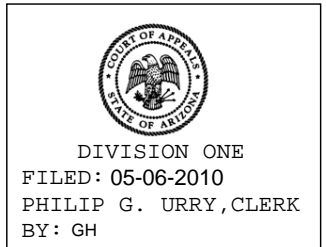


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



ANN MARIE BOTHWELL and JOHN DOE)	No. 1 CA-SA 10-0074
BOTHWELL, her husband; CITY OF)	
MESA, a municipality; JOHN DOES)	
I-X, JANE DOES I-X, BLACK)	DEPARTMENT A
CORPORATIONS I-X and GREEN)	
COMPANIES I-X,)	
)	Maricopa County
Petitioners,)	Superior Court
)	No. CV2008-030124
v.)	
)	
THE HONORABLE RICHARD J.)	DECISION ORDER
TRUJILLO, Judge of the SUPERIOR)	
COURT OF THE STATE OF ARIZONA,)	
in and for the County of)	
MARICOPA,)	
)	
Respondent Judge,)	
)	
CHRISTINA NELSON, individually)	
and on behalf of all the)	
beneficiaries of BARRY J. NELSON,)	
deceased, including NICHOLAS)	
JAMES NELSON, a minor, ABIGAIL)	
JO NELSON, a minor,)	
)	
Real Parties in Interest.)	
)	

The court, Presiding Judge Patricia A. Orozco and Judges Daniel A. Barker and Lawrence F. Winthrop participating, has considered the special action petition of Ann Marie Bothwell and

the City of Mesa ("the City") (collectively "Petitioners"). For the following reasons, we accept jurisdiction and grant relief.

Petitioners are defendants in a wrongful death lawsuit filed by Christina Nelson ("Plaintiff") individually and on behalf of others after a van driven by Bothwell, a volunteer driver for the City, struck and killed Plaintiff's husband. Before filing suit, Plaintiff requested and received a notice of claim form from the City, which advised her that her claim "must comply with Arizona state law, A.R.S. § 12-821.01." The form was accompanied by a cover letter, which advised Plaintiff that she could either use the form provided by the City or "write a letter of your own design." Plaintiff chose to utilize and submit the notice of claim form provided her by the City, but in doing so she failed to comply with the notice of claim statute, Ariz. Rev. Stat. ("A.R.S.") § 12-821.01(A) (2003), because she simply wrote "to be determined" in the space on the form where she was to indicate the specific amount for which her claim could be settled. Further, she provided no description or supporting documentation from which an amount could be calculated. Although Plaintiff later wrote a letter to the City stating that she was "expecting some kind of financial settlement on this horrible loss," she again failed to include a demand for a specific amount. Additionally, although Plaintiff submitted the notice of claim form to the City, she never attempted to serve it on Bothwell. After the statutory 180-day period for filing a

proper notice of claim had passed, the City denied the claim for failure to comply with the notice of claim statute.

Plaintiff filed suit against Petitioners, who filed a "motion to dismiss/motion for summary judgment," arguing that Plaintiff had failed to comply with the notice of claim statute and failed to serve Bothwell with the notice of claim. The superior court (the Honorable Judge Richard J. Trujillo) denied the motion, ruling that the City was equitably estopped from asserting noncompliance with the statute. The court relied on the fact that the cover letter accompanying the claim form did not advise Plaintiff that her claim must comply with A.R.S. § 12-821.01 and on Plaintiff's sworn affidavit, in which she averred that she "expected that she . . . would be asked to meet with City of Mesa Risk Management representatives to discuss the claim." With respect to Bothwell, the court ruled that the legislature's intent was not to deny a claimant "her day in court." The case was transferred from the Honorable Judge Trujillo to the Honorable Judge Emmet J. Ronan before Petitioners filed this special action petition.

Because evidence extrinsic to the pleadings was offered to and relied on by the superior court in making its decision, we treat the motion as a motion for summary judgment pursuant to Rule 56, Ariz. R. Civ. P., rather than a motion to dismiss. *See generally* Ariz. R. Civ. P. 12(b); *Frey v. Stoneman*, 150 Ariz. 106, 108-09, 722 P.2d 274, 276-77 (1986).

Petitioners argue that the superior court erred in denying Bothwell's motion for summary judgment because Plaintiff failed to serve Bothwell individually with a notice of claim. Petitioners further argue that the superior court erred in denying their motion for summary judgment because Plaintiff failed to state in her notice of claim a specific amount for which her claim could be settled.

We may accept special action jurisdiction when a petitioner has no equally plain, speedy, and adequate remedy by appeal, when the superior court has abused its discretion, or when the court has committed a plain and obvious error. See *Ariz. R.P. Spec. Act. 1(a), 3(c); Amos v. Bowen*, 143 Ariz. 324, 327, 693 P.2d 979, 982 (App. 1984).

With regard to the need to file a notice of claim against a public employee, the legislature has expressed its clear intent: "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" A.R.S. § 12-821.01(A). Thus, before filing a claim against a public entity and a public employee, a plaintiff must serve both the entity and employee with a notice of claim. See *Crum v. Superior Court*, 186 Ariz. 351, 352-53, 922 P.2d 316, 317-18 (App. 1996); *Johnson v. Superior Court*, 158 Ariz. 507, 509, 763 P.2d 1382, 1384 (App. 1988). In this case, Plaintiff has alleged, and

Petitioners have admitted, that when the accident at issue occurred, Bothwell was acting as an agent or employee of the City as a volunteer DUI van driver. A volunteer assisting a public entity qualifies as a public employee. See A.R.S. § 12-820(1), (5) (2003). Absent conduct that would invoke waiver, estoppel, or equitable tolling, when a public employee is not served with a notice of claim, a lawsuit against that employee is barred. See *McGrath v. Scott*, 250 F. Supp. 2d 1218, 1236 (D. Ariz. 2003). In this case, Plaintiff failed to serve Bothwell and alleges no circumstances or conduct that would excuse her failure to serve Bothwell.

The notice of claim statute also requires that a claim contain a sum certain for the controversy to be settled. See A.R.S. § 12-821.01(A) ("The claim shall [] contain a specific amount for which the claim can be settled and the facts supporting that amount."); *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295-96, ¶¶ 7-9, 152 P.3d 490, 492-93 (2007). Claims that do not comply with this requirement are statutorily barred. *Deer Valley*, 214 Ariz. at 295, ¶ 6, 152 P.3d at 492. In this case, no question of fact exists that Plaintiff failed to comply with the notice of claim statute because she failed to include a specific amount for which the claim could be settled. Further, the notice of claim form provided by the City and actually utilized by Plaintiff specifically and unambiguously advised her that her claim must

comply with A.R.S. § 12-821.01. Finally, notwithstanding the superior court's characterization to the contrary, neither the cover letter accompanying the claim form nor Plaintiff's affidavit support the conclusion or create a genuine issue of material fact whether the City affirmatively waived compliance with the statute or engaged in conduct which would invoke the application of equitable estoppel. See generally *McGrath*, 250 F. Supp. 2d at 1236. Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioners' special action petition.

IT IS FURTHER ORDERED granting Petitioner Bothwell's request for relief on the basis that the superior court abused its discretion in denying her motion for summary judgment because Plaintiff failed to serve her individually with a notice of claim.

IT IS FURTHER ORDERED granting Petitioners' request for relief on the basis that the superior court abused its discretion in denying Petitioners' motion for summary judgment regarding Plaintiff's failure to allege a sum certain in her notice of claim.

IT IS FURTHER ORDERED that the superior court enter judgment in favor of the City and Bothwell.

IT IS FURTHER ORDERED that the clerk of this court provide a copy of this Decision Order to Marc T. Steadman and Jacqueline Jeffery, counsel for Petitioners; William D. Black and David L.

Abney, co-counsel for Respondents/Real Parties in Interest; and the Honorable Emmet J. Ronan, a Judge of the Superior Court.

_____/S/_____
LAWRENCE F. WINTHROP, Judge