DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL HAIZLIP and ANGELA HAIZLIP, husband and wife, Plaintiffs/Appellants, v. CITY OF SCOTTSDALE, a municipal corporation; ALAN RODBELL, Chief of Police, City of Scottsdale; SEAN DUGGAN, Deputy Chief of Uniformed Services Bureau, City of Scottsdale; AARON MINOR, Badge No. 686, Sergeant District One, City of Scottsdale; ROBERT BONNETTE, Badge No. 690, Sergeant District Three, City of Scottsdale; BERNADETTE LAMAZZA, Human Resource Manager, City of Scottsdale; and SCOTT POPP, Badge No. 478, Commander, City of Scottsdale, Defendants/Appellees.	1 CA-CV 09-0163 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-016623

The Honorable Robert H. Oberbillig, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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W I N T H R O P, Judge

¶1 Paul and Angela Haizlip ("Plaintiffs") appeal the trial court's judgment on the pleadings in favor of the City of Scottsdale ("the City") and several City employees (collectively, "Defendants"). For the following reasons, we affirm in part, vacate in part based on the narrow issue raised in Plaintiffs' opening brief, and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Plaintiffs were probationary police officers for the City. Their probationary job status was ultimately rejected and terminated – Paul Haizlip's on June 29, 2007, and Angela Haizlip's on October 12, 2007. On April 9, 2008, Angela Haizlip filed a notice of claim pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003),[1] which was addressed to the

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[1] Before suing a public entity or a public employee for damages, a plaintiff must file a notice of claim "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

City and the City Attorney, and sought compensation for, *inter alia*, alleged gender discrimination, a hostile working environment, and retaliation that allegedly led to her wrongful termination. The notice of claim made the following demand:

> Based upon the above, and in order to avoid litigation, it is [sic] the discrimination claims, including claims for lost income, can be settled for $550,000 economic loss, emotional distress for $250,000 and attorneys' fees for $150,000, all totaling $950,000. This offer is unconditional and constitutes an offer to resolve these claims for a sum certain.

The notice of claim was not addressed to or served on any City employees named as defendants in Plaintiffs' subsequent lawsuit[2] and did not mention or set forth any claims by Paul Haizlip. Paul Haizlip also did not file a separate notice of claim before Plaintiffs filed their lawsuit.[3]

¶3 On July 14, 2008, Plaintiffs filed a complaint against Defendants, seeking compensation, attorneys' fees, and costs

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barred and no action may be maintained thereon." A.R.S. § 12-821.01(A).

[2] If a claimant asserts claims against a public entity and a public employee, the claimant must provide notice to both the public entity and the public employee. *See Johnson v. Superior Court (Ahanonu)*, 158 Ariz. 507, 509, 763 P.2d 1382, 1384 (App. 1988).

[3] *See Andress v. City of Chandler*, 198 Ariz. 112, 115, ¶ 14, 7 P.3d 121, 124 (App. 2000) (concluding that interpreting A.R.S. § 12-821.01 to allow the filing of a lawsuit before filing a notice of claim "would clearly defeat the pre-litigation notification and settlement purposes of the notice of claim statute" (citation omitted)).

based on the following counts: Count I, sex discrimination, including a hostile work environment and retaliation; Count II, wrongful discharge for status as a whistleblower; Count III, violation of due process under the Arizona Constitution; Count IV, violation of Arizona's public records laws; Count V, intentional infliction of emotional distress; Count VI, negligence, including negligence per se and negligent supervision and hiring; and Count VII, interference with Plaintiffs' employment relationship. Plaintiffs later filed a First Amended Complaint, adding Count VIII, breach of the covenant of good faith and fair dealing.

¶4 On September 8, 2008, Defendants filed a motion for judgment on the pleadings pursuant to Rule 12(c), Ariz. R. Civ. P.,[4] seeking to dismiss the complaint for several alleged instances of non-compliance with the notice of claim statute,

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[4] Rule 12(c) provides as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

including a failure to provide facts sufficient to determine liability and damages.[5] Specifically, Defendants argued:

> Plaintiff Paul Haizlip failed to file a Notice of Claim, thereby barring his claims against Defendants. Plaintiff Angela Haizlip's Notice of Claim was not served on them or addressed to the individually-named Defendants. Furthermore, Plaintiff Angela Haizlip's Notice of Claim is deficient regarding several of Angela Haizlip's claims, as it lacks the requisite factual foundation to comply with Ariz. Rev. Stat. § 12-821.01 and fails to provide any basis or evidentiary support for the amount demanded. Plaintiffs also failed to comply with the procedural requirements of Ariz. Rev. Stat. § 39-121.02 regarding their public records claim. Finally, Plaintiffs' wrongful discharge claim is barred by the exclusive remedies set forth in the Arizona Civil Rights Act.

¶5 On October 14, 2008, Plaintiffs filed a response opposing Defendants' motion, arguing that, to the extent necessary, they had fully complied with the notice of claim statute, and moving to amend the complaint, if necessary. At the same time, they filed a more detailed amended notice of claim on behalf of both of them that listed and was apparently filed with the employee Defendants previously left out of the

[5] Subsection (A) of A.R.S. § 12-821.01 provides in pertinent part: "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." A claim that does not comply with A.R.S. § 12-821.01(A) is statutorily barred. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295, ¶ 6, 152 P.3d 490, 492 (2007).

April 2008 notice of claim.[6] On November 3, 2008, Defendants filed their reply supporting their motion for judgment on the pleadings.

¶6 On December 1, 2008, the trial court held argument on Defendants' motion for judgment on the pleadings. The court initially noted that the April 2008 notice of claim had not been attached to Plaintiffs' original complaint or First Amended Complaint, or to Defendants' answer, and questioned whether, by considering that notice of claim, the court was considering matters outside the pleadings. Defense counsel replied, "Your Honor, we don't believe so and that's why we actually styled it as a motion for a judgment on the pleadings." The court stated that it had read and was considering that document, "so technically I'm going outside the pleadings to evaluate this issue," and would be considering the motion under Rule 56, Ariz. R. Civ. P. When the court asked if there was "any objection to the proceeding today," Plaintiffs' counsel replied, "[I]f I had considered this a Rule 56 [proceeding] I probably would have attached affidavits of my clients relative to the issue regarding the second notice of claim, which could have been done." After a brief discussion, the court clarified, "Well,

[6] The amended notice of claim was filed approximately one year after Angela Haizlip's job status was terminated and more than fifteen months after Paul Haizlip's job status was terminated.

let me ask it a different way. If I just considered it a motion for judgment on the pleadings, are you objecting because I have read the first notice of claim letter and I'm going to have to refer to it and rely on it in addressing the merits of the motion?" Plaintiffs' counsel replied, "No." The court stated it would not at that time read or consider the second notice of claim.

¶7 During argument, Defendants ultimately conceded and the trial court found that the April 2008 notice of claim alleged facts sufficient to permit the City to evaluate liability as to Count I. Nonetheless, the court expressed concern about the lack of "back up" or specificity supporting Plaintiffs' claims for economic losses and other damages.

¶8 Counsel for Plaintiffs also argued that the second notice of claim might still be timely because the 180-day period for filing "runs from accrual" and had arguably been tolled by discovery issues. Defense counsel "concede[d] that the statute itself has a discovery rule written within it" but argued that issue should not be considered when deciding the motion for judgment on the pleadings. The court clarified, "[W]hat you would ask me to do is . . . find judgment in your favor on the notice of claim issue, and then let them try to re-file their action based on some subsequent notice of claim letter, and argue in their complaint that there has been tolling of certain

provisions[?]" Defense counsel replied affirmatively, stating, "If they believe they have a new cause of action which accrued, they can then re-file. But on the existing state on the accrual from the original date of termination, and no notice of claim having been filed, that time is long gone." The court noted that Plaintiffs had not "asked for Rule 56(f) relief saying they want to go outside the pleadings in order to present the issues to the Court," and then indicated the first notice of claim was not "adequate for these particular pleadings." After further discussion, counsel for Plaintiffs requested "leave under Rule 56(f) to have some discovery on that because . . . I don't think it makes sense to go back and re-file." The court implicitly denied the motion, stating that "the notice of claims statute works a little differently. And . . . you now have one on file that you wrote in October that looks a whole lot different than the one that you wrote a year or so ago." Plaintiffs' counsel countered, "Only because the documents were unavailable."

¶9 The court then replied and granted Defendants' motion from the bench, ruling as follows:

> Well, maybe. That's what will have to be sorted out. I have to rule on this in the context of the way it's been framed for me. And, so, I'm going to go ahead and do that unless there is anything else anybody wants to say in the nature of oral argument. I think I have to call it the way I'm going to see it today. Okay?

The way I see it today is, I'm treating this as a motion for judgment on the pleadings. The only matter outside of the complaint by agreement of the parties that I've considered is the actual notice of claim that went out in reference to the original complaint and the first amended complaint, and that was sent out on April 9, 2008. The notice of claim itself is sufficient as to liability as to Count I. It's been conceded by the State and the Court would agree with that if it hadn't been conceded.

The separate issue, though, is to the remaining counts is there sufficient notice of claim as to liability, and then as to all counts as to Angela's claim, is there sufficient notice of the damage claim. Is it enough to just simply identify a category and an amount without any reference to what supports that? And I'm going to find that it's not sufficient in the area requesting economic loss and emotional distress to simply set forth that category with an amount with no effort to indicate the basis for that amount. I'm not asking for a treatise as a basis, and a nicely indexed document that you sometimes get with a settlement proposal, but I do think that we need more than what is in the notice of claim under the Arizona law as I'm reading it.

And for that reason I'm granting the judgment on the pleadings as to Angela Haizlip's claims, all of her claims. So, Count I fails for damages reason only. All the counts fail for liability and damages reasons combined. As to the individual named Defendants, my interpretation as a judgment on the pleadings, again, they weren't –- I find the law requires that as employees they receive such notice. That was not done, and I'm granting judgment on the pleading[s] as to the individuals on all counts. As –- and similar as to Paul Haizlip's claims, he didn't submit one either, and he is required to within the statutory time period and he did not on the complaint as presented. Okay?

So, that's my ruling.

. . . .

> So, that disposes of the entire case at this stage, which means I'll expect you to submit a form of judgment, if you can do that within 15 days, and I will get that out so you can make whatever decisions you need to make.

¶10 On December 4, 2008, the court memorialized its rulings in a minute entry, stating as follows:

> Based upon the Court's review and consideration of the pleadings and the arguments presented, and for the reasons stated on the record,
>
> **IT IS ORDERED granting** the Motion for Judgment on the Pleadings.

¶11 On December 5, 2008, Plaintiffs filed a motion for reconsideration and notice of supplemental authority, arguing that, based on a recent opinion of this court, *Havasupai Tribe v. Arizona Board of Regents*, 220 Ariz. 214, 204 P.3d 1063 (App. 2008), the trial court had erred in finding that Angela Haizlip's notice of claim provided an insufficient basis for her claim of lost wages and income. After Defendants filed their response to Plaintiffs' motion for reconsideration, the trial court issued a signed minute entry denying the motion "[f]or the reasons previously stated on the record on December 1, 2008," and a separate signed judgment granting Defendants' motion for judgment on the pleadings and issuing judgment in favor of Defendants "[f]or the reasons stated on the record on 12-1-08."

¶12 On February 5, 2009, Plaintiffs filed a timely notice of appeal from the court's judgment. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

STANDARD OF REVIEW

¶13 Defendants' motion for judgment on the pleadings asserted that Plaintiffs' April 2008 notice of claim did not comply with A.R.S. § 12-821.01. Because the trial court considered that notice of claim in arriving at its decision, the court's grant of Defendants' motion for judgment on the pleadings is more properly regarded as a grant of a motion for summary judgment pursuant to Rule 56(c). *See* Ariz. R. Civ. P. 12(c); *Jones v. Cochise County*, 218 Ariz. 372, 375, ¶ 7, 187 P.3d 97, 100 (App. 2008) (citing Rule 12(b)); *Am. Fed'n of State, County & Mun. Employees, AFL-CIO, Council 97 v. Lewis*, 165 Ariz. 149, 151, 797 P.2d 6, 8 (App. 1990).

¶14 In reviewing a trial court's grant of a motion for summary judgment, we construe the facts and reasonable inferences in the light most favorable to the opposing party and will affirm only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶¶ 13-14, 38 P.3d 12, 20 (2002); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review *de novo* the court's

application of the law, including its determination that a party's notice of claim failed to comply with A.R.S. § 12-821.01. *See Jones*, 218 Ariz. at 375, ¶ 7, 187 P.3d at 100 (citing *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 351, ¶ 24, 160 P.3d 223, 230 (App. 2007); *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007)); *see also Mobile Cmty. Council for Progress, Inc. v. Brock*, 211 Ariz. 196, 198, ¶ 5, 119 P.3d 463, 465 (App. 2005) (stating that, in reviewing a judgment on the pleadings, this court accepts the factual allegations of the complaint as true and reviews conclusions of law *de novo*).

ANALYSIS

A. The Merits

¶15 Plaintiffs contend that the notice of claim filed on behalf of Angela Haizlip was legally sufficient to support her claim for lost income. Citing this court's recent decisions in *Havasupai Tribe* and *Yollin v. City of Glendale*, 219 Ariz. 24, 33-34, ¶ 31, 191 P.3d at 1040, 1049-50 (App. 2008), and our supreme court's subsequent decision in *Backus v. State*, 220 Ariz. 101, 203 P.3d 499 (2009), Plaintiffs maintain that the absence of a method to calculate their claim is not fatal because

> the test is not whether a notice of claim contains facts that justify or prove the amount of the settlement demand. Nor is it whether the facts

> demonstrate that the settlement demand is reasonable. Instead, it is whether the notice of claim, read as a whole, provides facts supporting the settlement demand.

Havasupai Tribe, 220 Ariz. at 229, ¶ 53, 204 P.3d at 1078; *accord Backus*, 220 Ariz. at 106-07, ¶¶ 22-23, 203 P.3d at 504-05 ("If the legislature had intended to require that a notice contain facts 'sufficient' to support the amount claimed, it would have said so.").

¶16 Defendants concede that *Backus*, which our supreme court decided after the trial court issued judgment in this case, "appears to have resolved the 'facts supporting the settlement demand' issue in [Plaintiffs'] favor." In *Backus*, the Arizona Supreme Court held

> that a claimant complies with the supporting-facts requirement of § 12-821.01.A by providing the factual foundation that the claimant regards as adequate to permit the public entity to evaluate the specific amount claimed. This standard does not require a claimant to provide an exhaustive list of facts; as long as a claimant provides facts to support the amount claimed, he has complied with the supporting-facts requirement of the statute, and courts should not scrutinize the claimant's description of facts to determine the "sufficiency" of the factual disclosure.

220 Ariz. at 106-07, ¶ 23, 203 P.3d at 504-05. Defendants acknowledge, and we agree, that to the extent the trial court based its grant of their motion for judgment on the pleadings on a deficiency in the facts supporting the specific amount for which the April 2008 notice of claim could be settled, such

reasoning was in retrospect error based on *Backus*. Accordingly, Defendants concede that Count I is subject to remand - but only as to Angela Haizlip's assertion of that claim. We agree.

¶17 Defendants assert that Plaintiffs have waived argument on any of the other grounds listed by the trial court for dismissing their various claims.[7] Plaintiffs reply that they have not waived any issue regarding Counts II through VI, dismissal of the claims against individual Defendants, or dismissal of claims brought on behalf of Paul Haizlip.[8] They contend that the trial court's ruling was based solely on its conclusion that there was a deficiency in Plaintiffs' demand in their notice of claim, and that the court failed to reach or address any other issues raised by the parties. The record does not support their contention. At the close of argument, the

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[7] Plaintiffs characterize Defendants' waiver argument as a "cross issue" or "cross appeal." However, Defendants' argument that Plaintiffs have waived challenges to the court's alternative grounds for dismissal by not briefing them in the opening brief does not constitute a cross-appeal or lessen Plaintiffs' responsibility to properly appeal the trial court's rulings. *See generally* ARCAP 13(a)(5)-(6), (b)(2)-(3); *Jones v. Burk*, 164 Ariz. 595, 597, 795 P.2d 238, 240 (App. 1990) (stating that issues not clearly raised and argued in the opening brief are waived).

[8] After Plaintiffs filed their reply brief, Defendants filed a motion to strike that brief in whole or in part and an alternative request to allow supplemental briefing on "new issues" allegedly raised by Plaintiffs in that brief. The motions panel of this court denied Defendants' motion, but stated that, when considering this appeal for a decision on the merits, this court will evaluate whether any issues in the reply brief have been waived.

court dismissed all counts for failure to provide in the notice of claim facts sufficient to support the settlement demand. The court further ruled that all counts except Count I be dismissed on the additional ground of failure to provide in the notice of claim facts sufficient to support liability. The court also dismissed claims against the individually-named Defendants on the ground that they were not provided notice in the April 2008 notice of claim. Finally, the court dismissed all of Paul Haizlip's claims on the additional basis that he had failed to file a timely notice of claim. Thus, the trial court based its decision to dismiss the First Amended Complaint on numerous alleged deficiencies in the April 2008 notice of claim. Only the dismissal of Count I as asserted by Angela Haizlip against the City was based solely on the "facts supporting the settlement demand" issue, the only issue raised in the opening brief. By failing to raise or address in their opening brief the other grounds listed by the trial court for dismissing their various claims, Plaintiffs have waived argument on appeal with respect to the abovementioned bases for dismissal of those claims. *See Best v. Edwards*, 217 Ariz. 497, 504 n.7, ¶ 28, 176 P.3d 695, 702 n.7 (App. 2008) (citing *Menendez v. Paddock Pool Constr. Co.*, 172 Ariz. 258, 263 n.5, 836 P.2d 968, 973 n.5 (App. 1991) (stating that a party cannot raise an issue for the first

time in the reply brief)).[9] Because the "facts supporting the settlement demand" issue was not the only basis relied on by the trial court in granting the motion for judgment on the pleadings, we affirm the court's dismissal of all counts except Count I, dismissal of all claims against the individual Defendants, and dismissal of all of Paul Haizlip's claims.

¶18 In their reply brief, Plaintiffs alternatively argue that, because the title of the argument in their opening brief may be broadly construed, they challenged on appeal all grounds for the trial court's entry of judgment. We disagree. Plaintiffs failed in their opening brief to argue or even mention any of the other grounds listed by the trial court for its decision. *See* ARCAP 13(a)(6) (requiring an appellant's brief to set forth "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *Mercantile Nat'l Life Ins. Co. v. Villalba*, 18 Ariz. App. 179, 180, 501 P.2d 20, 21 (1972).

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[9] Accordingly, Plaintiffs have waived their argument that the notice of claim statute only required them to provide facts, and not specific legal causes of action, in the April 2008 notice of claim, *see generally Yollin*, 219 Ariz. at 32, ¶ 26, 191 P.3d at 1048, and their presumptive follow-up argument that they provided facts sufficient to support liability.

¶19 We recognize that the trial court's judgment and orders do not specify whether the judgment was with or without prejudice. Citing *Arizona Department of Revenue v. Dougherty*, 200 Ariz. 515, 520, ¶ 16, 29 P.3d 862, 867 (2001), Plaintiffs contend that Counts II through VI were dismissed without prejudice because a dismissal based on the failure to file a notice of claim or sufficient notice of claim is a failure to exhaust procedural or administrative requirements and thus results in a judgment without prejudice.

¶20 Even if we assume without deciding that Plaintiffs' contention is generally correct, however, Plaintiffs may not re-file their complaint if the statute of limitations has expired. *See Maher v. Urman*, 211 Ariz. 543, 550, ¶ 20, 124 P.3d 770, 777 (App. 2005). As we have noted, a notice of claim must be filed within 180 days after a cause of action accrues or the claim is barred. A.R.S. § 12-821.01(A). Further, an action against any public entity or public employee must be filed within one year after the cause of action accrues. A.R.S. § 12-821 (2003). Therefore, even if the First Amended Complaint was dismissed without prejudice, Plaintiffs cannot, absent potential application of A.R.S. § 12-504 (2003), re-file the claims made in that complaint. By this reference, we express no opinion on the application of § 12-504 or the merits of any argument to reinstate the matter pursuant to the savings statute.

¶21 Even absent application of the savings statute, Plaintiffs can, of course, argue that any *new* claims asserted in their second notice of claim did not accrue upon termination of their probationary status due to discovery issues, and thus should not be time-barred. That determination should be made in the first instance by the trial court, which clearly contemplated that Plaintiffs would file a second complaint based on the second notice of claim.

B. Attorneys' Fees

¶22 Plaintiffs also request an award of their attorneys' fees pursuant to A.R.S. §§ 12-341.01(C) (2003) and 12-348 (2003) "[i]n light of the ruling by the Arizona Supreme Court in *Backus*." The parties and the trial court did not have the benefit of our supreme court's opinion in *Backus* at the time of the trial court's judgment, and Plaintiffs have not provided "clear and convincing evidence" that Defendants' "defense constitutes harassment, is groundless and is not made in good faith." A.R.S. § 12-341.01(C). Additionally, this civil action was not brought by the City, and Plaintiffs have not yet prevailed on the merits of their civil action. *See* A.R.S. § 12-348. Finding neither statute applicable to the facts in this record, we decline to award attorneys' fees to Plaintiffs. We do, however, award Plaintiffs their costs on appeal upon compliance with Rule 21, ARCAP.

CONCLUSION

¶23 For the aforementioned reasons, we affirm the trial court's judgment in favor of Defendants, with the exception that we vacate the court's judgment as to Angela Haizlip's Count I claim against the City, and we remand for proceedings consistent with this decision. We express no opinion as to the merits of the parties' positions on remand.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge