ARIZONA SUPREME COURT

JACQUELIN JAMILEX LOPEZ SANCHEZ, et al.,

Plaintiffs/Appellants,

v.

MARICOPA COUNTY,

Defendant/Appellee.

NO. CV-24-0013-PR

COURT OF APPEALS, DIV. ONE
No. 1 CA-CV 22-0572

Maricopa County Superior Court
No. CV2022-092441

RESPONSE TO PETITION FOR REVIEW

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Introduction

Review should be denied in this case because the issue presented in Plaintiffs' Petition for Review ("Petition") is completely irrelevant to the disposition of the claim against Maricopa County. Though one could not tell it from reading the Petition, the claim against Maricopa County was dismissed because, as a matter of law, Maricopa County cannot exert control over a sheriff's deputy sufficient to create a claim for vicarious liability based on the deputy's alleged negligence. Plaintiff therefore failed to state a claim against Maricopa County. But the Petition is essentially silent on this issue; Plaintiffs do not meaningfully contest the Court of Appeals' analysis regarding vicarious liability. Rather than presenting any substantive analysis of vicarious liability, the Petition goes on a discursive and irrelevant discussion of whether a county sheriff can be served with a notice of claim. This entire discussion is irrelevant because Plaintiffs cannot maintain a vicarious liability claim against Maricopa County regardless of who can be served with the notice of claim. Besides, the notice of claim statute does not create liability where it otherwise would not exist, it only provides an avenue for claimants to bring their already-existing claims against government entities and employees.

Even if the Petition's issue presented for review were relevant, Plaintiffs' analysis of the notice of claim statute is simply wrong. When a plaintiff sues a county sheriff, they are not suing the individual holding the office of county sheriff,

they are suing the office itself. The office of county sheriff is a public entity which can be served with a notice of claim. But even if Plaintiffs are correct that the county sheriffs are "public employees" and not "public entities," that does nothing to change the disposition of this case because public employees can be served with notices of claim in the same manner as public entities. In short, the issue Plaintiffs present for review has absolutely no chance of overturning the dismissal of the claim against Maricopa County, so review should be denied.

Relevant Factual and Procedural History

Sanchez's Complaint alleges that on June 16, 2021, Plaintiffs were travelling eastbound on the I-10 when their vehicle was allegedly rear-ended by Maricopa County Sheriff's Office ("MCSO") Deputy Jesus Godinez. [R.[1] 1, ¶¶ 3, 6–7]. The Complaint alleges that Deputy Godinez was in the course and scope of his employment at the time of the accident. [R. 1, ¶ 8]. On June 8, 2022, Sanchez filed their Complaint concerning the alleged accident. [R. 1]. The Complaint lists only Maricopa County (the "County") as the sole Defendant; neither Deputy Godinez nor Maricopa County Sheriff Paul Penzone (the "Sheriff") were named as Defendants. [Id.]. The Complaint's only basis for the County's liability is on a theory of vicarious liability through *respondeat superior*. [*See* Id.].

On July 1, 2022, the County filed a motion to dismiss, pointing out that

[1] "R." refers to the Court's Electronic Index of Record.

Arizona law has long maintained that Arizona counties are not vicariously liable for torts committed by their respective sheriffs' offices, and thus Sanchez has no basis to sue the County for the alleged accident. [R. 7–8]. Following full briefing on the motion to dismiss, the superior court issued a minute entry granting the County's motion to dismiss on August 4, 2022. [R. 13]. Final judgment was entered in the County's favor on November 18, 2022, and Plaintiffs timely appealed. [R. 21]. Division One of the Court of Appeals issued an Opinion affirming that, as a matter of law, Arizona counties cannot exert sufficient control over sheriff's deputies to be vicariously liable for the deputy's actions. *Sanchez v. Maricopa County*, 541 P.3d 566 (App. 2023) (the "Opinion").

Issues Decided by the Court of Appeals

1. Did the trial court properly determine that the County cannot be vicariously liable for the actions of a sheriff's deputy where all controlling authority maintains that the County and the Maricopa County sheriff have completely separate powers and duties such that the County does not have the authority to control the sheriffs' deputies as they act in their official business?

Reasons the Petition Should be Denied

1. The Court of Appeals' vicarious liability analysis was entirely correct, so review should be denied. Plaintiffs' only stated claim against the County is an argument that the County is vicariously liable for Deputy Godinez's conduct. To prove an employer's vicarious liability for the conduct of an employee, a plaintiff must prove that "with respect to the physical conduct of the employee and the performance of [the employee's] service, [the employee] is subject to the employer's control or right of control." *Myers v. City of Tempe*, 212 Ariz. 128, 132, ¶ 16 (2006). Plaintiffs were charged with showing that the County exerted sufficient control over the details of Deputy Godinez's conduct and job performance such that it could be liable for any negligent performance thereof. Without reproducing the whole analysis here, the Court of Appeals thoroughly analyzed the provisions of the Arizona constitution and the controlling statutes to determine the relative rights and responsibilities of Arizona counties and Arizona sheriffs. In this analysis, the Court of Appeals correctly determined that Arizona counties are not granted the power to control the conduct of sheriff's deputies because the counties are, by law, not given the power to act in the same manner as the sheriffs. [Opinion, at ¶¶ 9-14]. Therefore, the County could not have exerted sufficient control over Deputy Godinez to be vicariously liable for Deputy Godinez's conduct.

The Opinion's holding is consistent with 50 years of authority from the Court of Appeals stating that Arizona counties are not vicariously liable for the conduct of the employees of separately elected officials. *Fridena v. Maricopa Cnty.*, 18 Ariz. App. 527, 530 (1972); *Hernandez v. Maricopa Cnty.*, 138 Ariz. 143, 146 (App. 1983) (applying the same logic to a justice of the peace); *Yamamoto v. Santa Cruz Cnty. Bd. of Supervisors*, 124 Ariz. 538, 540 (App. 1979) (same for the clerk of the court). Recently, this same reasoning has repeatedly been used to establish that Arizona counties are not liable for the torts of sheriff's deputies. *Sarkis v. Maricopa Cnty.*, No. 1 CA-CV 20-0271, 2021 WL 1991857, at *2, ¶ 8 (App. May 18, 2021), (*available without charge at* https://casetext.com/case/sarkis-v-maricopa-cnty); *Loredo v. Maricopa Cnty.*, No. 1 CA-CV 22-0259, 2023 WL 2181126 (App. Feb. 23, 2023), *review denied* (Aug. 22, 2023) (*available without charge at* https://casetext.com/case/loredo-v-maricopa-cnty).[2] In short, the Opinion states long-settled law, though for the first time in a published opinion as it applies to sheriff's deputies.

The Petition essentially punts on this issue and does not even argue that the County exerts sufficient control over sheriff's deputies to be vicariously liable for their conduct. Instead, Plaintiffs analyze whether Deputy Godinez was acting within

[2] Consistent with Arizona Rule of the Supreme Court 111(c), Maricopa County cites these cases only for persuasive value and to demonstrate the consistency of the Court of Appeals' rulings on this issue.

the course and scope of his employment—which has never been at issue in this case—and then assert that because Deputy Godinez was acting within the course and scope, the County must be vicariously liable. [Petition, at 15-16]. Plaintiffs' argument implicitly asserts that the County has the authority to control a sheriff's deputy's conduct through the Sheriff, who Plaintiffs assert is a mere manager of a county department despite being an elected official of a constitutionally separate office. [*See* Petition at 1, 16-17]. But Plaintiffs' argument is missing any authority which permits Arizona counties to control how the sheriffs execute their legal duties—and there is no such authority. In fact, all available legal authority demonstrates that the counties do not have the power to control how the sheriffs fulfill their legal duties, and without that aspect of control there can be no vicarious liability, and Plaintiffs do not contest this reality.

The Court should deny review because the Court of Appeals was correct that, as a matter of law, the County cannot be vicariously liable for the conduct of a sheriff's deputy. Furthermore, this line of cases from the Court of Appeals has stood for more than 50 years; there is no need for this Court to clarify anything about these cases.

2. The issue Plaintiffs present for review is entirely irrelevant to the disposition of the claim against the County. Plaintiffs, recognizing they have no hope of reviving their claims through a standard vicarious liability analysis, seek to

manufacture other avenues for liability against the County. Their argument essentially maintains that because the notice of claim statute, A.R.S. § 12-821.01, allows claimants to serve their notice of claim on the "public entity" that employs a negligent public employee, the claimants must be permitted to sue those public entities. Plaintiffs then endeavor to demonstrate that the County and not the Sheriff is the "public entity" that employs Deputy Godinez. The Court should deny review because, even if Plaintiffs are correct about whether the Sheriff is a public entity, it does not change the result of this case. The notice of claim statute is completely irrelevant to the liability analysis because it does not affect vicarious liability and does not create any separate cause of action.

First, fundamentally, the notice of claim statute cannot provide an independent basis for liability because it is merely a vehicle for claimants to bring claims they already possess; the notice of claim statute cannot create new claims from whole cloth. A.R.S. § 12-821.01(A) ("Persons *who have claims* against a public entity, public school or a public employee shall file claims. . .) (emphasis added); *see McKee v. State*, 241 Ariz. 377, 384, ¶ 30 (App. 2016) ("When a plaintiff *has a claim against a public entity*, the notice of claim statute requires the plaintiff to file notice with the public entity stating a factual basis and a settlement amount for the claim prior to filing the cause of action . . . . the purpose of the notice of claim statute is limited to providing the government entity with an opportunity to

investigate the claim, assess its potential liability, reach a settlement prior to litigation, budget and plan.") (emphasis added) (internal quotation and citations omitted). Thus, a potential plaintiff must first possess a claim against a governmental entity before that plaintiff uses the notice of claim statute to bring that claim. Because Plaintiff did not have a proper claim for liability against the County, the notice of claim statute does nothing to create that claim.

Second, A.R.S. § 12-821.01(A), which is the whole basis of the Petition, only concerns the *service* and *content* of a notice of claim. Even if Plaintiff were correct that that notice of claim statute provided that a notice of claim could be served on Maricopa County for Deputy Godinez's conduct, that would not create liability for the County. It would simply mean that Maricopa County could be served with the notice of claim. Nothing in A.R.S. § 12-821.01(A) remotely suggests that it creates liability against the entities served with a notice of claim. Because this statute only concerns service and not liability, it is irrelevant to the fact that Plaintiff failed to state a viable claim for liability against the County.

Because the issue Plaintiffs presented for review is irrelevant to the liability issue, which is the basis of this appeal, review should be denied.

3. Plaintiffs' argument is logically deficient. Plaintiffs' argument necessarily assumes that the law must provide some governmental entity which is vicariously liable for Deputy Godinez's conduct, and then Plaintiff proceeds to use

the notice of claim statute to deduce what governmental entity is liable for the conduct. There is absolutely no basis for Plaintiffs' assumption. Either a party is liable for another's conduct through the standard legal analyses, or it is not. The law will not manufacture vicarious liability where there is none simply because Plaintiffs would prefer to sue someone other than Deputy Godinez. Maricopa County is not vicariously liable for Deputy Godinez's conduct, and the Court should not change the law to make it liable for Deputy Godinez's conduct simply because Plaintiffs want to sue an entity who is vicariously liable for Deputy Godinez's conduct and not Deputy Godinez himself.[3] [*See* Petition, at 6-7].

Along these same lines, Plaintiffs' implicit assertion that the notice of claim statute is unfair because it deprives them of a liable entity to sue is nonsense because Plaintiffs openly admit that they could have sued Deputy Godinez with no prejudice, but they chose not to. [Petition, at 6-7]. The Court should not go to extreme lengths to provide a defendant for Plaintiffs to sue when Plaintiffs could have easily sued Deputy Godinez.

4. Plaintiffs' interpretation of the notice of claim statute is completely wrong. The core of Plaintiffs' discussion of the notice of claim statute is the argument that the Maricopa County Sheriff cannot receive a notice of claim because

[3] Besides, if Plaintiffs wanted to sue an entity vicariously liable for Deputy Godinez's conduct, they could have simply sued the Maricopa County Sheriff as Arizona plaintiffs have done for decades.

he is not a "public entity" as defined in A.R.S. § 12-820(7); instead, Plaintiffs assert, the Sheriff is merely a person. Plaintiff's interpretation is wrong on several fronts.

First, when a plaintiff sues the Maricopa County Sheriff, they are not suing the individual holding the office, they are suing the office itself. Arizona law and procedure is clear that the lawsuit is against the office and not the officer. *See* Ariz. R. Civ. P. 17(e) (providing that when a plaintiff sues a public officer, the plaintiff may name the office itself rather than the officer as the defendant); Ariz. R. Civ. P. 25(d) (providing for the automatic substitution of an elected officer if the officer leaves office during the pendency of a lawsuit). Other jurisdictions have similarly recognized that lawsuits against public officers are actually targeted against the office and not the office holder. *See, e.g.*, *Carver v. Sheriff of La Salle Cnty.*, 203 Ill. 2d 497, 512 (Ill. 2003) (discussing liability of "[t]he office of sheriff" as a public entity). Pursuant to these realities, for decades Arizona plaintiffs have sued elected officers as proxies for the employees they lead, including the county sheriffs. *Ryan v. Napier*, 245 Ariz. 54 (2018); *Watkins v. Arpaio*, 239 Ariz. 168 (App. 2016).[4]

Consequently, Plaintiffs' sophistry asserting that a human being is not an "entity" is a complete red herring. It does not matter whether a human being can be

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[4] Along these lines, Plaintiffs' inferences that the notice of claim statute renders the Maricopa County Sheriff and the Sheriff's deputies above the law simply does not pass the smell test. [Petition, at 18]. No credible observer of legal developments in Maricopa County over the last several decades can claim with a straight face that the Maricopa County Sheriff and his deputies are immune from civil lawsuits.

an entity because the question Plaintiffs actually raise is whether the Office of Maricopa County Sheriff can be a public entity which can be served with a notice of claim. And the law is clear that it can be served with a notice of claim.

Second, Plaintiffs' analysis is incorrect because a county sheriff is a public entity for the purposes of the notice of claim statute. Initially, what constitutes "public entity" is not nearly as constricted as Plaintiffs assert. As the Opinion correctly notes, the definition of "public entity" states that it "includes" "this state and any political subdivision of this state." The use of the word "includes" means that the legislature intended for "public entity" to encompass things beyond the state and its political subdivisions. *State ex rel. Dep't of Econ. Sec. v. Torres*, 245 Ariz. 554, 558 (App. 2018) ("when the legislature does not define a term, but states that the term "includes" specified items, we construe the term to also include other items that fall within the term's ordinary meaning."); A.R.S. § 1-215(14) ("'Includes' or 'including' means not limited to and is not a term of exclusion").

Since the passage of the notice of claim statute, litigants and courts alike have recognized that elected officials are public entities which can be served with a notice of claim. As discussed above, plaintiffs regularly name county sheriffs, and other elected officials, as proxies for their departments and organizations in notices of claim and lawsuits. Because the phrase "public entity" has been regularly interpreted to include these public offices, that meaning is now effective as law.

A.R.S. § 1-213 ("[t]echnical words and phrases and those which have acquired a peculiar and appropriate meaning in the law *shall be construed according to such peculiar and appropriate meaning*.") (emphasis added). The notice of claim statute has three decades and history which demonstrates that officers such as county sheriffs are "public entities" which are able to be served with a notice of claim. It is not necessary to hyper-fixate on the colloquial definition of the words "entity" or "public entity" as Plaintiffs urge because practices in Arizona make clear that elected officers are "public entities."[5] Plaintiffs' arguments are unavailing because county sheriffs are "public entities" which can be served with a notice of claim.

5. Even if Plaintiffs' interpretation of the notice of claim statute was correct, the result of this case would be exactly the same. Assuming *arguendo* that Arizona sheriffs are "public employees" and that the notice of claim statute can create a claim for liability out of whole cloth to provide some entity vicariously liable for a sheriff's deputy's conduct, Plaintiffs still do not have a viable claim against *Maricopa County*. This is because notices of claim can be served on public employees just as easily as they can be served on public entities. A.R.S. § 12-821.01(A). Therefore, even if the Sheriff is a "public employee" Plaintiffs still could have served him with a notice of claim. Plaintiffs absolutely were not forced to serve

[5] If the Court does wish to fixate on the definitions, a county sheriff easily fits within the then-existent definition of "public entity" in *Black's Law Dictionary*. [*See*, Petition, at 12].

the County with their notice of claim because, under any circumstance, the Sheriff alone is vicariously liable for the conduct of the deputies and the Sheriff can be served with a notice of claim. So even under Plaintiffs' tortured reading of the notice of claim statute, Plaintiffs still do not have a viable claim for liability against the County. The Court should not grant review when, even if the Court completely agreed with Plaintiffs' classification of the Sheriff and the County under the notice of claim statute, it would still not change the result of this lawsuit.

6. This Court has already rejected the exact argument Plaintiffs raise in their Petition, and there is no reason review should be granted this time. The plaintiffs in *Loredo* made essentially the same legal argument through the same appellate counsel in their petition for review. [*See Loredo* Petition for Review, Supreme Court No. CV-23-0079-PR, at 7-12]. This Court did not find the argument compelling and denied their petition. [*Loredo* Order Denying Review, Supreme Court No. CV-23-0079-PR]. Nothing about the law has changed since then—indeed the reasoning in the Opinion directly mirrors the reasoning in the Court of Appeals' *Loredo* decision—so there is no reason that the result here should be any different.

Conclusion

For these reasons, this Court should deny Plaintiffs' Petition for Review.

RESPECTFULLY SUBMITTED this 20th day of February 2024.

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