ARIZONA COURT OF APPEALS

DIVISION ONE

MARK GILMORE and MARK HARDER,

Plaintiffs/Appellants,

v.

KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX,

Defendants/Appellees,

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 2384,

Intervenor Defendant/Appellee.

Court of Appeals, Division One
Case No. 1 CA-CV 22-0049

Maricopa County Superior Court
Case No. CV2019-009033

THE CITY DEFENDANTS' RESPONSE TO THE AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

John Alan Doran (AZ Bar No. 012112)
Matthew A. Hesketh (AZ Bar No. 029319)
SHERMAN & HOWARD L.L.C.
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
Facsimile: (602) 240-6600
JDoran@ShermanHoward.com
MHesketh@ShermanHoward.com
Attorneys for the City Defendants/Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules and Regulations

I. Introduction

The American Civil Liberties Union of Arizona's ("ACLU") amicus brief relies heavily on assumptions about this case that are inaccurate and contradicted by the record. Despite the labels that Plaintiffs used to describe their claims, they were not pursuing "civil rights" litigation. Plaintiffs admitted they were not forced to join, support, finance, or associate with the American Federation of State, County and Municipal Employees (AFSCME), Local 2384 (the "Union"). Plaintiffs wanted to eliminate the release time provisions because they wanted more paid time off, and their claims failed because they were not entitled to more compensation than what was set forth in the Memorandum of Understanding ("MOU") between the City of Phoenix (the "City") and the Union.

This case was about Plaintiffs' contractual terms and conditions of employment under the MOU. Plaintiffs caused the City Defendants to incur significant fees in their effort to obtain more compensation for themselves, and courts have repeatedly rejected the notion that employees are immune from adverse fee awards in cases like this that arise out of their contractual terms and conditions of employment. The policies underlying A.R.S. § 12-341.01 justify the fee award here, and the superior court did not abuse its discretion by awarding fees to mitigate the cost of defending against Plaintiffs' unsuccessful bid to increase their own personal compensation.

II. This case arose out of contract because it was a direct attack on the MOU and involved Plaintiffs' attempt to redefine the contractual terms and conditions of their employment.

The ACLU contends that "the primary issue in this case is whether or not certain political activities by 'release time' employees, whose salaries were allegedly funded by Plaintiffs, violated Plaintiffs' First Amendment rights of speech and association." ACLU's Amicus Brief at 2. This was not the primary issue in this case. Plaintiffs wanted to eliminate release time in its entirety (not just for political activities) because they wanted more paid time off. With respect to Plaintiffs' freedom of speech and association claims (and their right-to-work claim), the primary issue was whether Plaintiffs were forced to pay for release time through an alleged loss of personal compensation. This issue turned on the contractual terms and conditions of Plaintiffs' employment as defined by the language, meaning, and interpretation of the MOU. Plaintiffs' alleged injury was based on this contractual nexus, and their claims were simply an attempt to change their contractual employment relationship. Their claims failed because they were not deprived of any contractual right and had no contractual entitlement to anything more.

The ACLU suggests that A.R.S. § 12-341.01 does not apply because Plaintiffs were not parties to the MOU. ACLU's Amicus Brief at 3, 5, 10-11. "[A] cause of action may arise out of a contract even if one of the litigants was not a party to the contract . . . ." *Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, 37, ¶ 12 (App.

1998). Thus, "the non-existence of a contractual relationship does not preclude awarding the successful defendants' attorneys' fees under the statute." *Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540, 543 (App. 1992); *see also ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 192-93 (App. 1983) (affirming fee award despite lack of contractual privity); *Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 2020 WL 3526664, at *3-4, ¶¶ 13-21 (Ariz. App. June 30, 2020) (memo. dec.) (similar).[1] Here, Plaintiffs' claims depended on, would not have existed but for, and therefore arose out of their contractual employment relationship with the City.

Next, the ACLU argues that "this case is not a contract case in the ordinary sense." ACLU's Amicus Brief at 3. It is not clear if this refers to "breach of contract" claims or something else, but A.R.S. § 12-341.01 is not limited to only "ordinary" contract cases. *See, e.g., ML Servicing Co. v. Coles*, 235 Ariz. 562, 570, ¶¶ 31-33 (App. 2014) (involving claims that "sound primarily in tort or quasi-contract"); *ASH*, 138 Ariz. at 192-93 (involving mandamus claim to invalidate government contract awarded to another bidder). *See also Tribe*, 2020 WL 3526664, at *3-5, ¶¶ 14-20 (affirming fee award based on public-nuisance claim).

The ACLU attempts to distinguish these cases by arguing that they "involve

[1] The City Defendants cite to this unpublished memorandum decision as persuasive authority under Rule 111 of the Rules of the Arizona Supreme Court because it analyzes the application of A.R.S. § 12-341.01 in similar circumstances, and it addresses arguments that are very similar to those raised by the ACLU.

situations in which the parties had or were alleged to have had a contract, not situations in which one party alleged wrongdoing by another party but made no allegation that a contract existed between them."[2] ACLU's Amicus Brief at 3. But the plaintiff in *ASH* was not a party (or a third-party beneficiary) to the contract. The plaintiff was a disappointed bidder who wanted to invalidate the contract awarded to another bidder. *ASH*, 138 Ariz. at 191. Still, the case "was initiated because of a contract," in part because "ASH sought to invalidate a contract; it is that contract which prompted suit." *Id*. at 192-93. This is nearly identical to Plaintiffs' request for relief in this case: "Declare that Sections 1-3(A), 1-3(C), and 1-3(D), of the 2019-2021 MOU are unconstitutional and unlawful and preliminarily and permanently enjoin their further effect." IR 9 at p.12.

Similarly, this Court recently affirmed a fee award against the Hopi Tribe based on an unsuccessful public nuisance challenge to the City of Flagstaff's contract to sell reclaimed water for artificial snowmaking at the Arizona Snowbowl. *Tribe*, 2020 WL 3526664, at *1-2, ¶¶ 1, 5-10. The Hopi Tribe argued that "its public-nuisance claim does not arise out of a contract because it was not a party to the agreement, but rather, a 'mere bystander' to Appellees' contractual relationship."

[2] The ACLU contends that "[t]here are two exceptions in the cited cases, but both involve third-party beneficiaries." ACLU's Amicus Brief at 3-4. This argument directly conflicts with *ASH* and *Tribe*. Plus, Plaintiffs acknowledge they were third-party beneficiaries. *See* Plaintiffs' Reply to the Union's Answering Brief at n.1.

Id. at *3, ¶ 13. The Court disagreed: "the legislature chose to authorize fees under A.R.S. § 12-341.01(A) in 'any action arising out of contract' – not 'an action for breach of contract' or 'an action between parties to a contract.'" *Id*. The same reasoning applies here, and it nullifies the ACLU's argument about "ordinary" contract claims.

The Hopi Tribe also argued that "the claim does not arise out of a contract because public nuisance traditionally sounds in tort, . . . and Appellees retain a general duty of care 'not to create or maintain a public nuisance' under tort law that is entirely independent from the contract between Appellees." *Id*. at ¶ 14. The Court also rejected this argument: "[r]egardless of the form of the pleadings [we] will look to the nature of the action and the surrounding circumstances to determine whether the claim is one 'arising out of a contract.'" *Id*. at ¶ 15. The contract was the essential basis for the lawsuit because the Hopi Tribe was seeking to invalidate and enjoin its performance. *Id*. at *4-5, ¶¶ 16-19.

> [W]hile a public-nuisance claim may traditionally sound in tort, the claim the Hopi Tribe brought constitutes a direct attack on the contract between Appellees. The Hopi Tribe specifically requested, as relief for its public-nuisance claim, that the superior court invalidate the contract such that neither Snowbowl or the City would be obligated to perform, nor entitled to the benefit of their bargain. In the Hopi Tribe's own words, the existence of the contract for the sale of reclaimed wastewater to Snowbowl caused the threatened harm, and therefore, the public nuisance.

Id. at *5, ¶ 20. Again, this reasoning applies equally here. Plaintiffs brought "a direct attack" on the MOU's release time provisions, and they wanted to change their employment contract by seeking to increase their own compensation and to deprive the parties of the benefits of release time.

Plaintiffs' relationship with the City is very similar to the individual plaintiffs at issue in *AFSCME, AFL-CIO, Loc. 2384 v. City of Phoenix*, 249 Ariz. 105 (2020), and *Piccioli v. City of Phoenix*, 249 Ariz. 113 (2020). The ACLU contends that *AFSCME* and *Piccioli* are distinguishable because "Plaintiffs are not parties to the contract, and they are not simply asking the court to interpret the contract in a way that benefits them financially."[3] ACLU's Amicus Brief at 5. But Plaintiffs *were* "asking the court to interpret the contract in a way that benefits them financially." Plaintiffs wanted to eliminate release time because they wanted more paid time off. IR 70 (Defendants' Joint Statement of Facts ("DSOF")) at ¶¶ 108-110; IR 100 (City Defendants' Controverting Statement of Facts ("CSOF")) at ¶¶ 17-18, 32-36, 48, 54. They did not want anything else from the elimination of release time. IR 70 (DSOF) at ¶¶ 108-110, 118; IR 100 (CSOF) at ¶¶ 17-18, 32-33, 35-36.

Accordingly, Plaintiffs were not "alleging that separate and independent

[3] The ACLU also asserts that *AFSCME* "raised no significant constitutional issues, except for the application of the contract clause." ACLU's Amicus Brief at 4-5. However, the *AFSCME* plaintiffs also alleged that the City "diminished and impaired their vested rights to pension benefits" in violation of the Pension Clause. *AFSCME*, 249 Ariz. at 107-08, 113, ¶¶ 5, 8-9.

constitutional rights are being violated, specifically their First Amendment rights." *Contra* ACLU's Amicus Brief at 5. They filed this case to obtain more personal compensation for themselves, and their claims cannot be artificially separated from this purpose.

Moreover, *AFSCME* and *Piccioli* also involved individual employees who were not signatories to an MOU. *AFSCME*, 249 Ariz. at 106-07, ¶¶ 2-5; *Piccioli*, 249 Ariz. at 115-16, ¶¶ 2-7. Yet those employees filed their claims "as parties to a contract rather than as aggrieved citizens" because their claims depended on their contractual employment relationship with the City. *AFSCME*, 249 Ariz. at 107-08, 111, 113, ¶¶ 8-9, 26, 32-33; *Piccioli*, 249 Ariz. at 117, 119, ¶¶ 11-12, 22-24.

In the same way, Plaintiffs were bound by the MOU that governed their terms and conditions of employment. Plaintiffs specifically alleged that they are "subject to the 2019- 2021 MOU between the City and the Union," and "[i]t is a condition of Plaintiffs' public employment that they are bound by the terms of the 2019-2021 MOU." IR 9 (Second Amended Complaint ("SAC")) at ¶¶ 5-6, 50-51. Plaintiffs also alleged that "[r]elease time employees are funded under memoranda of understanding between the City and labor unions that charge the cost of release time employees' salaries as part of 'total compensation' to all employees that are bound by the memorandum of understanding." *Id*. at ¶ 2. Plaintiffs' claims were about the MOU and their attempt to change the terms and conditions thereunder. *Cf. Tribe*,

2020 WL 3526664, at *4-5, ¶¶ 17-19 (detailing allegations about contract at issue).

Ultimately, Plaintiffs' claims depended on the language, meaning, and interpretation of the MOU, and their purported standing was based entirely on their contractual employment relationship with the City. *See* IR 9 (SAC) ¶¶ 2-6, 15-24, 33-37, 39, 50-53, 69-70; *see also* IR 70 (DSOF) at ¶¶ 108-110; IR 100 (CSOF) at ¶¶ 17-18. In similar cases regarding the meaning of a contract or the parties' rights thereunder, numerous courts have awarded fees in declaratory judgment actions like this. *See, e.g., Maleki v. Desert Palm Prof'l Props., L.L.C.*, 222 Ariz. 327, 334, ¶ 34 (App. 2009) ("Maleki brought this litigation seeking a declaration that he was entitled to possession, and he won such a ruling"); *John Deere Ins. Co. v. W. Am. Ins. Grp.*, 175 Ariz. 215, 216, 218-19 (App. 1993) (fees awardable in a declaratory judgment action to determine primary insurance coverage); *Mountain States Tel. & Tel. Co. v. Kennedy*, 147 Ariz. 514, 515, 517 (App. 1985) (fees awardable in declaratory judgment action to determine rights under a deed).

III. This case was really about Plaintiffs' terms and conditions of employment rather than their civil rights.

The ACLU contends this was "a case in which two City employees sought to vindicate their First Amendment rights." ACLU's Amicus Brief at 3. This is based on superficial labels of Plaintiffs' claims rather than the actual context of this case. Plaintiffs were not genuinely pursuing civil rights claims. Their only alleged injury arose out of their contractual employment relationship with the City, and their only

interest in eliminating the release time provisions was based on their desire to redefine the terms and conditions of their employment.

During their depositions, Plaintiffs could not identify the specific political or ideological activities with which they supposedly disagreed in connection with release time. IR 70 (DSOF) at ¶¶ 147-148. Moreover, Plaintiffs admitted that they were not forced to join, support, finance, or associate with the Union. IR 70 (DSOF) at ¶¶ 80, 82, 91-94, 96, 129, 139, 141-146; IR 100 (CSOF) at ¶¶ 20, 24, 27, 41-43, 46-47, 53-54. They also admitted that (1) they received all compensation to which they were entitled, (2) they were not entitled to more, and (3) nothing was deducted from their promised compensation in order to pay for release time. IR 70 (DSOF) at ¶¶ 87-94, 96, 113-117, 125, 127-129, 142-143; IR 100 (CSOF) at ¶¶ 23, 39-40, 42-43, 46-55. Plaintiffs' own admissions make it clear that their rights to free speech and association were not implicated.

The ACLU cites to *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), but the facts and issues in that case were very different than those at issue here. *Janus* involved a challenge to "agency fees" where money was deducted from the plaintiff's actual compensation after it had been earned, and the U.S. Supreme Court held that this was unconstitutional because it compelled the plaintiff to subsidize the union's speech and activities. *Id*. at 2459-60, 2486. Unlike *Janus*, Plaintiffs admitted that they were not forced to pay fees to the Union and that nothing was

deducted from their compensation to pay for release time. Plaintiffs suffered no injury and were not deprived of any civil rights because they received all compensation to which they were contractually entitled.

This case is more like situations where courts have awarded fees to an employer after rejecting an employee's constitutional or statutory claims seeking to redefine the contractual employment relationship. *See, e.g., Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 262-64, ¶¶ 1-3, 5, 9-13 (App. 2004) (rejecting employees' argument that A.R.S. § 23-351 required change to contractual terms for payment of wages); *Hale v. Amphitheater Sch. Dist. No. 10 of Pima Cty.*, 192 Ariz. 111, 113-15, ¶¶ 1, 8-14 (App. 1998) (rejecting employee's statutory challenge to termination of employment contract). Like *AFSCME* and *Piccioli*, these cases show that A.R.S. § 12-341.01 applies to employment disputes like this case (regardless of the specific claims or basis of the dispute) because they involve a contractual relationship.

Because Plaintiffs' claims were based on their contractual relationship with the City, this case is distinguishable from the hypothetical situations discussed on pages 5-6 of the ACLU's amicus brief.[4] In those situations, the protestors and

[4] The federal cases cited by the ACLU in connection with this discussion are factually distinguishable because the plaintiffs were not employees, and the cases are inapposite because they do not address fee awards under A.R.S. § 12-341.01. *Cf.* ACLU's Amicus Brief at 5-6.

residents would be suing as aggrieved citizens, not as employees seeking an interpretation of the contract that governs their employment relationship. In addition, the protestors and residents would not be seeking to change their employment contract for the admitted purpose of increasing their personal compensation. These differences highlight why our case *does* arise out of contract.

In contrast, the ACLU's description of *Toomey v. Arizona* seems to implicate A.R.S. § 12-341.01 because it appears to involve employees seeking relief based on their contractual employment relationship. ACLU's Amicus Brief at 6-7. Although that case is ongoing, the plaintiffs appear to be challenging the contractual terms of their health benefits under their employer's health plan. Like this case, those claims arise out of contract because they are based on the terms of the employer's health plan offered as part of the contractual employment relationship. This is true even if the plaintiffs do not allege a "breach of contract" and assert constitutional challenges to seek their requested changes to their employment benefits.

IV. The policy reasons for awarding fees under A.R.S. § 12-341.01 justify the fee award in this case.

The ACLU argues that the policies for awarding fees under A.R.S. § 12-341.01 do not apply in this case. These policies include "mitigating the burden of the expense of litigation" and encouraging parties to take a "more careful analysis prior to filing suit." ACLU's Amicus Brief at 11; *see also ASH*, 138 Ariz. at 193 (affirming fee award to parties that incurred substantial expense in defending their

contract); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 186 (App. 1983) (fee awards help to discourage meritless claims). These policies apply here.

As explained above and in the City Defendants' and the Union's previous briefing in this case, Plaintiffs' claims failed based on their own admissions. *See, e.g.,* City Defendants' Response to Pacific Legal Foundation's Amicus Brief at 8. Plaintiffs admitted that (1) nothing was deducted from their earned compensation and they were not promised or entitled to anything more, and (2) the MOU could serve a variety of public purposes, including employee services that give the City adequate consideration for the MOU as a whole. Yet Plaintiffs filed this lawsuit, persisted beyond discovery, and then filed *four* unsuccessful motions for summary judgment. This caused significant expense for the City Defendants and the Union in defending the MOU, and the ACLU does not explain why the City, the Union, and (more importantly) the City's taxpayers should bear the full cost of Plaintiffs' unsuccessful bid to increase their compensation.

The ACLU suggests that the fee requests should have been evaluated based on the sanctions framework under Rule 11 and A.R.S. § 12-349. But A.R.S. § 12-341.01 also helps discourage meritless claims (as the ACLU recognizes), and the *Associated Indemnity* factors include the relative merits of the parties' positions. These considerations mitigate the ACLU's concerns, and there is no requirement that these issues be addressed exclusively under Rule 11 or A.R.S. § 12-349.

The ACLU contends that "the award of fees under A.R.S. § 12-341.01 is not some important public policy provision to ensure parties can vindicate their rights, but rather a logical extension of the general principle of contract law – an award to make the non-breaching party whole." ACLU's Amicus Brief at 9. The "important public policy" underlying A.R.S. § 12-341.01 is "to mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01(B). This policy is not simply to "make the non-breaching party whole." The statute applies outside of "breach of contract" disputes and even applies "when the plaintiff asserted a contract and the defendant successfully proved that no contract existed." *See, e.g., ML Servicing*, 235 Ariz. at 570, ¶ 30. The statute's application and purpose are not nearly as limited as the ACLU suggests, and it does not matter that "there was no breach of contract alleged" or that "there is no way to put the Defendants in the position they would have been in but for the nonexistent breach." *Contra* ACLU's Amicus Brief at 9. These are not requirements under the statute. *See Marcus v. Fox*, 150 Ariz. 333, 336 (1986).

The ACLU argues that A.R.S. § 12-341.01 "is merely a gap-filler" and "the parties should be able to contract around it." ACLU's Amicus Brief at 7. But the MOU does not "contract around" the statute or alter its application in this case. The ACLU also complains that "it was impossible for [Plaintiffs] to exercise the right to . . . contract out of the applicability of A.R.S. § 12-341.01." ACLU's Amicus Brief

at 10-11. This argument is undercut by *Orfaly*, where fees were awarded based on the plaintiffs' statutory challenge to the terms for payment of wages under a collective bargaining agreement. 209 Ariz. at 262-64, ¶¶ 5, 9-13.

Moreover, Plaintiffs subjected themselves to the possibility of an adverse fee award by choosing to initiate this lawsuit arising out of their terms and conditions of employment under the MOU. They voluntarily made this decision, not the City or the Union. And Plaintiffs filed this suit seeking to promote their personal economic interests. It is not "fundamentally unfair" for Plaintiffs to bear the expense incurred by the City Defendants and the Union.[5]

V. The superior court did not abuse its discretion.

This Court "will not disturb the trial court's discretionary award of fees if there is *any reasonable basis* for it." *Orfaly*, 209 Ariz. at 265, ¶ 18 (emphasis added).

> In reviewing for an abuse of discretion, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge."

[5] The ACLU suggests that "binding Plaintiffs to a provision in a Union contract as non-members of the Union would seem to violate the public policy contained in Arizona's 'right to work' laws." ACLU's Amicus Brief at n.5. This is beyond the scope of the ACLU's amicus brief regarding fees, and Plaintiffs have indicated that they are not challenging the concept of exclusive representation. *See* Plaintiffs' Reply to the City's Answering Brief at 18. Exclusive representation does not violate the right-to-work laws. *See, e.g.,* City Defendants' Answering Brief at 37-38.

Solimeno v. Yonan, 224 Ariz. 74, 82, ¶ 36 (App. 2010) (citation omitted). "In reviewing a trial court's fee award, we view the record in the light most favorable to sustaining the trial court's decision." *Id*.

The ACLU argues that the superior court "abused its discretion by failing to expressly consider the deterrent effect of its fee award on future litigation." ACLU's Amicus Brief at 13. The ACLU also contends the superior court's "dearth of analysis gives this Court little to review." *Id*. at n.1. However, the superior court was not required to provide more analysis or "expressly consider the deterrent effect of its fee award." In *Orfaly*, the Court rejected a similar argument that "the trial court did not adequately explain its analysis and resolution of each *Associated Indemnity* factor in awarding fees." 209 Ariz. at 267, ¶ 25. *Associated Indemnity* does not require the superior court "to set forth a detailed factual basis for a fee award." *Orfaly*, 209 Ariz. at 267, ¶ 25. "As long as the record reflects a reasonable basis for the award, we will uphold it." *Id*.

The ACLU also argues that the superior court "may have failed to consider the hardship caused by assessing such substantial fees against the Plaintiffs." ACLU's Amicus Brief at 12. "The party asserting financial hardship has the burden of coming forward with prima facie evidence." *Rudinsky v. Harris*, 231 Ariz. 95, 102, ¶ 32 (App. 2012). "Unsworn and unproven assertions of counsel in memoranda are not facts admissible in evidence." *Id*. Hardship is not simply assumed, and

Plaintiffs did not submit evidence of any alleged hardship, so there was no evidence for the superior court to consider.

Next, the ACLU argues that the fee award "will have an adverse impact on these individuals and a chilling effect on the willingness of other individuals to step forward and try to vindicate their rights." ACLU's Amicus Brief at 15. Similarly, the ACLU contends that "parties should be able to bring constitutional claims . . . without fear that they will be bankrupted by attorneys' fees."[6] *Id*. at 7. These arguments ignore the context of this case. While Plaintiffs should not have filed this case in light of the undisputed facts and their motivation for suing, they certainly should not have continued once they admitted (specifically and without reservation) that they were not deprived of anything to which they were entitled under the MOU. Defendants should not bear the full cost of Plaintiffs' attempt to get more paid time off, especially when Plaintiffs admitted that they were not entitled to more. The fee award will not chill genuine "impact litigation" or "civil rights" cases brought in good faith, and the First Amendment does not protect losing litigants from adverse

[6] The ACLU also contends that "[c]onsitutional challenges such as the one brought by Goldwater in this case and by the ACLU in many others are often asking the court to expand on, overturn, or change existing law, and not every case of this nature will ultimately be successful." ACLU's Amicus Brief at 17. The City Defendants acknowledge the need for leeway, but this case is different. First, Plaintiffs were not asserting civil rights or attempting to promote a public purpose. They were seeking to promote their private economic interests. Second, Plaintiffs' endeavor for more compensation failed based on the undisputed facts and their own admissions.

fee awards. *See* City Defendants' Answering Brief at 55-56.

As the City Defendants explained in response to the Pacific Legal Foundation's amicus brief, Arizona courts have dismissed nearly identical arguments about the alleged chilling effect of fee awards in cases like this. *See* City Defendants' Response to Pacific Legal Foundation's Amicus Brief at 5. For example, the *Orfaly* plaintiffs "warn[ed] of the fee awards' 'chilling effect on [their] pursuit of meritorious claims' involving 'important wage claims and employment issues.'" 209 Ariz. at 266, ¶ 20. The plaintiffs also argued that the fee awards "'threaten[ed] harm to [the] balance' of 'competing interests' between employers and employees and trample the needed 'sensitivity to keeping the playing field level when one type of litigant typically has less financial strength than another.'" *Id*. The Court rejected these concerns as a basis for overturning a discretionary fee award. *Id*. at ¶ 21; *see also Mullins*, 174 Ariz. at 543 (rejecting argument "that an employee, if the unsuccessful party, should not be required to pay attorney's fees").

Finally, the ACLU contends that the superior court "used the contract statute to award damages in a constitutional case, which will deter all civil rights litigation anytime a contract is even remotely involved." ACLU's Amicus Brief at 19. This is not our case. The superior court did not award "damages," and this was not a constitutional case where a contract was "remotely involved." The MOU was the linchpin of Plaintiffs' attempt to change their terms and conditions of employment.

It was not merely involved on the periphery.

VI. Conclusion

This case arose out of contract under A.R.S. § 12-341.01 because it was about the MOU and the contractual terms and conditions of Plaintiffs' employment. In accordance with *AFSCME* and *Piccioli*, the superior court appropriately awarded fees to mitigate the cost of defense for the City and its taxpayers.

DATED: August 22, 2022.

SHERMAN & HOWARD L.L.C.

By: /s/ *Matthew A. Hesketh*
John Alan Doran (AZ Bar No. 012112)
Matthew A. Hesketh (AZ Bar No. 029319)
2555 E. Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
Facsimile: (602) 240-6600
JDoran@ShermanHoward.com
MHesketh@ShermanHoward.com
Attorneys for the City Defendants/Appellees