ARIZONA SUPREME COURT

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 United States Court Appeals for the Ninth Circuit No. 18-17150 United States District Court No. 2.18-cv-01247-DLR

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF TO THE ARIZONA SUPREME COURT

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Introduction

¶ 1 The doctrine of sovereign immunity has never been well-received in Arizona. In 1963, this Court referred to the doctrine "windblown across the Atlantic," as "an anachronism without rational basis." *Stone v. Ariz. Highway Comm'n*, 381 P.2d 107, 109–10 (Ariz. 1963). This Court's disdain is merited. The word "sovereign" is derived from the Latin word meaning "above."[1] In America, government is not "above" the people. In America, government is "of the people, by the people, and for the people." President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

¶ 2 Arizona's government was founded on this democratic principle. Indeed, the strongest underlying theme of our state's constitution is the primacy of individual rights over governmental power.[2] This priority is enshrined in Arizona's constitution: "All political power is

[1] OED Online, Oxford University Press (Sept. 2020)

[2] "Overall, perhaps the single dominant idea was one shared by constitutions across the United States; that is, they manifested 'more distrust than confidence in the uses of authority.' The Arizona framers were thoroughly skeptical of concentrating power in the hands of any institutions, governmental or not." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 60 (1988) (internal citation omitted).

inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Ariz. Const. art. 2, § 2.

¶ 3 Turning its back on these essential democratic principles, the State now asks this Court to give state agencies absolute impunity for their violation of binding federal law. This is a breathtaking request, given that (1) throughout this case, the State has never assured the Courts of its faithfulness to binding federal law, but has inexplicably and erroneously maintained that it should be "free" from federal regulation like the FLSA, despite United States Supreme Court precedent directly to the contrary; and (2) the State has yet to articulate a single policy reason to justify depriving many thousands of state employees of their federal wage rights.

¶ 4 The fundamental principles of a government "established to protect and maintain individual rights," *id.*, art. 2, § 2, surely require that the State be accountable for its intentional violation of federal law, especially where that violation deprives its own citizen-employees of their federal right to a decent wage.

Statement of the Case

¶ 5 In February 2018, Ms. Redgrave sued the State on behalf of herself and approximately 1,900 state-employed home healthcare workers, alleging FLSA minimum wage and overtime violations. The district court dismissed her case, ruling that Arizona had not waived its state sovereign immunity to FLSA claims. The Ninth Circuit Court of Appeals decided that a question of state law may be determinative of the cause and certified the case to this Court. This case arises from a motion to dismiss filed prior to discovery; thus, no statement of facts is provided.

Statement of the Issues

¶ 6 The question certified by the Ninth Circuit Court of Appeals is: "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?"

¶ 7 Importantly, the Ninth Circuit stated in its certification order that "when a State removes a case it invokes the jurisdiction of the federal district court and thereby waives the sovereign immunity *from suit* it would enjoy in state court." *Redgrave v. Ducey*, 953 F.3d 1123, 1125 (9th Cir. 2020) (emphasis in original). Thus, Eleventh Amendment immunity from suit in federal court is finally and definitively no longer at issue in this case.

¶ **8** Finally, this brief supplements the Plaintiff-Appellant's Ninth Circuit briefs. It does not stand alone. Ms. Redgrave's Opening and Reply briefs contain significant case law and analysis on this complex issue, most of which is not repeated here. Thus, the undersigned respectfully suggests that those briefs be read prior to this supplemental brief.

Argument

I. As a matter of law, under A.R.S. § 12-820.01, Arizona has consented to damages liability for the State's violation of the FLSA.

¶ **9** The Ninth Circuit queried whether the State's sovereign immunity waiver, known as the Actions Against Public Entities or Public Employees Act, A.R.S. §§ 12-820–12-826, (herein referred to as "the Act" and included at **APP 24-30**), can be applied to a federal statutory claim. *Redgrave*, 953 F.3d at 1126–27. For the reasons explained herein, it can. The only limitations on the Act's applicability are those present on the face of the law itself, none of which restrict the Act as the State has claimed.

A. The Act governs the State's immunity from FLSA claims.

¶ **10** The Ninth Circuit questioned whether the Act "even governs the question of Arizona's immunity from FLSA claims." *Redgrave*, 953 F.3d at 1127. It does. This Court has several times recognized that the Act occupies the field as the sole, comprehensive authority on sovereign immunity in Arizona. *See City of Phoenix v. Fields*, 201 P.3d 529, 534 (Ariz. 2009) ("In 1984, the legislature enacted a comprehensive statutory scheme governing actions against public entities and employees, . . . [which] set "forth limited circumstances in which public entities would enjoy complete or qualified immunity from liability."); *Doe ex rel. Doe v. State*, 24 P.3d 1269, 1271 (Ariz. 2001) ("the legislature defined the boundaries of governmental absolute and qualified immunity in A.R.S. sections 12-820 to 12-826.").

B. Under the Act's plain language, the State lacks immunity from FLSA claims.

¶ 11 The Act provides immunity for an extremely narrow range of decisions. It "immunizes only those administrative functions that involve 'the determination of fundamental governmental policy.'" This distinction ensures that courts will not second-guess the policy determinations of a coordinate branch of government, ***but does not extend immunity any farther than necessary to achieve that end***." *Doe*, 24 P.3d at 1271 (Ariz. 2001) (quoting A.R.S. § 12-820.01(A)) (emphasis added).

¶ 12 "[T]o gain protection under the absolute immunity statute, the burden rests with the defendants to plead and prove that the [state agency's] decisions [ ] fall within the narrow category of fundamental policy making." *Fidelity Sec. Life Ins. Co. v. Dep't of Ins.*, 954 P.2d 580, 583 (Ariz. 1998). The State cannot prove that its decision to defy valid, binding, and applicable federal law constitutes a decision of "fundamental governmental policy." The Act categorizes the decision of whether to provide resources necessary for "the purchase of equipment [and] the hiring of personnel" as a fundamental policy decision. ¶ 12-820.01(B)(1). But this section no more gives the State carte blanche to underpay its personnel in defiance of valid and binding federal law than it does to steal needed equipment. Indeed, the Supremacy Clause prohibits a state law from authorizing noncompliance with a federal law.[3]

"[T]he legislature has granted absolute immunity in the field of administration for the reason that immunity protection of government officers is warranted when fundamental governmental policy making is at stake, ***but not otherwise.***" *Fidelity Sec. Life Ins. Co.*, 954 P.2d at 583

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[3] U.S. Const., art. VI ("The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

(emphasis added). Defying federal law is not a "policy determination," so under the Act's plain language and this Court's direction to narrowly construe the Act, the State is not entitled to immunity. *Id.* ("[J]udicial construction of immunity provisions in statutes applicable to government entities should be restrained and narrow.").

C. The Act is not limited to cases arising in tort.

¶ 13 The Act's plain language and legislative history indicate that it is applicable to all types of cases. As detailed in the Opening brief, in 1985, the Legislature omitted language from prior versions of the Act and from suggested drafts that would have limited it to tort claims. **AOB 11–13[4]; ***cf. Russello v. United States*, 464 U.S. 16, 23–24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

¶ 14 In 1993, the Legislature again amended the Act, explicitly limiting waiver to "personal injury actions." 1993 Ariz. Sess. Laws ch. 90; **APP 31-32.** But during the very next legislative session, the Legislature

[4] Ms. Redgrave's Opening Brief to the Ninth Circuit is abbreviated as "AOB". The State's Answering Brief to the Ninth Circuit is abbreviated as "AB." The appendix to this brief is abbreviated as "APP."

eliminated this reference, returning the statute to its original and current language, which provides: "*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, **APP 32-33** (emphasis added).[5] Again, the Legislature's swift and definitive deletion of this reference conclusively shows that the Act is not limited to tort.

¶ 15 This Court has so frequently applied the Act to non-tort cases[6] that it would significantly diminish the value of this Court's precedent to

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[5] Notably, state notice of claim procedures and abbreviated statutes of limitation are inapplicable to federal claims. *Felder v. Casey*, 487 U.S. 131, 134 (1988) (federal law preempts notice of claim requirements).

[6] *See City of Phoenix*, 201 P.3d at 534 (applying the Act to a class claim for unpaid wages, breach of contract, and constructive fraud); *Fidelity Life Ins. Co.*, 954 P.2d at 584 (no sovereign immunity for decisions involving implementation of a statute's regulatory scheme); *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 959 P.2d 1256, (Ariz. 1998) (no sovereign immunity against equitable estoppel claim); *Andrew S. Arena, Inc. v. Superior Court*, 788 P.2d 1174, 1177 (Ariz. 1990) (no sovereign immunity to claim for monetary and injunctive relief stemming from excessive building permit fees); *Kromko v. Ariz. Bd. of Regents*, 146 P.3d 1016 (Ariz. Ct. App. 2006), *vacated on other grounds*, 165 P.3d 168 (Ariz. 2007) (Board of Regents not immune to constitutional claim); *County of La Paz v. Yakima Compost Co.*, 233 P.3d 1169, 1182 (Ariz. Ct. App. 2010) (no sovereign immunity against claim for breach of the covenant of good faith and fair dealing); *Pima County v. State*, 850 P.2d 115, 118 (Ariz. Ct. App. 1992) ("No immunity exists for the kinds of auditing activities performed by the auditor general in making AHCCCS assessments.").

suggest that the Court applied the Act in a manner inconsistent with its drafters' intent only because the parties did not raise the issue.

¶ **16** The Ninth Circuit also questioned whether the reference to "tort" in § 12-820.05, providing that the Act "shall not be construed to affect, alter or otherwise modify any other rules of tort immunity," "could be understood to limit the [Act's] scope to tort claims." *Redgrave*, 953 F.3d at 1126. It cannot. In the face of the Legislature's multiple eliminations of the word "tort" from the operative portions of the Act, this sole remaining reference cannot by itself restrict the entire Act to tort. The reference unremarkably confirms that the Act is *a* rule of tort liability but does not command the conclusion that it is *exclusively* a rule of tort liability.

¶ **17** To focus on the question of tort is to create a difference without a distinction. The policy reasons motivating the sweeping, definitive language in *Stone* are just as, if not more so, applicable to the State's intentional misconduct as they are to its negligence. The *Stone* court condemned sovereign immunity in the strongest possible terms:

> "It requires but a slight appreciation of the facts to realize that if the individual citizen is left to bear almost all the risk of a defective, negligent, perverse or erroneous administration of

> the state's functions, an unjust burden will become graver and more frequent as the government's activities are expanded and become more diversified. . . . If the government is to enter into businesses ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities. . . . Many inequalities are created through the application of the sovereign immunity doctrine."

Stone, 381 P.2d at 109, 111–12. Surely, this Court's expansive rationale supports the State's liability for statutory violations, because unlike negligence, intentional misconduct is fully preventable and deterrable.

¶ 18 In interpreting similarly broad language, the New Mexico Supreme Court held that its judicial abrogation of sovereign immunity in the tort context applies equally to all other claims:

> "Our Supreme Court has since read *Hicks* as generally abolishing the common law doctrine of sovereign immunity in all its ramifications, whether in tort or contract or otherwise."); *State ex rel. Hanosh v. State ex rel. King*, 217 P.3d 100, 103 (N.M. 2009) ("Although *Hicks* specifically challenged the state's common law immunity from actions in tort, no one should doubt the broader scope of what this Court has previously described as *Hick's* sweeping abolition of sovereign immunity.") (citing *Hicks v. State*, 544 P.2d 1153 (N.M. 1975)).

Torrance Cty. Mental Health Program v. N.M. Health and Env't Dep't, 830 P.2d 145, 149 (N.M. 1992). Similarly, given this Court's broad decisions criticizing sovereign immunity, there is no reason to limit the Act to tort.

D. The Act governs Arizona's immunity from federal claims.

¶ 19 The Ninth Circuit contemplated whether the Act waives only claims arising from state law. *Redgrave*, 953 F.3d at 1127. It is not. This Court has already determined that the legislature's failure to expressly list certain claims in the Act does not preclude those claims. *Andrew S. Arena, Inc.*, 788 P.2d at 1177 ("[N]othing in § 12-821 intimates that class claims are impermissible. We will not read the absence of express authorization as a preclusion against class claims.").

¶ 20 At least two other states have held that their waiver statutes consent to federal claims, despite not expressly authorizing them. *Hartman v. Regents of the Univ. of Colo.*, 22 P.3d 524 (Co. Ct. App. 2000) (finding Colorado subject to FLSA claims because its waiver immunized the state only from tort claims); *Bd. of Educ. V. Zimmer-Rubert*, 973 A.2d 233 (Md. Ct. App. 2009) (finding Maryland subject to employment claims because its immunity waiver subjected the county board of education "to any claim of $100,000 or less"). Thus, to limit the Act to state law claims would subvert its plain language, which contains no such limitation.

¶ 21 The Ninth Circuit also questioned whether the Act's uncodified preamble limits its applicability to state law claims. *Redgrave*, 953 F.3d at

1127. It does not. "The preamble is devoid of operative effect." *Cronin v. Sheldon*, 991 P.2d 231, 238 (Ariz. 1999) (citing *Sakrison v. Pierce*, 185 P.2d 528, 535 (1947) ("[W]here an unambiguous operative statutory section conflicts with the purpose or policy section of a statute, the operative section controls."); *D.C. v. Heller*, 554 U.S. 570, 578 n.3 (2008) ("In America, the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

¶ 22 The Act is unambiguous. The operative portion does not limit it to state claims. To graft a limitation onto the Act that is not present in its operative section and which would drastically curtail its reach runs afoul of this Court's precedent. *City of Phoenix*, 201 P.3d at 534 ("The legislature has the ultimate authority to regulate claims against public entities, and we are not free to ignore the language of the statute it has created.").

E. No law requires that the Act explicitly waive the State's immunity from FLSA claims.

¶ 23 The Ninth Circuit also queried whether to apply "the usual rule of construction that a sovereign does not subject itself to liability unless it does so explicitly." *Redgrave*, 953 F.3d at 1127 (citing *Lane v. Peña*, 518 U.S.

187, 192 (1996)). It should not, because this rule is applicable only to waivers of the federal government's sovereign immunity, not the states'. *Lane*, 518 U.S. at 192 ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.").

¶ 24 Here, the question is whether the State has consented to suit in state court. This is a state law question, so explicit waiver is unrequired:

> "Whether a state has waived its sovereign immunity against being sued in its own courts presents a state-law question. We are aware of no principle or authority, and the state has not identified any, that supports the idea that federal law controls the resolution of such a state-law question. Hence, we reject the state's argument that the Eleventh Amendment standard for waiver of sovereign immunity applies to whether the state has waived its immunity against being sued on FLSA claims in state court."

Byrd v. Or. State Police, 238 P.3d 404, 406 (Or. Ct. App. 2010). Moreover, as the Ninth Circuit aptly noted, this Court has "flipped the traditional rule," *Redgrave*, 953 F.3d at 1127, and held that "governmental liability is the rule in Arizona and immunity is the exception . . . [w]e therefore construe immunity provisions narrowly." *Doe*, 24 P.3d at 1271; *see also Fidelity Life Ins. Co.*, 954 P.2d at 583 ("Since immunity is the exception and not the rule, we have concluded, consistent with the intention of the legislature, that judicial construction of immunity provisions in statutes applicable to government entities should be restrained and narrow.").

II. As a matter of policy, this Court should hold that Arizona is subject to damages liability for FLSA violations.

¶ 25 A public policy that holds the State liable for its own intentional misfeasance is both just and consistent with Arizona's constitution, statutes, and jurisprudence.[7] This Court may judicially modify the state's sovereign immunity doctrine to hold the State accountable for its FLSA violation, and it should do so in this case.

A. This Court may decide, as a matter of public policy, that Arizona is subject to damages liability for a FLSA claim.

¶ 26 For the reasons enumerated in Section I, the Act consents to damages liability for FLSA violations. However, if the Court decides that the Act does not waive the State's immunity, it may independently hold that the State lacks sovereign immunity to a FLSA suit:

> "[W]e realize that the doctrine of sovereign immunity was originally judicially created. We are now convinced that a

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[7] Ariz. Const. art. 18, § 1 ("Eight hours and no more, shall constitute a lawful day's work in all employment by, or on behalf of, the state or any political subdivision of this State. The legislature shall enact such laws as may be necessary to put this provision into effect, and shall prescribe proper penalties for any violations of said laws."); A.R.S. § 23-391 (providing overtime to certain state employees).

> court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. ***This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.***"

Stone, 381 P.2d at 113 (emphasis added); *see also Cronin*, 991 P.2d at 237 ("Courts also participate in the development of public policy").[8]

B. Justice compels State liability for violating federal law.

¶ 27 In establishing the contours of our constitutional system, Justice Marshall wrote: "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S.

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[8] Of course, the Legislature may weigh in. *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982) ("We do not recoil from the thought that the legislature may in its wisdom wish to intervene in some aspects of this development."). If the Legislature believes it to be in either it or its constituents' best interest to explicitly permit state employers to skirt binding federal law with impunity and deny its employees a lawful wage, it may act accordingly, and with final authority. Ariz. Const. art. 4, pt. 2, § 8 ("The Legislature shall direct by law in what manner and in what court suits may be brought against the State."); *see also City of Phoenix*, 201 P.3d at 532 ("But although *Stone* and subsequent cases have developed a new common law of government liability, the legislature retains the power to modify the common law and develop this area of law.").

137, 166 (1803). Two hundred years later, the Supreme Court shook this foundation, holding that although states must comply with the FLSA, they are not subject to FLSA suits in state or federal courts. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999).

¶ 28 Critically, *Alden* did not render states "immune" from the FLSA.[9] *Id.* at 754–55 ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."). State employers must comply with the FLSA even if they are not liable for violations. The *Alden* court recognized potential for abuse, but stated:

> "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Id. (citing U.S. Const., Art. VI).

¶ 29 The State has demonstrated that it does not deserve the Supreme Court's confidence. The State has persistently refused to

[9] States are subject to legislation enacted under the Commerce Clause, like the FLSA. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–57 (1985).

recognize that regardless of this case's outcome, it is indeed *not* free from federal regulation. The fact that the State has now argued to two federal courts that it has immunity from a law that it has been subject to since 1985 perfectly illustrates the danger of divorcing a right from its remedy. The State should not be allowed to thumb its nose at the United States Supreme Court, or at its own taxpayers, employees, and disabled citizens. The State's refusal to comply with federal law deprives its employees of a wage to which they are federally entitled, leaves state dependents with insufficient care, and costs taxpayers millions for litigation that—they may be dismayed to learn—seeks to deprive them of their rights.

C. Arizona's sovereign immunity jurisprudence requires that the State be liable for its own wrongdoing.

¶ 30 This Court's condemnation of the injustices inherent in the sovereign immunity doctrine fills pages. **AOB 20-21**. This Court abolished the doctrine to protect citizens from government misfeasance, declaring:

> "There seems to be no benefit, and indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking outrageous actions. In any case, democracy by its

> very definition implies responsibility. In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous."

Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1233 (Ariz. 1977) (internal citation omitted).

¶ **31** Each of these concerns are manifest in this case. Ms. Redgrave is an elderly woman who for the last twenty years has cared for a severely disabled state dependent. She, like 1,900 other state caregivers, provides around-the-clock care for some 35,000 developmentally disabled Arizonans, who, but for these caregivers, would be institutionalized, or worse. Yet, until recently, the State knowingly and unlawfully failed to pay Ms. Redgrave overtime.

¶ **32** The State's evasion of the FLSA means that the developmentally disabled, who depend on the State to provide them with life-sustaining care, are frequently deprived of it, with devastating results. Despite advanced age, exhaustion, and poverty, Ms. Redgrave still works, fearing her charge would receive inadequate care in an institution and likely perish. Other state employees choose differently. As a result, the State is the losing party to a decades-long lawsuit, alleging that the State violated the Federal Medicaid Act by failing to adequately pay caregivers, resulting in staffing shortages that leave the disabled without care. *Ball v. Betlach*, No. 4:00-cv-00067CKJ (D. Ariz. 2000). As Ms. Redgrave—who has had only two days off in several years—can attest, the problem is unresolved.

¶ 33 It should not be this way. Arizona's government exists "to protect and maintain individual rights," not trample them. Ariz. Const. art. 2, § 2. This Court has the power and responsibility to hold the State laible for its actions, and it should do so to prevent further litigation paid for by the tax dollars of the same employees the State seeks to swindle.

D. No legitimate policy reasons support allowing the State to violate binding federal law.

¶ 34 The State has not articulated a single policy reason to support its desire to violate binding federal law with impunity. None exist. This Court has already rejected the concern that liability would damage the State. *Ryan*, 656 P.2d at 598 ("We are told that not only will the public treasury suffer but government will come to a standstill because its agents will be afraid to act. We can't but recall the dire predictions attendant to the publication of the *Stone* decision. Arizona survived!"). Furthermore, Arizona has an insurance program to ensure its solvency, despite liability for administrative harm, *see* A.R.S. § 41-621, which it presumably already uses to pay for judgments against it stemming from Title VII.[10]

¶ 35 The State also argues that it "should not, without explicitly saying so, be considered to have acquiesced to waiving its sovereignty when it comes to its freedom from federal regulation where Congress does not have the inherent authority to so regulate." **AB 20-21.** In addition to being manifestly legally erroneous, the State's belief that it should be "free from federal regulation" because it is a sovereign has already been repudiated by this Court, which held that "the royal prerogative is unknown." *Stone*, 381 P.2d at 109. The State's sovereignty does not, by itself, confer upon the State the privilege of ignoring its citizens' rights, especially in Arizona, where government is "established to protect and maintain individual rights." Ariz. Const., art. 2, § 2.

CONCLUSION

Ms. Redgrave requests that this Court answer the certified question in the affirmative and hold the State liable for its FLSA violations.

10 Congress validly abrogated sovereign immunity to Title VII suits by enacting it pursuant to its authority under the 14th Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

NOTICE UNDER RULE 21(a)

Pursuant to Arizona Rules of Civil Appellate Procedure 4(a)(8) and 21(a), Ms. Redgrave hereby provides notice that she intends to claim attorneys' fees incurred on this matter. Ms. Redgrave's request is made pursuant to 29 U.S.C. § 216(b), which provides that the Court "shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Ms. Redgrave also seeks attorneys' fees under the private attorney general doctrine recognized in *Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 608-09, 775 P.2d 521 (1989) and its progeny. In *Arnold*, this Court defined the private attorney general doctrine as "an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance." Each of these criteria is met in this case.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing, PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF TO THE ARIZONA SUPREME COURT, with the Clerk of the Arizona Supreme Court and electronically delivered it to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation and formatting requirements of Arizona Appellate Rule of Civil Procedure 4. It contains 4,510 words, is written in proportionately spaced typeface, uses Microsoft Office Book Antiqua 14-point font in the text and footnotes, and is twenty pages or less in length, excluding the caption and tables.

Date: September 18, 2020

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APPENDIX

A.R.S. § 12-820.01

Current with legislation from the 54th Legislature, 2nd Regular Session (2020), through chapter 90.

LexisNexis® Arizona Annotated Revised Statutes > Title 12 Courts and Civil Proceedings (Chs. 1 — 26) > Chapter 7 Special Actions and Proceedings in Which the State is a Party (Arts. 1 — 13) > Article 2. Actions Against Public Entities or Public Employees (§§ 12-820 — 12-826)

12-820.01. Absolute immunity

A. A public entity shall not be liable for acts and omissions of its employees constituting either of the following:

1. The exercise of a judicial or legislative function.

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for any of the following:

(a) The purchase of equipment.

(b) The construction or maintenance of facilities.

(c) The hiring of personnel.

(d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

4. The establishment, implementation and enforcement of minimum safety standards for light rail transit systems.

History

Last legislative year: 2002.

Recent legislative history: Laws 2002, Ch. 205, § 1.

Annotations

Notes

Prior Law

Laws 1993, 1st Reg. Sess., Ch. 90, § 6; Laws 1993, 1st Reg. Sess., Ch. 255, § 3; Laws 1993, 1st Reg. Sess., Ch. 256, § 1.

KAITLYN ORTIZ

JUDICIAL DECISIONS

Constitutionality.

This section rationally furthers the state's legitimate interest to avoid severe hampering of a governmental function or thwarting of established public policy and does not deny equal protection. *Evenstad v. State, 178 Ariz. 578, 875 P.2d 811, 144 Ariz. Adv. Rep. 55, 1993 Ariz. App. LEXIS 152 (Ariz. Ct. App. 1993)*.

In General.

As a matter of law, the licensing and regulation of any profession or occupation, as well as the other policy roles listed under subsection B, are discretionary and are covered by absolute immunity. *Bird v. State, 170 Ariz. 20, 821 P.2d 287, 100 Ariz. Adv. Rep. 16, 1991 Ariz. App. LEXIS 310 (Ariz. Ct. App. 1991)*.

This section grants immunity depending upon the type of function at issue, rather than granting blanket immunity for all who work for the legislature, so that a court must decide if acts of a state officer contain a matter which is properly to be regarded as legislative in character and effect. If the officer's duties are policy-related, they are immune; otherwise, if his duties merely implement policy shaped by the legislature, his actions are not immune. *Pima County v. State, 174 Ariz. 402, 850 P.2d 115, 121 Ariz. Adv. Rep. 33, 1992 Ariz. App. LEXIS 247 (Ariz. Ct. App. 1992).*

There is no easy test for determining whether an administrative function is immune under this section. *Evenstad v. State, 178 Ariz. 578, 875 P.2d 811, 144 Ariz. Adv. Rep. 55, 1993 Ariz. App. LEXIS 152 (Ariz. Ct. App. 1993).*

Determining whether the city is entitled to immunity from suit regarding funding and roadway construction priorities is a question of law for the court. *Galati v. Lake Havasu City, 186 Ariz. 131, 920 P.2d 11, 209 Ariz. Adv. Rep. 47, 1996 Ariz. App. LEXIS 15 (Ariz. Ct. App. 1996).*

To warrant absolute immunity in the exercise of an administrative function, the first element which must be present in the decision-making process is the determination of a fundamental governmental policy. *Fidelity Sec. Life Ins. Co. v. Department of Ins., 191 Ariz. 222, 954 P.2d 580, 263 Ariz. Adv. Rep. 7, 1998 Ariz. LEXIS 13 (Ariz. 1998).*

As to liability of state for injury to motorist caused by wild animals on the highway, see *Booth v. State, 207 Ariz. 61, 83 P.3d 61, 425 Ariz. Adv. Rep. 19, 2004 Ariz. App. LEXIS 20 (Ct. App. 2004).*

Purpose.

The Actions Against Public Entities or Public Employees Act, codified at §§ *12-820 to 12-823*, codified various common law doctrines that conferred absolute and qualified immunity on various public entities and employees and permitted governmental entities and their employees to raise affirmative defenses in actions sounding in tort. City of *Tucson v. Fahringer, 164 Ariz. 599, 795 P.2d 819, 64 Ariz. Adv. Rep. 38, 1990 Ariz. LEXIS 199 (Ariz. 1990).*

Applicability.

State and the county were entitled to absolute judicial immunity against any claim by plaintiff of direct or vicarious liability for the probate court commissioner's orders appointing the guardian ad litem (GAL) and the attorney to represent plaintiff, who was a minor at the time, in a wrongful death action; and they could not be held vicariously liable for the misconduct of independently contracted attorneys. The state and the county's direct liability, if any, was limited to each entity's conduct in pre-qualifying or selecting the GAL and the attorney to serve as appointed counsel, to the extent plaintiff could show they were incompetent and unqualified, and should not have been on the appointment list provided to the commissioner. *Gibson v. Theut, 246 Ariz. 297, 438 P.3d 666, 2019 Ariz. App. LEXIS 232 (Ariz. Ct. App. 2019)*, review denied, ordered not published, *2020 Ariz. LEXIS 1 (Ariz. Jan. 7, 2020).*

—Article.

An action seeking judicial review of an administrative decision is an entirely different proceeding than that governed by article 2, of which this section is a part. *Cochise County v. Borowiec, 162 Ariz. 192, 781 P.2d 1379, 46 Ariz. Adv. Rep. 41, 1989 Ariz. App. LEXIS 281 (Ariz. Ct. App. 1989).*

Article 2 was intended to apply to actions against public entities or public employees in their truest sense, not to judicial review of administrative decisions that are treated in a separate article. *Cochise County v. Borowiec, 162 Ariz. 192, 781 P.2d 1379, 46 Ariz. Adv. Rep. 41, 1989 Ariz. App. LEXIS 281 (Ariz. Ct. App. 1989).*

—Nondecisions.

This section was not meant to immunize a public entity from nondecisions, such as where no decision was ever made to spend money on guardrails, but only from actual decisions and the affirmative exercise of discretion with respect to fundamental governmental policy. Given the active language "exercise of discretion" and "determination," "omission," as it relates to the rest of the statute, means that in making its discretionary decision the public entity chooses not to do something. *Goss v. City of Globe, 180 Ariz. 229, 883 P.2d 466, 175 Ariz. Adv. Rep. 31, 1994 Ariz. App. LEXIS 213 (Ariz. Ct. App. 1994)*.

Where city officials were advised of high levels of carbon monoxide at a city lake, and after discussion they elected to study the issue further but made no decision regarding whether to implement any measures such as limiting public access or erecting warning signs, city was not immune from liability after a member of public was overcome by carbon monoxide and drowned because this section afforded immunity to a public entity only for actual decisions made, and the decision to further study the issue was not a decision to take action or to refrain from doing so. *Tostado v. City of Lake Havasu, 220 Ariz. 195, 204 P.3d 1044, 538 Ariz. Adv. Rep. 5, 2008 Ariz. App. LEXIS 134 (Ariz. Ct. App. 2008)*.

—Section.

The language used in this section uniformly indicates that it was intended to apply only to actions against public entities and public employees for money damages. *Zeigler v. Kirschner, 162 Ariz. 77, 781 P.2d 54, 44 Ariz. Adv. Rep. 23, 1989 Ariz. App. LEXIS 266 (Ariz. Ct. App. 1989)*.

Neither this section nor § *12-820.02* immunizes a Department of Occupational Safety and Health inspector who negligently performs a workplace inspection, first, because § 23-424 overrides this section and § *12-820.02*, and second, because they apply to licensing and required inspections, not discretionary inspections. *de la Cruz v. State, 192 Ariz. 122, 961 P.2d 1070, 263 Ariz. Adv. Rep. 31, 1998 Ariz. App. LEXIS 29 (Ariz. Ct. App. 1998)*.

Gross negligence claims filed by the personal representative and parents of a jail inmate who was killed by other inmates were barred against a tower officer and off-duty shift supervisors, but allowed against a sheriff and an on-duty shift supervisor; this section applies to public entities, and not public employees such as the sheriff, while the on-duty shift supervisor admitted knowing that leaving inmates unattended poses a substantial risk of harm to them. *Wilson v. Maricopa County, 463 F. Supp. 2d 987, 2006 U.S. Dist. LEXIS 82342 (D. Ariz. 2006)*.

Administrative Functions.

The plain language of paragraph B3 indicates that the legislature intended that the licensing and regulation of any profession or occupation is by definition a determination of fundamental governmental policy that involves the exercise of discretion. The use of the word "shall" reveals that the legislature did not intend for courts to make factual determinations as to whether the listed functions are discretionary. *Bird v. State, 170 Ariz. 20, 821 P.2d 287, 100 Ariz. Adv. Rep. 16, 1991 Ariz. App. LEXIS 310 (Ariz. Ct. App. 1991)*.

Section 12-820.02 specifically exempts from its operation the issuance of licenses for which absolute immunity is provided by this section. The licensing and regulation of any profession or occupation falls within the grant of absolute immunity, not qualified immunity. *Bird v. State, 170 Ariz. 20, 821 P.2d 287, 100 Ariz. Adv. Rep. 16, 1991 Ariz. App. LEXIS 310 (Ariz. Ct. App. 1991)*.

Cause of Action.

Because neither the Arizona courts nor the legislature has ever recognized a right of action against public entities for conduct shielded by this section, the Arizona Constitution does not guarantee a cause of action for such conduct against those public entities. *Evenstad v. State, 178 Ariz. 578, 875 P.2d 811, 144 Ariz. Adv. Rep. 55, 1993 Ariz. App. LEXIS 152 (Ariz. Ct. App. 1993)*.

Fundamental Governmental Policy.

City was not liable for the alleged negligence of another community's fire department when it responded to the decedent's medical emergency in compliance with a multi-city automatic aid and dispatch agreement. The agreement was one of fundamental governmental policy and was entitled to absolute immunity. City was not responsible for the actions of the employees of the other community's fire department because they were not employees of the city. *Myers v. City of Tempe, 212 Ariz. 128, 128 P.3d 751, 472 Ariz. Adv. Rep. 4, 2006 Ariz. LEXIS 23 (Ariz. 2006).*

Where parents alleged that the absence of a traffic light at an intersection caused their son's death, city was absolutely immune from liability because the decision to use a computer program to prioritize intersections to install traffic signals, and the discretionary selection of the specific criteria, were fundamental policy decisions. *Kohl v. City of Phoenix, 215 Ariz. 291, 160 P.3d 170, 505 Ariz. Adv. Rep. 46, 2007 Ariz. LEXIS 63 (Ariz. 2007).*

Inspections.

State mining inspector and state were not immune from liability in the death of miner where required inspections were alleged to have been negligently performed. *Diaz v. Magma Copper Co., 190 Ariz. 544, 950 P.2d 1165, 243 Ariz. Adv. Rep. 33, 1997 Ariz. App. LEXIS 92 (Ariz. Ct. App. 1997).*

Licensing of Professions and Occupations.

The state's decision to require that teachers be certificated, as well as decisions related to such matters as establishing certification requirements, developing an application, and establishing procedures for processing applications and investigating applicants receive absolute immunity under this section because they involve the determination of fundamental governmental policy. *Doe v. State, 200 Ariz. 174, 24 P.3d 1269, 348 Ariz. Adv. Rep. 7, 2001 Ariz. LEXIS 77 (Ariz. 2001).*

Although the establishment of certification requirements and establishment of procedures for processing applications and investigating applicants receives absolute immunity under this section, the processing of a particular application in accordance with the procedures does not involve the determination of fundamental governmental policy and therefore enjoys only qualified immunity under § *12-820.02*. *Doe v. State, 200 Ariz. 174, 24 P.3d 1269, 348 Ariz. Adv. Rep. 7, 2001 Ariz. LEXIS 77 (Ariz. 2001).*

No Immunity.

No immunity exists for the kinds of auditing activities performed by the auditor general in making Arizona health care cost containment system assessments. *Pima County v. State, 174 Ariz. 402, 850 P.2d 115, 121 Ariz. Adv. Rep. 33, 1992 Ariz. App. LEXIS 247 (Ariz. Ct. App. 1992).*

Absence of a decision to fund a street improvement project is not an exercise of a legislative function entitled to immunity; even if the city had made an affirmative decision not to fund roadway improvements, the city would not be entitled to immunity for street design that was substandard because when a city decides to act, it must do so non-negligently. *Galati v. Lake Havasu City, 186 Ariz. 131, 920 P.2d 11, 209 Ariz. Adv. Rep. 47, 1996 Ariz. App. LEXIS 15 (Ariz. Ct. App. 1996).*

While city would be immune from a suit to force it to spend its resources on the reconstruction of a road, such immunity would not shield it from a claim for negligent design and maintenance. *Galati v. Lake Havasu City, 186 Ariz. 131, 920 P.2d 11, 209 Ariz. Adv. Rep. 47, 1996 Ariz. App. LEXIS 15 (Ariz. Ct. App. 1996).*

School district was not immune from tort liability for injuries suffered by a student who was injured in a fall from a school playground swing set. Statutory immunity did not protect the district because it did not have the discretion to breach its duty to refrain from subjecting district students to unreasonable risks of harm. *Schabel v. Deer Valley Unified Sch. Dist. No. 97, 186 Ariz. 161, 920 P.2d 41, 220 Ariz. Adv. Rep. 59, 1996 Ariz. App. LEXIS 143 (Ariz. Ct. App. 1996).*

While designation of school bus stops is an essential government function, this function does not involve the determination of fundamental governmental policy so as to qualify for absolute immunity in the state. Warrington ex rel. *Warrington v. Tempe Elem. Sch. Dist. No. 3, 187 Ariz. 249, 928 P.2d 673, 217 Ariz. Adv. Rep. 36, 1996 Ariz. App. LEXIS 110 (Ariz. Ct. App. 1996)*.

Complaint alleging negligence by the city in delivering water with excessive amounts of bacteria to plaintiff did not allege that the city's formulation of its water disinfection policy was the cause of the excessive bacteria and the district court's dismissal of the complaint based on its conclusion that the city was entitled to immunity from plaintiff's negligence claim was not appropriate. *AlliedSignal, Inc. v. City of Phoenix, 182 F.3d 692, 1999 U.S. App. LEXIS 14204 (9th Cir. Ariz. 1999)*.

Although legislature was immune from suit for state university appropriations, the state board of regents as a constitutional entity under Ariz. Const. art. 11, § 5 deriving its authority from the legislature under Ariz. Const. art. 11, § 1, was not immune as matter of law against students' action for declaratory or injunctive relief because the board's authority to set tuition was not unlimited. *Kromko v. Ariz. Bd. of Regents, 213 Ariz. 607, 146 P.3d 1016, 491 Ariz. Adv. Rep. 8, 2006 Ariz. App. LEXIS 143 (Ariz. Ct. App. 2006)*.

Flood control district's design and implementation of its flood control projects involved the exercise of some discretion but did not rise to the level of establishing fundamental governmental policy or flow automatically from a policymaking decision and thus involve no discretion. The flood control district was not entitled to absolute immunity. *A Tumbling-T Ranches v. Flood Control Dist., 222 Ariz. 515, 217 P.3d 1220, 566 Ariz. Adv. Rep. 3, 2009 Ariz. App. LEXIS 734 (Ariz. Ct. App. 2009)*.

By directing the manner in which a daycare was to remedy its violation of infant-care regulations, a state inspector on behalf of the Arizona Department of Health Services created a special relationship with the infants at the day care, including the plaintiff's son, who died at the daycare center. Accordingly, this statute did not grant the State and the Department absolute immunity from the plaintiff's first and second claims for relief, which alleged gross negligence and liability under respondeat superior. *Bottomlee v. State, 459 P.3d 493, 2020 Ariz. App. LEXIS 103 (Ariz. Ct. App. 2020)*.

Operational Decisions.

County did not have immunity under this section on a contract claim arising from its termination of a sludge processing agreement because its acts were operational decisions. *County of La Paz v. Yakima Compost Co., 224 Ariz. 590, 233 P.3d 1169, 585 Ariz. Adv. Rep. 13, 2010 Ariz. App. LEXIS 105 (Ariz. Ct. App. 2010)*.

Question of Law or Fact.

The issue of whether county had absolute immunity against action for failure to take adequate interim measures with regard to dangerous intersection is a question of law for the trial court to decide, not a question of fact for the jury. *Link v. Pima County, 193 Ariz. 336, 972 P.2d 669, 272 Ariz. Adv. Rep. 22, 1998 Ariz. App. LEXIS 111 (Ariz. Ct. App. 1998)*.

Regulation of Insurance.

The decision to grant or renew a certificate of authority to an insurance company seeking to carry out or continue doing business in Arizona does not constitute the licensing or regulation of a "profession" or "occupation" under subsection B. *Fidelity Sec. Life Ins. Co. v. Department of Ins., 191 Ariz. 222, 954 P.2d 580, 263 Ariz. Adv. Rep. 7, 1998 Ariz. LEXIS 13 (Ariz. 1998)*.

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KAITLYN ORTIZ

§ 12-820.02. Qualified immunity

A. Unless a public employee acting within the scope of his employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for:

1. The failure to make an arrest or the failure to retain an arrested person in custody.

2. An injury caused by an escaping or escaped prisoner or a youth committed to the department of youth treatment and rehabilitation.

3. An injury resulting from the probation, parole, furlough, conditional liberty, release from confinement or discharge of a prisoner or a youth committed to the department of youth treatment and rehabilitation or from the terms and conditions of ~~their~~ the prisoner's or youth's probation, parole, furlough, conditional liberty or release from confinement or from the revocation of ~~their~~ the prisoner's or youth's probation, parole, furlough, conditional liberty or release from confinement.

4. An injury caused by a prisoner to any other prisoner or an injury caused by a youth committed to the department of youth treatment and rehabilitation to any other committed youth.

5. The issuance of or failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization for which absolute immunity is not provided pursuant to section 12-820.01.

6. The failure to discover violations of any provision of law requiring inspections of property other than property owned by the public entity in question.

7. An injury to the driver of a motor vehicle that is attributable to the violation by the driver of section 28-692 or 28-693.

B. When the acts or omissions that are alleged to create liability for injury or damage occur after a highway, road, street, right-of-way or bridge has been accepted as complete by a governmental entity and acts or omissions that are alleged to create liability for injury or damage arise out of the maintenance or operation of the highway, road, street, right-of-way or bridge, the governmental entity or public employee acting within the scope of his employment may not be held liable for such damage or injury unless the damage or injury was intended or caused by gross negligence. When damage or injury arises out of the operation or use of a motor vehicle or other motorized device by the employee of a governmental entity performing maintenance on the highway, road, street, right-of-way or bridge either before or after it is accepted as complete by the governmental entity, liability may be demonstrated by proving ordinary negligence.

Sec. 7. **Repeal**

Sections 12-820.03 and 12-821, Arizona Revised Statutes, are repealed.

Sec. 8. Title 12, chapter 7, article 2, Arizona Revised Statutes, is amended by adding a new section 12-821, to read:

§ 12-821. General limitation

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.

Sec. 9. Section 12-822, Arizona Revised Statutes, is amended to read:

§ 12-822. Change of venue

A. Service of summons in an action ~~authorized in section 12-821~~ against any public entity or public employee involving acts that are alleged to have occurred

Section 1. Title 41, chapter 7, Arizona Revised Statutes, is amended by adding article 18, to read:

ARTICLE 18. JOINT LEGISLATIVE COMMITTEE ON FEDERAL MANDATES

§ 41-1292. Joint legislative committee on federal mandates; members; powers and duties

A. A joint legislative committee on federal mandates is established consisting of the president of the senate, four members of the senate appointed by the president of the senate, the speaker of the house of representatives and four members of the house of representatives appointed by the speaker of the house of representatives. No more than three members of the senate or house of representatives, including the president and speaker, shall be from the same political party. Members shall serve two year terms ending on the convening of the regular session of the legislature each odd numbered year.

B. The committee shall meet on the call of the president of the senate or the speaker of the house of representatives, and a majority of the members constitutes a quorum for the transaction of business.

C. The committee shall:

1. Review each year the activities of congress and the federal government including court rulings with regard to any laws, regulations or other actions that may require this state to comply with any federal mandate.

2. Take any action necessary to protect this state's constitutional rights and sovereignty against federal mandates.

3. Arrange for and conduct an annual joint session of the legislature or a meeting of the committee and request the attendance of all members of the Arizona congressional delegation to discuss issues relating to federal mandates and the appropriate use of federal power to influence state policy.

D. The committee may utilize legislative staff for research and other services required by the committee.

Approved by the Governor April 18, 1994.

Filed in the Office of the Secretary of State April 19, 1994.

ACTIONS AGAINST PUBLIC ENTITIES OR PUBLIC EMPLOYEES--LIMITATIONS--AUTHORIZATION

CHAPTER 162

S.B. 1254

AN ACT AMENDING SECTION 12-821, ARIZONA REVISED STATUTES; AMENDING TITLE 12, CHAPTER 7, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 12-821.01; RELATING TO ACTIONS AGAINST PUBLIC ENTITIES OR PUBLIC EMPLOYEES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 12-821, Arizona Revised Statutes, is amended to read:

§ 12-821. General limitation; public employee

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.

Sec. 2. Title 12, chapter 7, article 2, Arizona Revised Statutes, is amended by adding section 12-821.01, to read:

§ 12-821.01. Authorization of claim against public entity or public employee; definition

A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.

C. Notwithstanding subsection A, any claim which must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim.

D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases.

E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

F. This section shall apply to all causes of action which accrue on or after the effective date of this act.

Approved by the Governor April 18, 1994.

Filed in the Office of the Secretary of State April 19, 1994.