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SUPREME COURT OF ARIZONA

MARCIE A. REDGRAVE, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

DOUG DUCEY, Governor; THOMAS J. BETLACH, in his official capacity as Director of the Arizona Health Care Cost Containment System; ARIZONA DEPARTMENT OF ECONOMIC SECURITY; ARIZONA DIVISION OF DEVELOPMENTAL DISABILITIES,

Defendants-Appellees.

Arizona Supreme Court
No. CV-20-0082-CQ

Ninth Circuit No. 18-17150
District of Arizona
Case No. 2:18-cv-01247-DLR
Hon. Douglas L. Rayes

AMICUS CURIAE BRIEF OF ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
◄AND►
ARIZONA ASSOCIATION FOR JUSTICE/ ARIZONA TRIAL LAWYERS ASSOCIATION

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Certified Question

> "Has Arizona consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207?"

Introduction

Appellees contend the Arizona Legislature's "Actions against Public Entities or Public Employees" Act ("Act"), codified as A.R.S. §§ 12-820, et seq., "waives sovereign immunity only for *tort* claims." *Answering Brief* at 12.[1]

They argue the "Act only waives the State's sovereign immunity as to actions sounding in tort" and that the Act's plain text supposedly establishes it only applies to torts. *Id*. at 14. They claim the Act's plain words prove it is "limited to tort liability" and "only applies to claims that arise in tort." *Id*. at 15, 20.

In their supplemental brief, Appellees also argue that "the best—and *at least reasonable* alternative construction—of the Act is that it waives immunity only for Arizona-law tort claims" *Appellees' Supp. Brief* at 2 (Sep. 18, 2020) (emphasis in original). Appellees claim the Act is "limited to tort liability" and that "the Legislature was solely focused on tort liability/immunity in the Act." *Id*. at 14.

History, caselaw, and the Act's own words prove otherwise.

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[1] *Appellees' Corrected Answering Brief* at 12, *Redgrave v. Ducey*, No. 18-17150 (9th Cir. June 5, 2019) (emphasis in original).

Legal Discussion

1. In 1913, the Arizona Legislature created a system allowing negligence and contract lawsuits against the State. That system waived the State's sovereign immunity for those claimants who complied with it.

"The Legislature shall direct by law in what manner and in what courts suits may be brought against the State." Ariz. Const. art. 4, pt. 2, § 18.

The underlying question is whether the Arizona Legislature has only waived sovereign immunity for tort claims against public employees and public entities—or has waived sovereign immunity for other claims. The answer to the underlying question is "yes." The Arizona Legislature has long waived sovereign immunity for more than tort claims.

Waiver started early. In the Second Special Session of 1913, the Arizona Legislature enacted Chapter 34, entitled "Suits Against the State." As codified, § 1791 of the 1913 Civil Code provided that:

> All persons who have, or who shall hereafter have claims on contract or for negligence against the state, which have been disallowed, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules and practice in civil cases shall apply to such suits except as herein otherwise provided.

Rev. Stat. Ariz. Civil Code § 1791 (1913).

In general, there was a two-year statute of limitations, tolled for "any minor, insane, or incompetent person." *Id.* at § 1792. The plaintiff had to file a $500

"undertaking" for costs and to serve the summons on the governor and attorney general. *Id*. at §§ 1793-94. If the plaintiff obtained a judgment it was to "be for the amount actually due from the state to the plaintiff, with legal interest thereon from the time the obligation accrued and without costs." *Id*. at § 1795. The governor had a duty to report to the Legislature on all judgments rendered against the State. *Id*. at § 1796. It was the state auditor's duty to draw a warrant upon the State treasury for the payment of a judgment on presentation of a duly authenticated copy of the judgment with the attorney general's approval, as long as the Legislature made an appropriation sufficient to cover the judgment's amount. *Id*. at § 1797.

The judicial process could not begin until a plaintiff had first made a claim on the State and had it disallowed. The claim process required the plaintiff to make a claim to the state auditor, who had, with minor exceptions, the power to audit and settle "all claims against the state." *Id*. at § 70(1).

There was a one-year statute of limitations on presenting claims to the state auditor: "Persons having claims against the state shall exhibit the same, sworn to, with the evidence in support thereof to the auditor, to be audited, settled and allowed, within one year after such claim shall accrue, and not afterwards; and no claim shall be audited or allowed the items of which are not specifically and fully stated and set out." *Id*. at § 73. Once the state auditor disallowed the claim, and the governor countersigned the warrant from the state treasurer, the plaintiff could then

sue, as provided in §§ 1791-97.

Unlike the present two-step, notice-of-claim system, the 1913 system had several steps. But a plaintiff could, by completing the steps, sue the State in contract or in negligence.

One of the first appellate cases about suing the State was *State v. Sharp*, 21 Ariz. 424 (1920). It is often viewed as the first case where this Court recognized the doctrine of sovereign immunity. But there is more to the case than that.

In early 1919, Claude Sharp was a young man working on the addition to the capitol building in Phoenix. State employees negligently operated a derrick lifting heavy stones. The derrick fell on Claude and gravely injured him. A newspaper explained that L.W. Sharp, Claude's guardian, brought a $15,000 damage suit against the State before Maricopa County Superior Court Judge Rawghlie Stanford (1879-1963). The report added that Claude "was injured on the skull by a falling derrick." *Sues for $15,000*, Arizona Republic 6 (Nov. 7, 1919). The judgment was for $5,000. *Jury Gives Boy $5,000*, Arizona Republic 6 (Nov. 8, 1919).

This Court declared that Rev. Stat. Ariz. Civil Code § 1791 (1913) did not actually create a cause of action against the State, but merely provided a remedy to enforce a liability. Thus, the State had supposedly not waived its immunity from liability for its employees' negligence. *State v. Sharp*, 21 Ariz. 424, 428 (1920). The odd thing about *Sharp* is that it overlooked the detailed process for a claimant

to present a contract or negligence claim to the state auditor, have the claim disallowed, and sue the State.[2] That was a clear waiver of sovereign immunity.

During the 1928 code revision, the Legislature once again authorized claims against the State on contract or for negligence. Section 4379 provided that: "Persons having claims on contract or for negligence against the state, which have been disallowed, may on terms and conditions herein contained, bring action thereon against the state, and prosecute the same to final judgment." Rev. Code.

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[2] And what of the unfortunate Claude Sharp? Well, his guardian was nothing if not inventive. In 1921, he persuaded a legislator to introduce a private relief bill to award Claude $5,000 for his injuries, with $500 to be paid from that to his lawyer, and the remaining $4,500 to be deposited in trust for him in a bank. The interest was to go to Claude during his life, with the principal to revert to the State at his death. The Legislature passed the bill, which became law on March 23, 1921. Ariz. Sess. Laws ch. 171 (1921).

As he grew older and needed the $4,500 principal, Claude managed four times to persuade legislators to submit private relief bills to have the $4,500 principal paid to him. They did that in 1933 (H.B. 19), 1947 (H.B. 52), 1949 (H.B. 210), and 1951 (H.B. 154). At least two times, the private relief bills made it to the governor's desk. But all efforts failed.

A newspaper article about the 1947 effort reported the Legislature "passed the bill proposing to give Sharp the $4,500 principal on the theory that interest rates have so declined in recent years that he receives very little from the trust fund." *Bill Vetoed by Governor*, Arizona Republic 12 (Mar. 19, 1947). The article added that, because Governor George W.P. Hunt (1859-1934) had vetoed an earlier request, Governor Sidney Preston Osborn (1884-1948) would do the same, although he admitted he did not know why Governor Hunt had vetoed the earlier bill and had no independent reason for his own veto. *Id.*

In the end, it was all moot. In 1959, at age 57, Claude Sharp died in Los Angeles, California, after a car hit him while he was running across the Santa Ana Freeway. *Man Running Across Freeway Killed by Car*, Los Angeles Times 5 (Jan. 5, 1959). Two months later, First National Bank of Arizona paid the $4,500 principal to the state auditor. *Death Brings State $4,500*, Arizona Republic 52 (March 4, 1959). Claude never got the $4,500 principal awarded in 1921.

Ariz. § 4379 (1928). Other statutes reiterated the same system for suing the State in contract or negligence that the 1913 Civil Code had instituted. *Id.* at §§ 28(1), 30, 2619, 4379-84.

Notably, § 2619 required that the state auditor approve the claim, if valid, and, if approved, draw a warrant on the state treasurer, who was to pay the claim "when countersigned by the governor" out of the appropriation made to pay it. Thus, both the state auditor and the governor had to approve the claim. If they did, the claimant received the money. If they did not, the claimant could sue the State under § 4379.

In 1937, this Court finally acknowledged it was proper to sue the State if the plaintiff followed the claim-presentment-and-disallowance process. In *State v. Miser*, 50 Ariz. 244 (1937), J.W. Miser, who had worked at the University of Arizona's experimental farm near Mesa, sought $549 for unpaid overtime. Before suing, however, he failed to make a written verified claim with the proper state officials. Still, he sued and won a partial award of his unpaid wages.

But on appeal, this Court pointed out that Miser had failed to present a sworn, itemized claim to the state auditor and to the head official of the relevant state office or agency, and have it disallowed. *Miser*, 50 Ariz. at 257-58 (1937) (citing and quoting Rev. Code Ariz. §§ 30, 2619, 4379 (1928)).

This Court explained that Miser was "required under these two sections to

allege that he presented his verified claim for the amount sued for to the proper officer, and under section 4379 that it was disallowed, before his complaint states a cause of action or sets up facts conferring jurisdiction of the subject-matter on the court, because these requirements are conditions that must be complied with before the right to sue the state comes into being." *Id.* at 258.

And so, because Miser, before suing, failed to file a verified claim with the proper officers for the amount he sought to recover and failed to prove that the claim had been disallowed, his "complaint failed to state a cause of action or allege facts showing jurisdiction of the subject-matter." *Id.* at 261. Miser lost, but this Court had finally recognized that a claim for unpaid wages against the State was allowable, if the proper steps were taken before filing the lawsuit. That is, take the proper steps, and the State waives its sovereign immunity. That was the principle *State v. Sharp* had failed to acknowledge in 1920, perhaps because Sharp's lawyer had not presented a timely claim or because no one had reminded this Court about the rather-involved claim process.

In 1940, this Court again held that an action to collect wages that the State had allegedly improperly not paid must fail if the plaintiff has not presented the claim for payment to the proper administrative officials and had the claim disallowed. *State v. Angle*, 56 Ariz. 46 (1940). The Court explained that it was clear from the statutory language that "actions on claims against the state may be

brought only on those that have been disallowed and it follows necessarily that the disallowance must be made by the officer or officers upon whom the statute has placed that duty." *Id*. at 50.

On July 1, 1940, this Court reviewed a case where W.R. Hutchins, the state engineer, had presented travel-expense claims to the state, but had not completed the full claim process before suing. *Hutchins v. Frohmiller*, 55 Ariz. 522 (1940). This Court noted that Hutchins could still properly present the claims, and if they were properly presented, and disallowed by both the state auditor and the governor, he could sue the State to determine whether the claims "were for a public purpose and authorized by law." *Id*. at 530.

On that same July 1, 1940, this Court upheld a trial-court writ of mandamus requiring the state auditor to pay an increase in salary for the members of the Industrial Commission. *Holmes v. Frohmiller*, 55 Ariz. 556 (1940). A statute had authorized an annual increase of $1,000 to each of the commissioners' original $4,000 salaries, but the state auditor incorrectly disallowed the claims, thinking the state constitution blocked the increase. The claimants had apparently correctly presented their claims for payment and had them denied.[3]

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[3] A newspaper story contrasted the commissioners' success with the failure of the state engineer (W.R. Hutchins) to obtain payment of his claims because he had not properly first obtained final action on them from the governor. *Commissioners Win, State Engineer Loses*, Arizona Republic 4 (July 2, 1940) (The Arizona Supreme Court "placed in the governor's hands the decision as to whether

Just before this Court decided the *Angle*, *Hutchins*, and *Holmes* appeals in 1940, the Legislature enacted the 1939 Code, which applied prospectively, but kept the claim-presentation, disallowance, and lawsuit process invented in the 1913 code and retained in the 1928 code. *See* Ariz. Code Ann. §§ 4-302(1), 4-302, 10-206, and 27-101 to 27-106 (1939).

The system of presenting claims against the State to the state auditor and then to the governor for countersignature before the claim could be considered disallowed and a lawsuit filed was awkward and time-consuming. In the end, if the claim was denied, the plaintiff had to sue for a writ of mandamus. Still, in case after case, this Court explained that lawsuits against the State were possible, implicitly recognizing the (obvious) fact that the State had indeed waived its sovereign immunity when a plaintiff completed the proper claim-presentation process. *See Board of Regents of University and State Colleges v. Frohmiller*, 69 Ariz. 50, 59 (1949) (citing six cases).

When the Legislature created the Arizona Revised Statutes, it reenacted the basics of the 1913 claim-presentation system that the Legislature had fashioned in the 1913 code—and retained in the 1928 and 1939 codes. Thus, the 1956 version of A.R.S. § 12-821 (1956) provided that: "Persons having claims on contract or for negligence against the state, which have been disallowed, may on the terms and

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the claims should be paid.").

conditions set forth in this article, bring action thereon against the state and prosecute the action to final judgment."

2. In the 1963 *Stone* opinion, this Court abolished all sovereign immunity, apparently without realizing that, in 1913, the Legislature had already abolished sovereign immunity for contract and negligence claims.

That brings us to the case of *Stone v. Arizona Highway Commission*, 93 Ariz. 384 (1963). In that landmark case, a negligently marked and signed state highway contributed to causing a motor-vehicle collision that killed a mother and injured her children and husband. The survivors sued the Arizona Highway Commission and its members, the state highway engineer, the deputy state engineer, and the district engineer. The superior court dismissed the complaint because the commission and its named engineers were "exempt under the doctrine of governmental immunity from tort liability." *Id*. at 386.

This Court, however, reversed and remanded, holding that Arizona would abolish sovereign immunity. "We are of the opinion," Justice Lorna E. Lockwood (1903-1977) wrote, "that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled." *Id*. at 387.

Ironically, since *Stone* had re-abolished sovereign immunity the Legislature

had already abolished for contract and negligence claims in 1913, contemporary commentary argued that Stone was "too broad and impose[d] too great a burden on governmental bodies to be a practical solution to the problem." Dennis P. Blackhurst, *Governmental Immunity in Arizona—the* Stone *Case*, 6 Ariz. L. Rev. 102, 108 (1964). For contract and negligence claims, *Stone* may not have added anything profoundly new to the Legislature's sovereign-immunity waiver, but for other claims, including those arising from intentional torts, *Stone* was a revolution that eventually pushed the Legislature into revamping the claim-presentation laws.

In 1969, this Court limited *Stone* by holding that if the State only owed a duty to the public and not to an individual, there would not be a private cause of action against the government. *Massengill v. Yuma County*, 104 Ariz. 518 (1969). The *Massengill* doctrine, however, required trial courts to speculate whether the government owed a general duty to an injured person (barring barred any recovery) or had a specific duty to an individual (allowing the possibility of a recovery).

In 1982, this Court held that *Massengill* had "made the task of the lower courts more difficult," stating that a "return" to *Stone* "would make a good starting point." *Ryan v. State*, 134 Ariz. 308, 309 (1982). The Court proposed "to endorse the use of governmental immunity as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the state and its agents will be subject to the

same tort law as private citizens." *Id*. at 311.

This Court invited legislative action to develop and define the scope of state liability, stating: "We do not recoil from the thought that the legislature may in its wisdom wish to intervene in some aspects of this development." *Id*. at 310. "The legislature accepted that invitation." Andrew Becke, *Two Steps Forward, One Step Back: Arizona's Notice of Claim Requirements and Statute of Limitations Since the Abrogation of State Sovereign Immunity*, 39 Ariz. St. L.J. 247, 253 (2007).

3. In 1984, the Legislature amended, streamlined, and expanded the claim-presentation process into a broader notice-of-claim system.

In 1984, the Legislature revised and broadened the claims statutes. The change was evident when the Legislature amended the heading for Title 12, Chapter 7, Article 2 of the Arizona Revised Statutes from the restricted "Actions against the State on Contracts or for Negligence" to the global "Actions against Public Entities or Public Employees." 1984 Ariz. Sess. Laws, Ch. 285, § 2.

That change in title reflected a continuation of the historical legislative intent to abrogate Arizona's sovereign immunity over more than torts. The Legislature now created a newer, far broader set of statutes allowing claim presentation and disallowance, followed, as needed, by litigation against the State.

In addition, unlike the earlier statutory-waiver, claim-presentment laws, the 1984 iteration of A.R.S. § 12-821 did not just apply to the State. It applied to *all* public entities and public employees. Other parts of the notice-of-claim system

also indicated its greater scope. For instance, an actionable "injury" now included "any" sort of "injury that a person may suffer that would be actionable if inflicted by a private person." A.R.S. § 12-820(2). The term "person" expansively included "a corporation, company, partnership, firm, association or society, as well as a natural person." A.R.S. § 1-215(28).

4. The Legislature made the last extensive changes to the notice-of-claim system in 1993 and 1994.

In 1993 and 1994, based in part on the work of a gubernatorial commission, the Legislature greatly revised the claim-presentation system. It passed a set of statutes on absolute and qualified immunity, listing affirmative defenses, barring punitive and exemplary damages in actions against public entities and public employees, and reworking the notice-of-claim provisions.

Oddly, A.R.S. § 12-821's 1993 version seemed to limit waiver to personal-injury actions when it stated: "All personal injury actions against any public entity or public employee involving acts that are alleged to have occurred within the scope of the public employee's employment shall be brought within one year after the cause of action accrues and not afterward." 1993 Ariz. Sess. Laws ch. 90 § 8.

That seeming limitation to one variety of action departed from all earlier legislative waivers of sovereign immunity, which allowed lawsuits for "claims on contract or for negligence against the state." Rev. Stat. Ariz. Civil Code § 1791 (1913); Rev. Code. Ariz. § 4379 (1928); Ariz. Code. Ann. § 27-101 (1939); A.R.S.

§ 12-821 (1956).

The Legislature corrected that apparently inadvertent wording in 1994, when it went beyond the contract-and-negligence scope of the earlier codes by providing that: "*All actions* against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." 1994 Ariz. Sess. Laws ch. 162 § 1 (emphasis added).

Use of "all" powerfully signals an intent to imbue the phrase "all actions" with its broadest possible meaning. Thus, "the statute was amended to expand the universe of permissible claims against the State to 'all actions.'" Dawinder S. Sidhu, *Arizona's Notice of Claim Statute: Guidance on Clearing this Procedural Hurdle and Suggestions for Its Improvement*, 3 Phoenix L. Rev. 229, 239 (2010). The Legislature did not use the term "all actions" to limit the Act to tort claims but to broaden its reach.

The Legislature also showed the breadth of the revamped claim-presentation system when it mandated that the notice-of-claim procedures would apply "to *all causes of action* that accrue on or after July 17, 1994." A.R.S. § 12-821.01(F) (emphasis added). *See also* 1994 Ariz. Sess. Laws ch. 162, § 2.

Indeed, under its express terms, the notice-of-claim statute applies to all "claims" except for claims for just compensation in eminent-domain cases, A.R.S. § 12–821.01(A), (H). In addition, contemporary caselaw excludes from the notice-

of-claim system's reach actions seeking declaratory or injunctive relief, on the grounds that those actions are not "claims" because they seek no money damages. *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 244-45 ¶¶ 47-53 (App. 2007); *Martineau v. Maricopa County*, 207 Ariz. 332, 337 ¶ 25 (App. 2004).

There some other statutory or caselaw exceptions to the Act's coverage. But unless there is a specific exception in caselaw or statute, Arizona public entities and public employees are now subject to liability for all actions and claims that can be brought against them through the notice-of-claim system, whether in contract, in tort, or otherwise. The Act now reasonably clarifies and expands the waiver of sovereign immunity the 1913 Arizona Legislature first created.

5. Precedent, public policy, and legislative history suggest Arizona might indeed allow a claim for a state agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act.

With a slight interruption for the 1993 version of A.R.S. § 12-821 that seemed to cover only "personal injury actions," 1993 Ariz. Sess. Laws ch. 90, § 8, Arizona's post-statehood statutes have consistently waived sovereign immunity in contract and negligence cases. In 1915, this Court recognized the claim statutes related to paying claims against the State—as for salaries the State had incorrectly failed to pay—operate together, creating a mandatory duty of payment by the state auditor enforceable by mandamus. *Callaghan v. Boyce*, 17 Ariz. 433, 450 (1915).

Notably for the present case, in the 1930s and 1940s, this Court considered a

series of cases in which claimants sought compensation from the State for wages or salaries the State had allegedly wrongfully failed to pay. *See*, *e.g.*, *Proctor v. Hunt*, 43 Ariz. 198, 202-207 (1934); *State v. Miser*, 50 Ariz. 244, 258 (1937); *Ward v. Frohmiller*, 55 Ariz. 202, 203-207 (1940); *Hutchins v. Frohmiller*, 55 Ariz. 522, 523-30 (1940); *State v. Angle*, 56 Ariz. 46, 49-54 (1940); *Best v. State*, 56 Ariz. 408, 409 (1940); *State v. Barnum*, 58 Ariz. 221, 226-29 (1941); *Dunshee v. Manning*, 59 Ariz. 430, 436-37 (1942); *Board of Regents of University and State Colleges v. Frohmiller*, 69 Ariz. 50, 59 (1949).

In each of those cases, this Court indicated the wage or salary claimant could pursue an action against the State as long as the claimant properly presented the claim to the state auditor and to the governor and had the claim "disallowed." *See* Rev. Stat. Ariz. Civil Code § 1791 (1913); Rev. Code. Ariz. § 4379 (1928); Ariz. Code. Ann. § 27-101 (1939).

Not all wage or salary claimants have successfully complied with the claim-presentation process. But when did so, this Court has indicated sovereign immunity would be no barrier to their wage and salary claims. The State had waived its sovereign immunity in relation to those claims.

From 1913 forward, the Arizona claim-presentation statutes show historical consent to waiving sovereign immunity for contract claims, including for wage and salary claims. All that claimants have had to do to sue the State concerning those

claims has been to comply with the terms of the claim-presentation process.

Moreover, although the parties here overlooked it, A.R.S. § 12-821.01(C) states that the "parties to any contract" may agree to extend the time for filing a notice of claim subject to an alternative-dispute-resolution process or other administrative claim process or review process. Note the word "contract." It is a mystery how the State can argue the notice-of-claim statute applies only to tort claims when A.R.S. § 12-821.01(C) specifically contains the word "contract" and thus addresses contract claims.

The historical consent to waiving sovereign immunity for contract and related claims continues into the present, more expansive notice-of-claim version of the claim-presentation statutes. Thus, in *Harris v. Cochise Health Systems*, 215 Ariz. 344 (App. 2007), a home healthcare provider sued the director of a county health services agency for, among other things, breach of contract. The trial court granted the director's motion to dismiss based on the plaintiff's failure to file a timely notice of claim under A.R.S. § 12-821.01. *Id.* at 351 ¶ 24.

The Court of Appeals affirmed, noting that failure to timely and properly file a notice of claim "'bars *any* claim against the [public] entity or employee." *Id.* at 351 ¶ 26 (quoting *Salerno v. Espinoza*, 210 Ariz. 586, 588 ¶ 7 (2005), quoting *Western Corrections Group, Inc. v. Tierney*, 208 Ariz. 583, 585 ¶ 7 (App. 2004)) (emphasis in original). *See Madrid v. Concho Elem. Sch. Dist. No. 6 of Apache*

County, 439 Fed. Appx. 566, 567 (9th Cir. 2011) (improperly served notice of claim barred breach-of-contract claims against school district and board members).

Indeed, on September 3, 2020, the Court of Appeals held that: "A plaintiff's breach of contract claim against a public entity is barred absent compliance with both A.R.S. § 12-821.01, which requires a notice of claim to be provided to the entity 'within one hundred eighty days after the cause of action accrues,' and § 12-821, which requires a complaint to be filed 'within one year after the cause of action accrues.'" *Standard Construction Co. v. State*, No. 1 CA-CV 19-0411, 2020 WL 5247946 at * 2 ¶ 6, --- Ariz. --- (App. Sep. 3, 2020). *See also Jones v. Cochise County*, 218 Ariz. 372, 378 ¶ 19 (App. 2008) (discussing factual basis needed for a lost-wages notice of claim against a public entity).

The 2020 *Standard Construction* case concerned a contractor's breach-of-contract claim against the Arizona Department of Transportation (a.k.a., the State). When a dispute arose over payment for construction work, the contractor filed a notice of claim followed by a lawsuit against ADOT and the State. Significantly, the State apparently never argued the notice-of-claim statutes did not apply because the breach-of-contract claim was not a tort claim.

Indeed, instead of arguing the breach-of-contract notice of claim was invalid because the notice-of-claim statute was limited to tort claims, the State quibbled about the correct due dates for the notice of claim and for the complaint. *Standard*

Construction at *2, ¶¶ 3-4. It is unfair for the State to argue the notice-of-claim statutes apply only to tort claims in this case and take a contrary position in a different case. At the least, an honorable government ought to be consistent.

As to the ultimate question whether Arizona has waived sovereign immunity for Federal Labor Standards Act claims, we can only suggest that the State has waived its sovereign immunity for much more than tort claims, including for contract and wage-related claims. That is compatible with allowing FLSA claims. There is certainly no impediment to that in the present version of the Arizona claims-presentation statutes. Since 1913, there never has been. We hope that fact will help the Court answer the ultimate question.

Conclusion

We answer the penultimate question, which is whether the notice-of-claim system covers tort, contract, and other claims against an Arizona public entity or public employee. It does. The present broad notice-of-claim version of the claim-presentation system first created in 1913 is consistent with the statutory, historical, and caselaw tradition of allowing lawsuits based on properly presented claims for torts—as well as for breach of contract and for lost or withheld wages.

Whether that broad scope supports waiver of sovereign immunity for a State agency's violation of the minimum-wage or overtime provisions of the Fair Labor Standards Act is the ultimate question. Answering that ultimate question was never

our task. Our task was different. We proved beyond reasonable doubt that the State has presently and historically waived its sovereign immunity for far more than tort claims. That proof will, we hope, help this Court answer the ultimate question with greater confidence.

DATED this 21st day of September, 2020.

AHWATUKEE LEGAL OFFICE, P.C.

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On this date, the above-signing lawyer electronically filed this document with the Clerk of the Arizona Supreme Court and electronically delivered it to:

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