exceptions and ambiguities to the statutory requirements should be rejected because they undermine and contradict the clear and express legislative directive contained in the notice of claim statute. A.R.S. § 12-821.01. Ultimately, this would lead to more confusion and litigation regarding the sufficiency of a claimant's notice of claim.

CONCLUSION

For the aforementioned reasons, the City of Mesa respectfully requests that the Supreme Court affirm the Court of Appeals' decision.

DATED this 28th day of May, 2024.

CITY OF MESA ATTORNEY'S OFFICE

/s/ Duncan J. Stoutner
Duncan J. Stoutner (#020699)
P.O. Box 1466
Mesa, Arizona 85211