DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KEVIN C. GREIF and MARY A. MOREL, husband and wife, Plaintiffs/Appellants, v. PRESCOTT CITY ATTORNEY, GARY D. KIDD; CITY OF PRESCOTT FLOOD PLAIN BOARD, LORA LOPAS, STEVE BLAIR, TAMMY LINN, JIM LAMERSON, MARY ANN SUTTLES, JOHN HANNA; PRESCOTT FLOODPLAIN ADMINISTRATOR, RICHARD MASTIN; PRESCOTT DRAINAGE ENGINEER, GREGORY TOTH, Defendants/Appellees.	1 CA-CV 11-0767 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. CV P1300CV201100093

The Honorable Kenton D. Jones, Judge

AFFIRMED

Kevin C. Greif and Mary A. Morel, *In Propria Persona* Prescott

Potts & Associates Phoenix
By Walter Grochowski
Attorneys for Defendants/Appellees

N O R R I S, Judge

¶1 Plaintiffs/appellants Kevin Greif and Mary Morel timely appeal summary judgment in favor of defendants/appellees the Prescott City Attorney Gary Kidd, the City Floodplain Administrator Richard Mastin, the City Drainage Engineer Gregory Toth, members of the City Floodplain Board Lora Lopas, Steve Blair, Tammy Linn, Jim Lamerson, Mary Ann Suttle, and John Hanna (collectively, "individual defendants"), and the City of Prescott Floodplain Board ("Board"). Plaintiffs argue the superior court should not have dismissed their claims against the individual defendants and Board for failure to serve them with any notice of claim as required by Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003). They also assert the court should not have dismissed their claims against the Board because it was a "jural" entity capable of being sued. We disagree with both arguments and their subsidiary arguments and therefore affirm the superior court's judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1982, the City of Prescott installed bollards and cables that acted as a barrier in a "low water crossing" of Granite Creek, near plaintiffs' property. According to plaintiffs' complaint, high water flows in January 2010 clogged the bollard/cable barrier with debris, which in turn diverted the water flow in the creek and damaged their property.

Plaintiffs sued the City, the individual defendants, and the Board, alleging they had failed to enforce floodplain regulations and negligently installed the barrier, and asserted two claims for relief. In their first claim for "equitable/injunctive relief," plaintiffs asked the court to order the City to remove the barrier and award them damages ("damage claim"). In their second claim, they alleged the "wrongful installation" of the barrier "constitute[d] a taking as defined by law for which [they were] entitled to compensation" ("takings claim").

¶3 While the City answered the complaint, the individual defendants and Board asked the superior court to dismiss them from the lawsuit because, among other things, plaintiffs had not served the individual defendants with any notice of claim as required by A.R.S. § 12-821.01 and Board was a non-jural governmental entity incapable of being sued. Because the parties "presented within their relevant pleadings matters outside the pleading," the court treated the motion to dismiss as one for summary judgment. Ariz. R. Civ. P. 12(b).

¶4 After briefing and oral argument, the court granted the individual defendants and Board summary judgment on plaintiffs' damage claim because plaintiffs only served the City with a notice of claim and, under *Simon v. Maricopa Med. Ctr.*,

225 Ariz. 55, 234 P.3d 623 (App. 2010), service on the City did not "constitute service on an agent of Defendants other than the City." The court granted the individual defendants summary judgment on their takings claim because it believed such a claim could only be asserted against the government as the sovereign. The court also found the Board was a "non-jural entity" and, thus, could not be sued.

¶5 Plaintiffs moved for reconsideration. After briefing and oral argument, the court denied the motion.

DISCUSSION

¶6 We review the superior court's factual and legal determinations on a grant of summary judgment de novo, viewing the evidence and reasonable factual inferences in a light most favorable to plaintiffs as the non-moving parties. *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, ¶ 8, 129 P.3d 71, 73 (App. 2006) (citing *Aranki v. RKP Inv., Inc.*, 194 Ariz. 206, 208, ¶ 6, 979 P.2d 534, 536 (App. 1999)).

I. Damage Claim against the Individual Defendants

A. Necessity of a Notice of Claim

¶7 A.R.S. § 12-821.01(A) provides:

> 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. . . . 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.

Plaintiffs first argue they were not required to comply with this statute vis-à-vis the individual defendants because "their original complaint . . . request[ed] punitive damages for gross negligence and reckless misconduct and deprivation of their rights," and thus requested relief under 42 U.S.C. § 1983 (1996) ("§ 1983"). *See Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (notice-of-claim statute inapplicable to § 1983 actions). Because plaintiffs mischaracterize the claims they actually pleaded in superior court, which did not tie their damage claim to § 1983, we disagree.

¶8 As an initial matter, we note the complaint, which essentially threw in the kitchen sink of legal theories, made it extremely difficult for the superior court (and now this court) to determine what claims plaintiffs actually filed against the individual defendants. To plead a § 1983 claim, however, a plaintiff need only allege facts "which show a deprivation of a right, privilege or immunity secured by the Constitution or federal law . . . . [and i]t is not necessary to state the statutory or constitutional basis for a claim as long as the underlying facts are present." *Mulleneaux v. State*, 190 Ariz.

535, 539, 950 P.2d 1156, 1160 (App. 1997) (quotations and citations omitted). Applying this principle here, we acknowledge plaintiffs' complaint contained some miscellaneous statements that could have been construed as suggesting a § 1983 claim. Such a construction, however, would be inconsistent with plaintiffs' own clarification and characterization of their damage claim.

¶9 First, although plaintiffs quoted § 1983 in their written response to the motion to dismiss and generally accused the individual defendants of failing to administer federal, state, and city floodplain regulations, they never tied their damage claim to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Indeed, their response alleged their "injury/damages [fell] within the range of defendant's [sic] duty and within the range of unreasonable risks that Defendants generated by their breach. The Defendants were negligent in the performance of their common law duty."

¶10 Second, slightly shifting gears during oral argument on the motion to dismiss, plaintiffs argued they had made a § 1983 claim, but tied it only to their takings claim: "[Plaintiffs] did state a claim upon which relief can be granted. The defendant's [sic] failure to act deprived

plaintiffs of rights secured under the federal constitution violating Federal Statute 42 USC, Section 1983. The takings clause states: Nor shall private property be taken for public use without just compensation."[1]

¶11 Third, during oral argument on their motion for reconsideration, the superior court sought further clarification by asking plaintiffs directly whether they had pleaded a § 1983 claim. In response, plaintiffs specifically identified paragraphs 44 and 45 of their complaint as comprising their § 1983 claim. These paragraphs referred only to common law principles of liability:

> 44) Plaintiff further requests punitive damages for gross negligence and reckless misconduct by the City and other named Defendants in the administration and enforcement of common law, the Prescott Floodplain Regulations and the malicious breach of the implied covenant of Good Faith and Fair Dealing. The intentional failure to comply with the City Floodplain Regulations is reckless, significantly increasing injury and drowning hazards in drainages throughout the City of Prescott. The willful and wanton disregard for human life and other people's rights by the Defendants is the antithesis of legitimate government function.

[1]Although plaintiffs, at this point, asserted their takings claim under § 1983, the superior court nevertheless properly dismissed that claim as against the individual defendants and Board on other grounds, *see supra* ¶¶ 17-21.

> 45) Defendants should be required to respond to the Plaintiffs in punitive damages in an amount which the Court and jury may deem appropriate to make an example of, and punish, the gross and reckless misconduct of these Defendants in accordance with the law and evidence.

¶12 Accordingly, given plaintiffs' own characterizations of their § 1983 claim, we disagree their damage claim constituted a cognizable § 1983 claim against the individual defendants. *See generally Morgan v. City of Phoenix*, 162 Ariz. 581, 587, 785 P.2d 101, 107 (App. 1989) ("[A]cknowledgement that plaintiffs' claim sounds essentially in negligence is fatal to their ability to advance it under § 1983."). Thus, plaintiffs were required to serve the individual defendants with notice of their damage claim under A.R.S. § 12-821.01.

B. Compliance with A.R.S. § 12-821.01

¶13 Plaintiffs next argue even if they were required to comply with A.R.S. § 12-821.01, they effectively did so. Specifically, they argue "[t]here is no statutory requirement that both the public entity and the public employee be notified," and because they served the City with two notices of claim, they were not required to also serve the individual defendants. We disagree; as this court has previously held, A.R.S. § 12-821.01 requires strict compliance and service on

each defendant personally. *Simon*, 225 Ariz. at 61, ¶ 20, 62, ¶ 23, 234 P.3d at 629, 630 (citations omitted).

¶14 Plaintiffs also argue they complied with A.R.S. § 12-821.01 because they gave the individual defendants "actual notice" of their claims through "two twenty minute [PowerPoint] presentations that discussed the flood damages." Again, we disagree; "[a]ctual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12–821.01(A)." *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, ¶ 10, 144 P.3d 1254, 1256 (2006) (citation omitted).[2]

¶15 Citing a memorandum decision, *Sandpiper Resorts Development Corp. v. La Paz County*, 1 CA-CV 08-0637, 2011 WL 2737811, at *7-8, ¶¶ 32-34 (Ariz. App. July 14, 2011) (mem. decision) (county did not waive deficiencies in service of process by merely processing claim; for waiver to apply, county must have considered or denied claim without raising defect in service), plaintiffs further argue the individual defendants

[2]Plaintiffs also ask this court to hold A.R.S. § 12-821.01 unconstitutional, asserting it is vague. As we have in previous decisions, *Simon*, 225 Ariz. at 62, ¶ 27, 234 P.3d at 630; *Stulce v. Salt River Project Agr. Imp. & Power Dist.*, 197 Ariz. 87, 92-93, ¶¶ 19-20, 3 P.3d 1007, 1012-13 (App. 1999), we reject this argument. Plaintiffs also argue the statute violates the anti-abrogation and separation of powers provisions of the Arizona Constitution. They did not raise these arguments in the superior court and have waived them on appeal. *Simon*, 225 Ariz. at 62, ¶ 26, 234 P.3d at 630 (citation omitted).

"waived compliance with A.R.S. § 12-821.01(A) by their actions prior to litigation" because the City not only "accepted [plaintiffs'] revised [notice of] claim and forwarded it" to its insurance carrier, but also attempted to negotiate a settlement with plaintiffs that would have released the City and the individual defendants from liability.[3] First, plaintiffs are not entitled to rely on *Sandpiper*, as it is a memorandum decision. *See* ARCAP 28(c). Second, we do not express an opinion as to the validity of this waiver argument because plaintiffs did not raise this argument in the superior court and thus have waived it.[4] *Simon*, 225 Ariz. at 62, ¶ 26, 234 P.3d at 630 (citation omitted).

¶16 In sum, plaintiffs were required to serve the individual defendants with notice of their damage claim pursuant

[3]Plaintiffs also argue the City's insurance policy "establish[ed] an express agency relationship between the City . . . and its employees" and, "[g]iven this express agency relationship, [their] notice to the [City] . . . gave all parties sufficient opportunity to investigate the claim," satisfying A.R.S. § 12-821.01. Plaintiffs did not raise this argument in the superior court and have waived it.

[4]While plaintiffs' motion for reconsideration included a block quote from *Young v. City of Scottsdale*, 193 Ariz. 110, 114, ¶ 15, 970 P.2d 942, 946 (App. 1998) (city waived service of process deficiencies by forwarding the claim to insurance adjuster who denied it in writing as untimely), *rev'd on other grounds*, *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), they did not argue the individual defendants had waived compliance with A.R.S. § 12-821.01 for these reasons.

to A.R.S. § 12-821.01 and did not do so. Thus, the superior court properly dismissed that claim against them.

II. Takings Claim against the Individual Defendants

¶17 As discussed, *see supra* ¶¶ 9-10, plaintiffs brought their takings claim, at least in part, under § 1983, and pleaded facts that presented a takings claim. *See generally Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753, 756, *amended by* 42 F.3d 1306 (9th Cir. 1994) (citation omitted) ("[Section] 1983 claims, of course, include § 1983 claims based on takings."). Thus, plaintiffs were not required to serve the individual defendants with notice of this claim. *Felder*, 487 U.S. at 153, 108 S. Ct. at 2314; *accord Mulleneaux*, 190 Ariz. 535, 950 P.2d 1156. The superior court's dismissal of plaintiffs' takings claim as against the individual defendants was nevertheless proper because that claim was redundant.

¶18 A § 1983 claim against an individual defendant in his or her official capacity is considered redundant when, as here,

the plaintiff has also sued the government entity.[5] Here, all the allegations in plaintiffs' complaint focused on the individual defendants' action or inaction "acting within the course and scope of their agency [] employment." Further, in their response to the motion to dismiss, plaintiffs specifically argued the individual defendants "[i]n their official capacity" had failed to enforce various floodplain regulations. Thus, "examin[ing] the pleadings and the course of proceedings" as a whole, *Carroll v. Robinson*, 178 Ariz. 453, 459, 874 P.2d 1010, 1016 (App. 1994) (citation omitted), we construe plaintiffs' takings claim to be against the individual defendants in their official capacities.

¶19 The superior court dismissed plaintiffs' § 1983 takings claim against the individual defendants because it believed such a claim could only be asserted against the government as the sovereign. But such a claim can be asserted

[5]Although plaintiffs may bring a § 1983 claim against municipalities and local government, including "local government officials sued in their official capacities," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 690 n.55, 98 S. Ct. 2018, 2035, 2035 n.55, 56 L. Ed. 2d 611 (1978), "[t]here is no longer a need to bring official-capacity actions against local government officials, [because] . . . local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed. 2d 114 (1985) (citations omitted).

against elected officials acting in their official capacity.[6] Nevertheless, the court correctly dismissed plaintiffs' § 1983 takings claim here because under well-established case law, "[i]f a plaintiff brings [a § 1983] suit against a government entity, any claim against an officer of that entity in his or her official capacity is redundant and should be dismissed," as "[o]fficial capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Stevens v. Hous. Auth. of S. Bend*, 720 F. Supp. 2d 1013, 1022 (N.D. Ind. 2010) (quotation and citations omitted). *Accord, e.g.*, *Carmody v. Vill. of Rockville Ctr.*, 661 F. Supp. 2d 299, 329-30 (E.D.N.Y. 2009); *Jones v. Quintana*, 658 F. Supp. 2d 183, 195 (D.D.C. 2009); *Harrison v. Chalmers*, 551 F. Supp. 2d 432, 438 (M.D.N.C. 2008); *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 568 (E.D. Pa. 2008); *Gray v. City of Eufaula*, 31 F. Supp. 2d 957, 965 (M.D. Ala. 1998); *McCaslin v. Wilkins*, 17 F. Supp. 2d 840, 844 (W.D. Ark. 1998); *Doe v. Douglas Cnty. Sch. Dist. RE-1*, 775 F. Supp. 1414, 1416 (D. Colo. 1991).[7]

[6]*See supra* note 5.

[7]We acknowledge a few other cases reach the opposite conclusion. See, for example, *Kennedy v. Hardiman*, 684 F. Supp. 540, 542 (N.D. Ill. 1988) (citation omitted):

Accordingly, plaintiffs' takings claim against the individual defendants was redundant and the superior court properly dismissed it.

III. Dismissal of Both Claims against the Board

¶20 The superior court determined the Board was a subordinate non-jural entity incapable of being sued. We agree. A subordinate entity, such as the Board, is "non-jural" when neither the "constitution nor the statutes provide that [it] is an autonomous body with the right to sue and to be sued." *Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972); *see generally Braillard v. Maricopa County*, 224 Ariz. 481, 487, ¶ 12, 232 P.3d 1263, 1269 (App. 2010) (citation omitted) ("Governmental entities have no inherent power and possess only those powers and duties delegated to them by their enabling statutes."); 56 Am. Jur. 2d Municipal Corporations,

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> [T]his court can see no reason for dismissing either of the official-capacity claims. By naming an individual in his official capacity, rather than merely naming the municipality itself, a plaintiff focuses the attention of the parties, the court, and perhaps later the jury, on the particular official whom he seeks to hold responsible for implementing an allegedly unlawful municipal policy.

We do not find these cases persuasive, and agree with the reasoning in the majority of cases on this issue: keeping both the entity and the official in the suit is "redundant and an inefficient use of judicial resources." *Carmody*, 661 F. Supp. 2d at 329 (quotation and citations omitted).

Etc. § 736 (2012) ("Generally, the departments and subordinate entities of municipalities, counties, and towns that are not separate legal entities or bodies do not have the capacity to sue or be sued."). We have found no authority granting the Board the power to sue or be sued.

¶21 Although plaintiffs argue A.R.S. §§ 48-3609, -3610 (2003 & Supp. 2011) gave the Board the power to "sue and be sued," these statutes merely permit the City to adopt and enforce floodplain regulations and do not grant the Board any power to "sue and be sued." *Cf.* A.R.S. § 11-201(A)(1) (2012) ("The powers of a county shall be exercised only by the board of supervisors . . . [which] has the power to . . . [s]ue and be sued."). Thus, because "a governmental entity may be sued only if the legislature has so provided," and plaintiffs have not demonstrated any statute conferred "such power" on the Board, the court properly dismissed plaintiffs' claims against it. *Braillard*, 224 Ariz. at 487, ¶ 12, 232 P.3d at 1269 (citation omitted); *see also Stump v. Gates*, 777 F. Supp. 808, 816 (D. Colo. 1991) ("[N]aming a municipal department as a defendant is not an appropriate means of pleading a § 1983 action against a municipality. Nor can municipal departments, enjoying no status independent of the municipality itself, be held separately liable for § 1983 damages, any more than could a municipal

official sued in an official capacity.") (footnote and citations omitted).

IV. Plaintiffs' Motion to Compel

¶22 Plaintiffs also seem to argue the superior court improperly denied their motion to compel disclosure and that compelling disclosure of certain documents "would have lead [sic] to a different outcome in the Motion to Dismiss." Specifically, they argue the superior court should have compelled all defendants to disclose "the Risk Management file on this claim, the work order for the partial removal of the barrier, the names of the people that removed the barrier and FEMA biennial reports." The parties did not fully brief this disclosure issue until 22 days after the court's summary judgment dismissal in favor of the individual defendants and Board. Later, the court simultaneously denied plaintiffs' motion for reconsideration and motion to compel disclosure. Because the court affirmed its dismissal of the individual defendants and Board from the lawsuit at that time, there was no basis to compel them to disclose any further materials. Moreover, plaintiffs have not stated any reason the documents

they requested would have changed the decisions discussed above.[8] Thus, the superior court did not abuse its discretion in denying plaintiffs' motion to compel disclosure. *Solimeno v. Yonan*, 224 Ariz. 74, 77, ¶ 9, 227 P.3d 481, 484 (App. 2010) (superior court's decisions regarding alleged disclosure violations "will not be disturbed on appeal absent an abuse of discretion").

V. Attorneys' Fees

¶23 Finally, plaintiffs ask this court to award them attorneys' fees and costs on appeal, but have not set forth any statutory or contractual provision entitling them to such an award. At any rate, they have not succeeded on appeal, and we deny their request. We award the individual defendants and Board their costs on appeal subject to their compliance with Arizona Rule of Civil Appellate Procedure 21(c).

[8]We note the superior court directed the City to ensure it had provided "all information for which disclosure [was] required pursuant to [Arizona Rule of Civil Procedure 26.1]" and left open the opportunity for plaintiffs to request further disclosure.

CONCLUSION

¶24 For the foregoing reasons, we affirm summary judgment in favor of the individual defendants and Board.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge