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 PACIFIC LEGAL FOUNDATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Rules and Regulations

Other Authorities

I. Introduction

This case involves Plaintiffs' attempt to change the contractual terms and conditions of their employment with the City of Phoenix (the "City"). At its core, this case was about Plaintiffs' desire to seek more compensation for themselves. It was not about freedom of speech, freedom of association, the right to work, or Arizona's Gift Clause. Plaintiffs were seeking only to promote their private interests, and they admitted that this would not benefit the public. This was not a "public interest" case.

Yet Pacific Legal Foundation's ("PLF") amicus brief is about whether fees should be awarded to intervening defendants in "public interest" litigation. PLF's briefing is divorced from the facts and record in this case. While PLF's policy and other arguments might make for a good discussion in another case that involves genuine public interest litigation, such discussions are inapposite here.

This case arose out of contract, and the purpose and criteria for awarding fees under A.R.S. § 12-341.01 are different than in public interest litigation. Plaintiffs caused significant fees in their effort to obtain more compensation for themselves, and courts have flatly rejected the argument that employees are immune from fee awards. Our superior courts are fully equipped and capable of weighing equitable and policy considerations when evaluating fee requests under A.R.S. § 12-341.01, and there is no need for the limitations that PLF proposes.

II. The Union had a clear interest in this case, and the City Defendants did not "outsource" their defense of this lawsuit.

PLF's primary focus seems to be on special interest advocacy groups who intervene as defendants in public interest cases to advocate for a specific ideological viewpoint. PLF asserts that fee awards to such advocacy groups undermine the public discourse and could chill public interest litigation. But the intervenor in this case was not acting as a special interest advocacy group that wanted to promote an ideological position. Instead, American Federation of State, County and Municipal Employees (AFSCME), Local 2384 (the "Union") intervened because Plaintiffs were seeking to eliminate the release time provisions in the Union's Memorandum of Understanding ("MOU") with the City. The Union had a clear and direct interest in the outcome of this case as a party to the contract that Plaintiffs were seeking to alter. PLF's arguments miss the mark for this reason alone.

PLF also asserts that fee awards to intervening defendants will incentivize public entities to "outsource" their defense of public interest litigation. PLF's Amicus Brief at 13-14. The City fundamentally disagrees with this assertion, which is based on anecdotes and strained inferences. Even if this were a legitimate concern, it should be addressed in the context of the facts of specific cases. If it appears the government has done this in a particular case, the court can take it into consideration when evaluating a fee award.

But this discussion is inapplicable here because the City did not "outsource"

its defense or "sit by passively while private organizations intervene for the purpose of defending laws." *Contra* PLF's Amicus Brief at 13. Nor did the City "preserve [its] own resources by letting such intervenors guide the litigation." *Contra id*. at 14. The City's very real defense of this lawsuit is apparent from its attorneys' time records in their fee application, and it is obvious from the fee award in this case. IR 133-134, 144, 149. Even if PLF's hypothetical concerns were real in other cases, they do not reflect the realities and circumstances of this case.[1]

III. A.R.S. § 12-341.01 is not *in pari materia* with public interest statutes.

PLF asserts that "[m]ost fee-shifting statutes do not permit government defendants to recover fees from public-interest plaintiffs," and PLF suggests that the Court should "read[] A.R.S. § 12-341.01 *in pari materia* with Arizona statutes awarding fees to civil rights plaintiffs." PLF's Amicus Brief at 1, 16.

A.R.S. § 12-341.01 is not a civil rights statute, and it is not *in pari materia* with such statutes. *Cf.* Scalia & Garner, Reading Law: The Interpretation of Legal Texts, at 252 (2012) ("laws dealing with the same subject – being *in pari materia* (translated as 'in a like matter') – should if possible be interpreted harmoniously."). A.R.S. § 12-341.01 applies to "any contested action arising out of a contract." In

[1] It is not clear how fee awards cause the hypothetical concerns that PLF raises. Even if fee awards in favor of intervening defendants were curbed in this context, the government and "ideological advocacy groups" would have the same incentives for acting in the same way.

contrast, public interest fee shifting statutes apply in different contexts, and they have different purposes. There is no basis for conflating them.

"The award of reasonable attorney fees pursuant to [A.R.S. § 12-341.01] should be made 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); *see also ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 193 (App. 1983) (A.R.S. § 12-341.01 is remedial, and fees were properly awarded to parties that incurred substantial expense in defending the propriety of their contract). Conversely, the prospect of an adverse award serves the salutary purpose of discouraging parties from taking unreasonable positions in matters arising out of a contract. *See Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 186 (App. 1983); *Nationwide Mut. Ins. Co. v. Granillo*, 117 Ariz. 389, 395 (App. 1977).

Under A.R.S. § 12-341.01, the superior court has discretion when deciding whether to award fees and in determining the amount based on the factors set forth in *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). These include the novelty of the case, the relative merits of the parties' positions, potential hardship on the unsuccessful party, and whether a fee award would discourage parties with tenable claims from pursuing litigation. In other words, the fee award analysis under A.R.S. § 12-341.01 already is designed to address the concerns raised by PLF, but in the context of cases arising out of contract. There is no reason to depart from this

well-established framework or to deprive the superior courts of their discretion to appropriately evaluate these factors in the context of specific cases. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18 (App. 2004) ("An award of attorney fees is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion").

In employment cases, this Court has specifically rejected arguments that plaintiff employees should be immune from fee awards. *See Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540, 543 (App. 1992) (unsuccessful employee may be required to pay attorneys' fees in action against employer); *Orfaly*, 209 Ariz. at 265-66, ¶¶ 17-21 (affirming fee award after rejecting employees' claims for more compensation under collective bargaining agreement). In *Orfaly*, the Court dismissed arguments that the fee award would have a "chilling effect on [the] pursuit of meritorious claims" and "threaten[ed] harm to [the] balance of competing interests between employers and employees and trample[d] the needed sensitivity to keeping the playing field level when one type of litigant typically has less financial strength than another." *Orfaly*, 209 Ariz. at 266, ¶¶ 20-21.

This Court also has affirmed fee awards in favor of public employers, even in cases where the employee asserted statutory and constitutional claims that arise out of a contract. For example, fees were awarded against a teacher who filed a special action lawsuit to challenge a school district's alleged failure to comply with the

statutory requirements for terminating her teaching contract. *Hale v. Amphitheater Sch. Dist. No. 10 of Pima Cty.*, 192 Ariz. 111, 113, ¶ 1 (App. 1998). After finding that the school district complied with the statutes, this Court affirmed a fee award in favor of the district. *Id*. at 117, ¶ 20. Similarly, the Arizona Supreme Court awarded fees against individual employees who brought constitutional claims in *AFSCME, AFL-CIO, Loc. 2384 v. City of Phoenix*, 249 Ariz. 105, 113, ¶ 33 (2020), and *Piccioli v. City of Phoenix*, 249 Ariz. 113, 119, ¶ 24 (2020).

In short, A.R.S. § 12-341.01 is not a public interest statute and it has been applied to award fees against individual employees and in favor of public employers in circumstances very similar to this case.

IV. This is not a "public interest" case – Plaintiffs were pursuing their own private interests, and they admitted that the public would not benefit from these private interests.

PLF raises concerns about "stymying the corrective role that public-interest litigation plays in our constitutional order." PLF's Amicus Brief at 2. PLF asserts that adverse fee awards "chill[] valuable First Amendment activity by dissuading public-interest plaintiffs from providing a necessary check on government by challenging its laws and policies." *Id*. at 11. PLF also contends that "the plaintiffs from whom defendant-intervenors may seek fees had no role whatsoever in causing any potential violation of constitutional or statutory rights." *Id*. at 5.

Even if these are genuine concerns in public interest litigation, they are not

relevant here because our case does not involve "aggrieved citizens" pursuing public interest litigation. Instead, Plaintiffs wanted to change their contractual terms and conditions of employment in hopes of increasing their personal compensation – a purely private interest. Specifically, Plaintiffs wanted to eliminate release time because they wanted more paid time off. *See* IR 70 (Defendants' Joint Statement of Facts ("DSOF")) at ¶¶ 94, 108-110; IR 100 (City Defendants' Controverting Statement of Facts ("CSOF")) at ¶¶ 32, 35, 48, 54. They admitted that their claims were designed to promote their private interests, and they admitted that "the benefit wouldn't be for the public." *See* IR 70 (DSOF) at ¶¶ 108, 110, 118; IR 100 (CSOF) at ¶¶ 33-34, 36.

Neither the City nor the Union invited this case. Plaintiffs made the voluntary decision to initiate litigation to seek more compensation for themselves, and the fee award helps mitigate the cost to the City and the Union of defending their contractual relationship. *See ASH*, 138 Ariz. at 193.

V. Fees were appropriately awarded in light of Plaintiffs' admissions that defeated their claims.

PLF asserts that fee awards to defendants in public interest litigation may have "a profound chilling effect" and that plaintiffs "may see no choice but to dismiss their lawsuit that has merit." PLF's Amicus Brief at 9-10. But *Orfaly* dismissed similar concerns, and the *Associated Indemnity* factors already address these issues when evaluating fee awards under A.R.S. § 12-341.01.

PLF's handwringing is misplaced here because Plaintiffs' case had no merit. Their own deposition admissions made this clear. To start, Plaintiffs had no standing because they were not harmed. They received all compensation to which they were entitled under the MOU, and no one promised that they would receive more. *See* IR 70 (DSOF) at ¶¶ 96, 125, 128-129; IR 100 (CSOF) at ¶¶ 21, 47-49, 51-55. They specifically admitted that they were not entitled to compensation beyond what was set forth in the MOU. *See* IR 70 (DSOF) at ¶¶ 87, 94, 127; IR 100 (CSOF) at ¶¶ 49-50, 54-55.

On the merits, Plaintiffs admitted that they were not compelled to speak or associate with the Union. *See* IR 70 (DSOF) at ¶¶ 91-94, 96, 129, 142-147; IR 100 (CSOF) at ¶¶ 20, 24, 27, 41-43, 46-47, 53. They also admitted that the MOU, including its release time provisions, can serve a variety of public purposes. *See* IR 70 (DSOF) at ¶¶ 50-53, 57-63; IR 100 (CSOF) at ¶¶ 44-45. And they admitted that the City does not pay too much for the entire MOU. *See* IR 70 (DSOF) at ¶¶ 99-100; IR 100 (CSOF) at ¶¶ 37-38.

Plaintiffs were aware of these facts from the beginning, yet they persisted even after they made these admissions in their depositions. PLF's brief overlooks this context, and the concerns it raises are not applicable here.

VI. Conclusion

This case was about Plaintiffs' attempt to change their contractual terms and

conditions of employment, even though they admitted that they were not entitled to more compensation and had not been deprived of any contractual right. This was not a good faith public interest case. There is no reason to change the application of A.R.S. § 12-341.01 in cases like this, and our superior courts can address PLF's concerns in the context of specific cases based on the *Associated Indemnity* factors.

DATED: August 3, 2022.

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