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

MARICOPA COUNTY'S RESPONSE TO AMICUS BRIEF OF ARIZONA ASSOCIATION FOR JUSTICE

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Defendant Maricopa County hereby responds to the amicus brief filed by the Arizona Association for Justice ("AAJ"). The amicus brief is more notable for what it does not say than for what it does say. Namely, AAJ's brief argues that Arizona counties should be vicariously liable for the acts of deputy county sheriffs without providing any authority establishing (1) that deputy county sheriffs are the employees of the counties and not the sheriffs; (2) that the legislature intended for the counties to be vicariously liable for the acts of sheriffs' deputies; or (3) that any court in Arizona has ever found an Arizona county to be vicariously liable for the conduct of sheriffs' deputies. Nor does the AAJ's brief analyze, or even reference, the elements of vicarious liability, let alone apply those elements to these facts. Plainly, neither Plaintiffs nor the AAJ has articulated any legitimate reason why Arizona counties are, or should be, vicariously liable for the acts of sheriffs' deputies. Furthermore, the issues the amicus brief does discuss illustrate the wisdom and logic of Maricopa County's position. In short, the amicus brief changes nothing, and the Court should either deny review as having been improvidently granted or affirm the Court of Appeals.

Legal Argument

I. The AAJ's brief does not change the vicarious liability analysis.

The primary thrust of every section of the AAJ's amicus brief is to argue that Arizona counties should be vicariously liable for the acts of sheriff's deputies. While

Maricopa County agrees that vicarious liability is the central issue in this case,[1] the Court's order granting review does not concern vicarious liability. The issues for review only concern whether sheriffs' deputies are employees of the counties for the purposes of the Arizona Claims Act. Therefore, the Court need not even consider the merits of the AAJ's brief, because it does not provide any clarity or argument concerning the issues on which the Court has granted review.

Beyond that, the AAJ's analysis is simply wrong, as is evident from the absence of any authority supporting the AAJ's interpretation of the law.

A. Nothing in the Arizona Claims Act creates vicarious liability for Arizona Counties.

The AAJ's brief starts by arguing that the Arizona Claims Act "explicitly recognized a county's liability for the acts of its employees, including sheriffs and deputy sheriffs." [AAJ Brief at 1]. The AAJ seems to be saying that the text of the Arizona Claims Act contains language explicitly creating vicarious liability for Arizona counties. But the AAJ's brief never cites to any statutory language purporting to create a new private cause of action. As discussed in Maricopa County's supplemental brief, there is no such language anywhere in the Arizona Claims Act. Indeed, statutes similar to the Arizona Claims Act have been on the books since at least early statehood, and these have never functioned to create new

[1] Maricopa County does not agree with the AAJ's substantive analysis of the vicarious liability issues.

private causes of action where there otherwise were none. *See State v. Miser*, 50 Ariz. 244, 257 (1937) (analyzing precursor statute; "the language of this section merely provides a remedy to enforce a liability existing under general law and does not create a cause of action where none existed before"). And if the state legislature wished to change that fact with the passage of the Arizona Claims Act, it would have said so in explicit language, but it did not do so. *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (explaining that fundamental to statutory interpretation "is the presumption that what the Legislature means, it will say.").

Rather than pointing to any language in the Arizona Claims Act that would create vicarious liability from whole cloth, the AAJ's brief unsuccessfully attempts to patch together various definitions into a viable legal theory. The AAJ's brief argues that county sheriffs fall within the definition of "public employees"; that Arizona counties are "public entities"; and that a public employee must be employed by a public entity. [AAJ Brief at 2-3]. None of that discussion is new or controversial; it does not move the ball forward. From there, the brief goes on a meandering discussion of immunity and asserts that as along as Arizona counties are not immune from vicarious liability, they must be vicariously liable. [AAJ Brief at 3-4]. This circular analysis does not come close to establishing the counties' vicarious liability for sheriffs' deputies.

The AAJ's argument falls to its death in several logical gaps. For example,

(1) it analyzes only the sheriffs themselves and omits any discussion of sheriffs' deputies entirely; (2) it fails to analyze *which* public entity employs sheriffs' deputies; and (3) it never points to any language in the Arizona Claims Act that purportedly creates vicarious liability for a public entity based upon the employment relationship alone.

Beyond that, the AAJ ignores the portions of Maricopa County's supplemental brief which establish that (1) the elected offices of the county sheriffs are public entities; (2) deputy county sheriffs are employees of the county sheriffs; and (3) an employment relationship alone is insufficient to create vicarious liability without the employer's control over the day-to-day details of the employee's job. All of these legal and logical deficiencies in the AAJ's position doom its argument.

The AAJ's lack of analysis regarding the language and mechanism by which the Arizona Claims Act purportedly creates vicarious liability is particularly telling. The AAJ cites the language of A.R.S. § 12-821.01 only one time in its brief, and that citation supports Maricopa County's position. The AAJ's brief notes that the Arizona Claims Act permits those who have "claims against a public entity, public school or a public employee" to pursue those claims subject to the notice of claim requirement. [AAJ Brief at 3]. As the County's supplemental brief discusses, this language requires the claimant to already have a claim for liability against the public entity or employee *before* presenting a notice of claim. [Maricopa County

Supplemental Brief at 5-7]. The statute does not *create* that substantive claim. A.R.S. § 12-821.01 outlines the content of a notice of claim and those upon whom that notice of claim may be served. It is silent on the issue of substantive liability. Thus, even assuming the truth of the AAJ's argument regarding the relationship between sheriffs and Arizona counties under Arizona Claims Act, it does nothing more than establish that Arizona counties may be served with a notice of claim based upon a sheriff's negligence. It does not establish that a county is substantively liable for that negligence because A.R.S. § 12-821.01 does not address (or create) substantive liability.

The AAJ's discussion of immunity is a complete red herring in any event. Immunity analysis has no relevance to these issues. There is no need for Arizona counties to establish immunity over a vicarious liability claim for which they are not liable in the first place. As such, the AAJ's assertion that Maricopa County must prove immunity or be vicariously liable erroneously assumes that vicarious liability exists. The rule is that a statute will not create a new private cause of action unless the statute provides for it; not that a statute creates a private cause of action unless the defendant fails to prove otherwise. *Transamerica Fin. Corp. v. Superior Ct. In & For Maricopa Cnty.*, 158 Ariz. 115, 116 (1988). Since no statute or analysis creates County vicarious liability for sheriff's deputies, the subject of immunity to that liability is irrelevant.

Ultimately, the Arizona Claims Act should be considered in the context in which it was passed—the context of claims for liability against governmental actors. And within that context, Maricopa County has provided many cases clearly establishing the common understanding dating back to early statehood that Arizona sheriffs, not the counties, are the public entities vicariously responsible for their deputies' torts. [MC Supplemental Brief, at 13]. This Court should presume that the legislature was aware of this long line of cases when it passed the Arizona Claims Act. *Staples v. Concord Equities, L.L.C.*, 221 Ariz. 27, 33 (App. 2009) ("a legislature is presumed to be aware of existing statutes and case law when it passes a statute"). If the legislature wanted the Arizona Claims Act to change substantive law and the public entity that is vicariously liable for sheriffs' deputies, then it would have said so. But it did not. This Court should not read substantive changes to established law into the Claims Act that the statute does not even address. This is particularly true given that the Claims Act has been on the books for three decades without any indication from the legislature that courts have been misinterpreting it this whole time.

The AAJ is asking the Court to determine that the Arizona Claims Act made sweeping changes to substantive governmental liability, but the text of the statute reveals it did nothing of the sort. The Court should affirm the current state of the law and reject AAJ's tortured reading of the Arizona Claims Act.

B. The AAJ fails to distinguish *Fridena* and its progeny.

The AAJ argues that *Fridena v. Maricopa* County, 18 Ariz. App. 527 (1972), and its progeny do not apply here because the governmental actor there was fulfilling a judicial function (serving a writ of restitution), and thus those cases concern only separation of powers issues, not vicarious liability. The AAJ's attempts to distinguish *Fridena* and its progeny on this basis are superficial and incorrect.

Fridena's analysis and holding was not based on the fact that the sheriff's deputy was issuing a writ as opposed to doing some other function. It was based on the fact that an employer, to be vicariously liable for an employee's conduct, must have control over the employee at the time the tort was committed, *id.* at 530-31; and Maricopa County did not control sheriff's deputies when serving writs of restitution. Thus, the County could not be vicariously liable for the deputies' conduct. *Id.*

Rather than addressing *Fridena*'s vicarious liability analysis, the AAJ's brief simply poohpoohs it as "dicta" and then moves on. [AAJ Brief at 8]. The analysis was not dicta; the lack of control was the very reason vicarious liability did not exist and that analysis directly lead to the affirmance of summary judgment in Maricopa County's favor. 18 Ariz.App. at 531. *Fridena's* analysis is logical and remains good law; its reasoning applies with force here. It cannot be simply ignored or "passed off" as dicta. Maricopa County does not and cannot control the conduct of sheriffs'

deputies, thus Maricopa County cannot be vicariously liable for their torts.

The AAJ utterly fails to distinguish *Fridena* or its analysis. It does not argue that *Fridena* should be overruled. It does not argue that *Fridena* misapplied the vicarious liability analysis. It does not argue that Maricopa County has the right to control the conduct of sheriffs' deputies at *any* time. And it does not argue that Arizona law on vicarious liability has changed such that *Fridena* is no longer good law. It (and Plaintiffs) simply refuse to engage in the vicarious liability analysis.

Indeed, the AAJ contradicts itself in trying to distance itself from the applicable vicarious liability analysis. Its introduction, the AAJ attempts to change the vicarious liability standard by arguing that "the right of control is not relevant; the official relationship between the employee and a county is the dispositive factor." But when it attempted to distinguish *Fridena* it argued that the deputy was engaged in a judicial function because the judicial branch had ***control*** over the deputy when executing a writ. [AAJ Brief at 6-7 ("sheriff executing a writ of restitution is acting as a judicial officer *because* it has been long held the Superior Court has the exclusive ***right to control*** the sheriff's deputies in the performance of court functions such as executing writs"; "The judicial branch's ***exclusive control*** over a sheriff who is executing writs derives from the Arizona Constitution." (emphasis added)].

The contradiction is shown in the AAJ's method of analysis. The AAJ

maintains that the deputy in *Fridena* was engaging in a judicial function because the judicial branch *controlled* the deputy's conduct. By analyzing *Fridena's* vicarious liability in terms of control, and not in terms of an employment relationship, the AAJ implicitly admits that control is the determinative factor and not the existence of an employment relationship.[2] In this respect, the AAJ's analysis of *Fridena* closely resembles Maricopa County's analysis of the vicarious liability of general and special employers. [Maricopa County Supplemental Brief at 8]. The analysis under both maintains that even when an entity employs an employee, that entity will not be vicariously liable for the employee's tort if it did not control the employee when the tort was committed. Thus, the AAJ's attempt to distinguish *Fridena* ultimately supports Maricopa County's analysis and position because it demonstrates that the County should not be liable if it did not control the deputy's conduct at the time of the tort's commission.

The AAJ's inability to analyze the elements of vicarious liability and how those elements apply to these facts is telling. If Plaintiffs and the AAJ truly believed that Maricopa County is vicariously liable for the conduct of sheriffs' deputies, they would have conducted the legal analysis demonstrating as much. The fact that neither even attempted to do so is all the Court needs to reject its argument.

[2] The AAJ does not, for example, argue that sheriffs' deputies have an employment relationship with the judicial branch when executing writs.

C. The structure of Arizona counties supports Maricopa County's position on vicarious liability.

Finally, the AAJ argues that the structure of Arizona counties supports its theory of liability. [AAJ Brief at 10-12]. Not so. Because the actual vicarious liability analysis supports the County's position, the AAJ primarily uses the point in an attempt to manufacture liability by referring to an inapplicable policymaker analysis under 42 U.S.C. § 1983. The analysis under § 1983 is fundamentally different from the vicarious liability analysis. *Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("under § 1983, local governments are responsible only for their *own* illegal acts . . . [t]hey are not vicariously liable under § 1983 for their employees' actions") (emphasis in original) (citations and quotation omitted); *Flanders v. Maricopa Cnty.*, 203 Ariz. 368, 378 (App. 2002) (under § 1983 "[l]iability is imposed, not on the grounds of *respondeat superior*, but because the agent's status cloaks him with the governmental body's authority"). This is not a § 1983 case, and Plaintiffs' sole claim against Maricopa County is for vicarious liability. Further, the § 1983 analysis applies to civil rights cases concerning constitutional violations, where policymaker liability makes sense, not to simple negligence cases where standard tort analyses apply. The § 1983 analysis is completely irrelevant.

The AAJ also suggests that if § 1983-style policymaker liability is not imposed on Arizona counties, then the various separately-elected county officials and their deputies would effectively be immune from liability. Frankly, this

suggestion is senseless. Since the passage of the Arizona Claims Act, claimants have had no issue suing the Maricopa County sheriff to the tune of hundreds of millions of dollars. And as detailed in Maricopa County's supplemental brief, claimants have been suing Arizona sheriffs for vicarious liability for as long as anyone reading this brief has been alive. There is no mystery here. If a sheriff's deputy commits a tort in the course and scope of their employment, the county sheriff in his official capacity is vicariously liable for those torts. There is no immunity.

However, the AAJ's discussion of the parallel structure of Arizona counties does highlight the logic of Maricopa County's position. As discussed in Maricopa County's supplemental brief, a lawsuit against an Arizona county is actually against that county's board of supervisors. And as the AAJ points out in its brief, the board of supervisors is constitutionally parallel with the county sheriff. The board of supervisors is not "above" the county sheriff, and it does not have the ability to oversee the sheriff when engaging in his official duties. [Maricopa County Supplemental Brief at 3-4]. Given that the board of supervisors is parallel to the sheriff and does not exert any control over the sheriff, it makes no sense to hold the board vicariously liable for the deputy sheriffs' conduct.

Finally, A.R.S. § 11-444, which provides that the county must pay the sheriff's expenses, including legal expenses, obviates any need to interpret the Claims Act to create a new substantive claim for vicarious liability here (nor could

the Court do so anyway, as explained above). By statute, the County must pay any award against the sheriff. There is no point in warping settled vicarious liability analysis, contradicting decades of established case law, or engaging in inappropriate judicial legislation simply to try to create a new vicarious liability claim out of the Claims Statute where there is none. The County pays regardless.[3]

Conclusion

The AAJ's brief falls well short of establishing Arizona counties' vicarious liability for the acts of deputy county sheriffs. It instead highlights the reasons why the counties are not vicariously liable for such torts. For these reasons, the Court should either deny review as having been improvidently granted or affirm the Court of Appeals' Opinion.

RESPECTFULLY SUBMITTED this 23rd day of October 2024.

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[3] The AAJ's cursory discussion of Maricopa County's insurance scheme is totally irrelevant. The point is completely irrelevant to the liability analysis, and it further raises a host of factual questions unanswerable on this record. Besides, most other counties are insured through the Arizona County Insurance Pool which has a different arrangement than Maricopa County, so this argument does not broadly apply to Arizona counties.