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

MARK A. RYAN, for and on behalf of himself, and as next friend for HESTER and HANNAH RYAN, minors; and MARGARET LEE RYAN; ANTHONY J. FOSTER; and VIRGINIA FOSTER and RICK PATTEN, his parents,	1 CA-CV 08-0761
	DEPARTMENT C
	MEMORANDUM DECISION
	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Plaintiffs-Appellants,	
v.	
STATE OF ARIZONA,	
Defendant-Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-008189

The Honorable F. Pendleton Gaines, III, Judge

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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K E S S L E R, Judge

¶1 Plaintiffs-Appellants Mark A. Ryan, Hester Ryan, Hannah Ryan, Margaret Lee Ryan and Anthony J. Foster, Virginia Foster, and Rick Patten appeal the trial court's summary judgment in favor of Defendant-Appellee State of Arizona on their claims for violation of the Administrative Procedure Act, false imprisonment, and violation of their constitutional rights. For the following reasons, we affirm the court's summary judgment for the State on Plaintiffs' statutory and constitutional claims. We also affirm the summary judgment on Plaintiffs' false imprisonment claim in part, but reverse in part and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On March 1, 1999, Mark Ryan was sentenced to a four-year prison term for negligent homicide. On June 6, 1999, Anthony Foster was sentenced to two concurrent five-year prison terms for aggravated assault.

¶3 The Board of Executive Clemency ("Board") subsequently unanimously recommended commutation of both sentences. The Board recommended that Ryan's sentence be commuted to one and one-half years, and that Foster's sentence be reduced to two and three-quarters years. Both recommendations were made pursuant

to Arizona Revised Statutes ("A.R.S.") section 31-402(D) (Supp. 2009), which provides that a unanimous Board recommendation "that is not acted on by the governor within ninety days after the [B]oard submits its recommendation to the governor automatically becomes effective."

¶4 Along with its recommendation, the Board transmitted to the governor a form letter for the governor to return indicating his or her decision on the Board's recommendation (the "Form Letter"). The Form Letter, which was created by the Board's staff, stated: "The following application for executive clemency has been reviewed by the Governor. Documents submitted to our office for our review are being returned to you under this cover and the Governor's decision is as follows[.]" The Form Letter then contained a place for the governor to indicate his or her decision regarding the recommended commutation and a place for the governor or his or her representative to sign and date the form. The Form Letter did not contain a space for the secretary of state's attestation.

¶5 Governor Hull received the Board's recommendation regarding Ryan's sentence on December 1, 1999. On February 8, 2000, she signed, dated and returned the Form Letter to the Board, indicating that she denied the Board's recommended commutation. The governor received the Board's recommendation regarding Foster's sentence on March 7, 2000. On May 10, 2000,

she signed, dated and returned the Form Letter to the Board, indicating that she denied the Board's recommended commutation. Neither form indicated that the governor had forwarded it to the secretary of state for attestation and recording in the State's public records.

¶6 In October 2000, at the governor's request, the Board returned to her all of the Form Letters denying unanimous commutation recommendations, including those for Ryan and Foster. Thereafter, the governor resubmitted the forms, to which the secretary of state's signature of attestation had been added.

¶7 On October 18, 2000, Ryan petitioned for post-conviction relief in Pima County Superior Court. He argued the secretary of state had not timely attested the governor's signature on the Form Letter, as required for an official act, and therefore that his commutation became effective pursuant to A.R.S. § 31-402 on the ninety-first day after the governor received the Board's recommendation.

¶8 On November 2, 2000, this Court published *McDonald v. Thomas*, 198 Ariz. 590, 12 P.3d 1194 (App. 2000) ("*McDonald I*"), *vacated* 202 Ariz. 35, 40 P.3d 819 (2002), in which we held that Governor Symington's denial of the Board's unanimous recommendation to commute the sentence of Kevin McDonald under the Disproportionality Review Act, 1994 Ariz. Sess. Laws, ch.

365, § 1 (2d Reg. Sess.) was not an official act and therefore did not require either the governor's signature or the secretary of state's attestation. *McDonald I*, 198 Ariz. at 593-96, ¶¶ 12-26, 12 P.3d at 1197-1200.[1] In that case, a person other than Governor Symington had signed the Form Letter and it had not been attested by the secretary of state. *McDonald v. Thomas*, 202 Ariz. 35, 39, ¶ 6, 40 P.3d 819, 823 (2002) ("*McDonald II*") (*vacating McDonald I*).

¶9 On December 7, 2000, noting that it was bound by *McDonald I*, the Pima County Superior Court denied Ryan's petition for post-conviction relief. Division Two of this Court denied Ryan's petition for relief from the superior court's ruling on June 14, 2001 in a memorandum decision. Ryan filed a petition for review with the Arizona Supreme Court.

¶10 On February 19, 2002, the Arizona Supreme Court issued *McDonald II*, in which it vacated *McDonald I* and held that the governor's denial of the Board's unanimous commutation recommendation was an "official act," that was required to be signed by the governor and attested by the secretary of state. *McDonald II,* 202 Ariz. at 45-46, ¶¶ 31-35, 40 P.3d at 829-30. The court ruled that because the governor's rejection of the

[1] Section 1(G) of the Disproportionality Review Act contained the same provision as A.R.S. § 31-402(D), that a unanimous recommendation would automatically become effective if not denied by the governor within ninety days. *See* 1994 Ariz. Sess. Laws, ch. 365, § 1(G).

Board's recommendation that McDonald's sentence be commuted was not signed by the governor and attested by the secretary of state, the governor "did not act in the manner required by law and the purported denial did not go into effect." *Id*. at 46, ¶ 35, 40 P.3d at 830. As a result, McDonald's commutation became automatically effective ninety-one days after the governor received the Board's recommendation. *Id*.

¶11 On July 15, 2002, the Arizona Supreme Court held that because the governor's denial of the Board's recommendation to commute Ryan's sentence was not attested by the secretary of state until eight months after the governor signed it, the denial was not valid. The court vacated this Court's memorandum decision and remanded the matter to the superior court with instructions that Ryan be granted post-conviction relief.

¶12 On August 8, 2002, the Board issued a notice that Foster's sentence had been commuted based on the Arizona Supreme Court's ruling in Ryan's case. Ryan and Foster were then both released from prison.

¶13 On May 30, 2006, Plaintiffs filed this lawsuit, in which they alleged the Board and the governor had breached their common law and statutory duties and caused damage to Plaintiffs and that the State's conduct constituted false imprisonment and cruel and unusual punishment and deprived Ryan and Foster of their constitutional rights to due process, privacy, and equal

protection. The State moved for summary judgment, arguing that its continued incarceration of Ryan and Foster after the ninety-first day following the governor's receipt of the Board's recommendation was supported by probable cause, that, as a matter of law, the Administrative Procedure Act ("the APA"), A.R.S. §§ 41-1001 to -1092.12 (2004 & Supp. 2009), did not require the Board to promulgate or review the legal sufficiency of the Form Letter, and that the Board did not violate any of Ryan's and Foster's constitutional rights. In addition, the State asserted that Plaintiffs' claims were barred by their failure to comply with Arizona's notice of claim statute, A.R.S. § 12-821.01 (2003).

¶14 The superior court granted summary judgment for the State, ruling that Plaintiffs' alleged injuries were not related to the Board's failure to treat the Form Letter as a rule pursuant to the APA, the Board had no authority or obligation to ensure that the governor's signature was timely attested by the secretary of state, the State had probable cause to continue Ryan's and Foster's incarceration, and that the State had not violated Ryan's and Foster's due process and equal protection rights.[2] The court also found that Plaintiffs' notices of claim were deficient.

[2] Noting that Ryan and Foster had only responded to the State's arguments regarding due process and equal protection,

¶15 Plaintiffs moved for new trial, arguing the summary judgment was not justified by the evidence and was contrary to law. In particular, they asserted that (i) even if the Board had not breached the APA, the governor breached her duty to follow the law and caused damage to Plaintiffs for which tort remedies should be available; (ii) at minimum, the State's failure to release Ryan and Foster after the Arizona Supreme Court issued *McDonald II* constituted false imprisonment[3]; and (iii) the court's probable cause ruling was factually and legally incorrect. In addition to their pleadings on the motion for new trial, the parties stipulated to provide the court new legal authorities regarding Arizona's notice of claim statute. In response to those authorities, the court withdrew its notice of claim ruling, but, noting that independent, substantive reasons supported its grant of summary judgment, denied the motion for new trial.[4]

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the trial court found they had abandoned their remaining constitutional claims.

[3] Although the State argues on appeal that Plaintiffs waived this argument by not timely presenting it in the trial court, the State acknowledged in response to Plaintiffs' motion for new trial that they had contended at oral argument on the summary judgment motion that Ryan and Foster should have been released following *McDonald II*. In addition, the trial court specifically addressed that argument in its ruling granting summary judgment. Accordingly, we find no waiver.

[4] The court's ruling was set forth in an unsigned minute entry. Pursuant to this Court's January 12, 2009 order revesting jurisdiction in the superior court, on January 16, 2009, the court issued an amended signed judgment memorializing

¶16 Ryan and Foster timely appealed. The State suggests in its answering brief Plaintiffs' notice of appeal was untimely because their motion for a new trial was merely a placeholder motion that was ineffective to extend the time to file a notice of appeal. *See Butler Products Co. v. Roush*, 145 Ariz. 32, 33 n.1, 699 P.2d 906, 907 (App. 1984). In *Butler*, the defendant's motion for new trial contained little more than a citation to Rule 59(a) and a request for leave to file a memorandum in support of the motion at a later time. *Id.* However, the motion for a new trial in this case contains substantial arguments. The later amendment to the motion does not convert it into an impermissible placeholder motion. We have jurisdiction pursuant to A.R.S. § 12-2101(B) & (F)(1) (2003).

ANALYSIS

¶17 On appeal, Plaintiffs contend that 1) the Board violated the Administrative Procedure Act, 2) the superior court erroneously granted summary judgment against them on their false imprisonment claims, including that there is a genuine issue of material fact regarding whether probable cause to hold them existed after *McDonald II*, 3) the State violated their due process and equal protection rights with its procedure for

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its February 21, 2008 summary judgment ruling and its August 26, 2008 minute entry denying Ryan's and Foster's motion for new trial.

handling the clemency petitions, and 4) they complied with the notice of claim statute.

¶18 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment should be granted, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). If the evidence would allow a jury to resolve a material issue in favor of either party, summary judgment is improper. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶19 In reviewing a summary judgment, our task is to determine *de novo* whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). We review the facts in the light most favorable to the party against whom summary judgment was entered, *Riley, Hoggatt & Suagee v. English*, 177 Ariz. 10, 12, 864 P.2d 1042, 1044 (1993), and will affirm the entry of summary judgment if it is correct for any reason.

Hawkins v. State, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

I. The Administrative Procedure Act

¶20 Plaintiffs contend the APA required the Board to (i) follow a particular process to create an official government form for the governor to use in denying a recommended commutation; (ii) exercise its rulemaking authority to create a rule that described the appropriate form and file that description with the secretary of state for approval by the Governor's Regulatory Review Board or the Attorney General's Office; or (iii) file the form with the secretary of state as an agency guidance document. They allege the Board's purported failure to adhere to any of these requirements gave rise to their claim for civil remedies.

¶21 The State argues the Board is exempt from the APA because it does not apply to a rule or substantive policy statement concerning inmates made by the Board, *see* A.R.S. § 41-1005(A)(7) (Supp. 2009), and asserts that, in any event, the Form Letter was not a "rule" within the meaning of the APA because the Board was not required by law to provide the form to the governor.

¶22 We find it unnecessary to reach these issues, however, because we agree with the State that any violation by the Board of the APA did not give rise to a private right of action for

damages. *See Napier v. Bertram*, 191 Ariz. 238, 240, ¶ 9, 954 P.2d 1389, 1391 (1998) (stating that in deciding whether a private right of action exists, a court must consider "'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.'") (citation omitted).

¶23 The APA allows a person to participate in an agency's rulemaking process, allege that an existing agency practice or substantive policy statement constitutes a rule and seek to have it declared void, request the making of a final rule, or file a complaint with the administrative rules oversight committee to challenge a rule he or she alleges is duplicative or onerous or does not conform with statutory law or legislative intent. A.R.S. §§ 41-1001.01(A)(6), (9) & (10), -1023, -1033, -1047, -1048. However, this enumeration of rights does not create any additional rights not contained in the APA, which is limited to procedural rights and imposes only procedural duties. A.R.S. §§ 41-1001.01(B), -1002(B) (2004). Thus, if Ryan and Foster believed the Board violated the provisions of the APA, their only remedy was to petition the Board to make a final rule or change its practice and appeal any adverse decision. *See* A.R.S. §§ 41-1033(A), (B), & (D).

¶24 The APA does not proscribe specific acts and does not purport to protect any person or class of persons, but simply

sets forth the requirements for agency rulemaking and the circumstances under which persons may participate in the process or challenge an agency's rule or practice. A.R.S. §§ 41-1001.01(A)(6), (9) & (10), -1023, -1033, -1047, -1048. There is no indication that the legislature intended to create a private right of action for damages or that its purpose in implementing the APA would be impaired if such a right were not allowed.

¶25 Nevertheless, Plaintiffs cite Article 18, § 6 of the Arizona Constitution, which provides, as relevant: "[t]he right of action to recover damages for injuries shall never be abrogated . . . " and suggest that the failure to recognize their cause of action under the APA would be an infringement on their fundamental right to recover damages. This clause, known as the anti-abrogation clause, protects the right of access to the courts and prevents abrogation of common-law tort actions. *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 228, ¶ 32, 172 P.3d 410, 416 (2007). Here, however, there is no common-law tort action that Plaintiffs allege has been infringed; rather, they assert that the APA creates a cause of action by which they may recover damages for the Board's alleged faulty rulemaking. Our determination that the APA does not provide a private right of action to Plaintiffs does not violate the anti-abrogation clause of Article 18, § 6.

II. False Imprisonment

¶26 False imprisonment is the detention of a person without consent or lawful authority. *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975). If a plaintiff demonstrates he was unlawfully detained, the defendant must prove a legal justification for the detention. *Id*. Probable cause to detain is a complete defense, which the court determines. *Hockett v. City of Tucson*, 139 Ariz. 317, 320, 678 P.2d 502, 505 (App. 1983). The test is generally whether, upon the appearance presented to the defendant, a reasonably prudent person would have continued the incarceration. *Id*. The question presented is whether the Board knew prior to *McDonald II* that the denial letters from the governor were legally insufficient.

¶27 Plaintiffs contend that because the governor did not issue proper denials, but instead utilized a denial letter that they assert was facially invalid, the State knew it did not have probable cause to detain Ryan and Foster. However, the Board was entitled to rely on *McDonald I*, in which we held that although the governor did not personally sign the letters or have them attested by the secretary of state, he had properly denied the Board's unanimous commutation recommendations. *Id*. at 594, ¶¶ 16-18, 596, ¶¶ 24-25, 597, ¶ 32, 12 P.3d at 1198, 1200-01. Only with *McDonald II* did the Board know the denial

letters were ineffective. *See generally McDonald II*, 202 Ariz. 35, 40 P.3d 819. Accordingly, prior to *McDonald II*, it was not unreasonable for the Board to believe that the denial letters were sufficient to constitute the governor's denial of its recommendations.[5]

¶28 However, we agree with Plaintiffs that there is a genuine issue of material fact regarding whether the State unreasonably delayed Ryan's and Foster's release after the supreme court's ruling in *McDonald II*. The ruling explicitly held that to effectively deny the Board's unanimous commutation recommendation, the governor was required to not only sign the denial but also have it attested by the secretary of state. *Id*. at 45-46, ¶¶ 31-35, 40 P.3d at 829-30. Thus, there is a genuine issue of material fact regarding when, after *McDonald II*, the Board knew or should have known that the governor's denial letters in Ryan's and Foster's cases were ineffective and that

[5] Plaintiffs also assert the Board had notice that Ryan's and Foster's detentions were unlawful because it was aware that the United States District Court for the District of Arizona had granted the petition of another prisoner, Michael Hester, for writ of habeas corpus on the grounds that the governor had not properly denied the Board's commutation recommendation. *Hester v. Savage*, CIV 97-780 TUC FRZ (JWS) (D.Ariz.). However, that unpublished order was not binding authority. *See United States v. Heuer*, 916 F.2d 1457, 1460 n.1 (9th Cir. 1990) (stating unpublished district court opinion was without precedential force and not binding). In addition, because *McDonald I* was issued just a few months after the Hester decision, it was not unreasonable for the Board to maintain the belief that the governor had properly denied its recommendations.

it lacked probable cause to continue their incarcerations. The trial court erred in granting summary judgment for the State on Plaintiffs' false imprisonment claim insofar as it arose out of the continued incarceration of Ryan and Foster after *McDonald II*.

III. Constitutional Violations

¶29 Plaintiffs claim the State violated Ryan's and Foster's due process and equal protection rights under the federal and state constitutions. As an initial matter, we note that the State cannot be sued for damages for violation of a plaintiff's federal civil rights, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989), and therefore affirm the trial court's summary judgment for the State on those claims. We consider Plaintiffs' claims only insofar as they allege violations of Ryan's and Foster's rights under the Arizona Constitution.

III.A Due Process

¶30 Article 2, § 4 of the Arizona Constitution provides: "[n]o person shall be deprived of life, liberty, or property without due process of law." We have previously recognized that a prisoner has a liberty interest in the duration of his sentence and the procedures used to impose it. *State v. Gatlin*, 171 Ariz. 418, 420, 831 P.2d 417, 419 (App. 1992) (stating defendant had a liberty interest in the trial court's authority

to impose length of sentence); *Stewart v. Ariz. Bd. of Pardons and Paroles*, 156 Ariz. 538, 542-43, 753 P.2d 1194, 1198-99 (App. 1988) (holding mandatory language of parole eligibility statute created a constitutionally protected liberty interest in parole release). In addition, the Arizona Supreme Court accords due process protection to the consideration of an application for commutation. *State ex rel. Ariz. State Bd. of Pardons and Paroles v. Super. Court of Maricopa County*, 12 Ariz. App. 77, 80, 467 P.2d 917, 920 (1970); *Banks v. Ariz. State Bd. of Pardons & Paroles*, 129 Ariz. 199, 201-02, 629 P.2d 1035, 1037-38 (App. 1981); *McGee v. Ariz. State Bd. of Pardons and Paroles*, 92 Ariz. 317, 320, 376 P.2d 779, 781 (1962) ("A person under sentence of death upon timely application must be permitted a hearing at which he may produce evidence to establish extenuating or mitigating circumstances or which may otherwise justify such commutation."). Plaintiffs argue that, similarly, Arizona's commutation statutes gave Ryan and Foster a constitutionally protected liberty interest in the Board's recommended commutation of their sentences that could not be denied without due process. We assume without deciding that Ryan and Foster had a liberty interest in the Board's recommended commutation of their sentences, but find no indication that they were denied due process.

¶31 "'[D]ue process' is flexible and calls for such procedural protections as the particular situation demands." *Stewart*, 156 Ariz. at 543, 753 P.2d at 1199. In this case, both Ryan and Foster had the opportunity for a meaningful hearing to challenge their continued incarceration. *Ariz. Farmworkers Union v. Whitewing Ranch Mgmt., Inc.*, 154 Ariz. 525, 531, 744 P.2d 437, 443 (App. 1987) (stating procedural due process is satisfied when a party is afforded adequate notice, a fair opportunity to be heard, and an impartial tribunal to consider the evidence). Once the Board timely notified them of the governor's purported denial of their commutations, they were able to file a special action to challenge the effectiveness of the governor's denial of the Board's recommendation or seek habeas corpus relief under Arizona Rule of Criminal Procedure 32. Ariz. R. Crim. P. 32.1(d) (among the grounds for post-conviction relief is that "[t]he person is being held in custody after the sentence imposed has expired."); *cf. Arnold v. Moran*, 114 Ariz. 335, 336-37, 560 P.2d 1242, 1243-44 (1977) (granting inmate relief in special action challenging the ADOC director's refusal to apply good-time and double-time credits to inmate's sentence). Thus, we agree with the trial court that, as a matter of law, neither Ryan nor Foster was denied due process.

III.B Equal Protection

¶32 Article 2, § 13 of the Arizona Constitution provides: "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." The doctrine of equal protection does not "prohibit all unequal or discriminatory treatment, but is intended only to require equal treatment of persons similarly situated in a given class and that this classification itself is reasonable and not discriminatory." *Lindsay v. Indus. Comm'n*, 115 Ariz. 254, 256, 564 P.2d 943, 945 (App. 1977); *see also Queen Creek Summit, LLC v. Davis*, 219 Ariz. 576, 201 P.3d 537 (App. 2008) (stating Arizona's equal privileges clause essentially directs that "all persons similarly situated should be treated alike.") (citation omitted).

¶33 Plaintiffs assert Ryan and Foster were members of the "class" of persons for whom the Board made unanimous recommendations to the governor and argue the procedure used by the governor to deny the Board's commutation recommendations was not equal to the procedure used by the governor when granting a commutation, which required a signed, attested and filed "Proclamation" form. However, the State argues, and we agree, that those inmates for whom the governor granted a commutation

were not similarly situated to those inmates for whom she denied commutation. The governor was therefore entitled to use a different procedure for communicating her decision regarding each group.[6] We affirm the trial court's summary judgment for the State on Ryan's and Foster's equal protection claim.

IV. Notice of Claim

¶34 Finally, the State urges us to affirm the trial court's summary judgment on Ryan's claims because, it contends, his notice of claim did not set forth a sum certain for which he was willing to settle his claims and therefore was deficient as a matter of law.[7]

¶35 Plaintiffs argue that by failing to cross-appeal from the judgment, the State did not preserve this issue for appeal. An appellee may argue any issue properly presented in the superior court as grounds to affirm the judgment, without filing a cross-appeal and need only file a cross-appeal if it is seeking to enlarge its own rights or to lessen those of the appellant. ARCAP 13(b)(3); *A M Leasing Ltd. v. Baker*, 163 Ariz. 194, 195-96, 786 P.2d 1045, 1046-47 (App. 1989). Here, the State is not seeking to expand its rights on appeal, but only to argue an alternative basis to affirm the trial court's summary

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[6] Subject, of course, to the requirements of Arizona law. *See McDonald II*, 202 Ariz. at 42-44, ¶¶ 22-26, 40 P.3d at 826-28.

[7] The State does not challenge the notice of claim insofar as it relates to the claims of Ryan's wife and children.

judgment. Thus, the State was not required to file a cross-appeal in order to preserve the notice of claim issue for appellate review.[8]

¶36 Arizona's notice of claim statute requires a person with a claim against a public entity to file his or her claim with the authorized person within one hundred eighty days after the cause of action accrues. A.R.S. § 12-821.01(A). In addition, the statute provides that all claims "shall [] contain a specific amount for which the claim can be settled . . . ." *Id*. These statutory requirements "'allow the public entity to investigate and assess liability, . . . permit the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting.'" *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295, ¶ 6, 152 P.3d 490, 492 (2007) (citations omitted). Failure to comply

[8] We reject Plaintiffs' argument that the State waived any deficiency in Ryan's claim by actively participating in the litigation without objecting to the adequacy of the notice. The record shows that the State alleged in its answer to Plaintiffs' First Amended Complaint that Plaintiffs had failed to comply with A.R.S. § 12-821.01, and it argued two months later in its motion for summary judgment that Ryan's notice of claim was untimely and deficient. In addition, there is no indication in the record, and Plaintiffs do not contend, that the State engaged in disclosure or discovery such that its conduct was inconsistent with an intention to assert the notice of claim statute as a defense. We therefore find this case distinguishable from *City of Phoenix v. Fields*, 219 Ariz. 568, 574-75, ¶¶ 29-31, 201 P.3d 529, 535-36 (2009) and *Jones v. Cochise County*, 218 Ariz. 372, 380-81, ¶¶ 27-29, 187 P.3d 97, 105-06 (App. 2008), and decline to find waiver as a matter of law.

with the statute bars a plaintiff from pursuing the underlying cause of action. A.R.S. § 12-821.01(A); *Salerno v. Espinoza*, 210 Ariz. 586, 587-88, ¶ 7, 115 P.3d 626, 627-28 (App. 2005) (stating compliance with the notice provision of A.R.S. § 12-821.01(A) is a mandatory and essential prerequisite to maintaining an action against a public employee) (citations omitted); *Crum v. Super. Court*, 186 Ariz. 351, 353, 922 P.2d 316, 318 (App. 1996) (holding failure to include all claims and settlement amount in notice letter would bar claim).

¶37 Ryan's notice stated, in relevant part: "Demand is made on behalf of Mr. Ryan for all damages he has experienced . . . in the amount of no less than $2,000,000." In *Deer Valley*, the Arizona Supreme Court held that a claimant who identified her economic damage as "'*approximately* $35,000.00 per year *or more* going forward over the next 18 years,'" and her damages for emotional distress and harm to her reputation as "'no less than' $300,000 and $200,000, respectively," had not complied with the notice of claim statute because it was impossible to discern the amount for which she would have settled her claim. 214 Ariz. at 296-97, ¶¶ 10-11, 152 P.3d at 493-94 (emphasis in original). The Court wrote that § 12-821.01 "unmistakably instructs claimants to include a particular and certain amount of money that, if agreed to by the governmental entity, will settle the claim" and found that because she

repeatedly used qualifying language, the claimant's notice did not define a specific amount she would have accepted to resolve her claim. *Id.* at 296, ¶¶ 9-10, 152 P.3d at 493.

¶38 In this case, Plaintiffs argue that despite Ryan's use of the term "no less than," his claim did set forth a specific settlement amount because the State should have understood that an offer of $2 million would have met his demand. They cite *Jones v. Cochise County*, 218 Ariz. 372, 375-76, ¶¶ 11-12, 187 P.3d 97, 100-01 (App. 2008), in which this Court wrote that a notice of claim must be considered in context and as a whole and held that a notice's language stating that plaintiffs' counsel would advise them to settle for specific amounts could not reasonably be interpreted as qualifying plaintiffs' claims for those amounts. We agree with Plaintiffs that, unlike in *Deer Valley*, where the claimant's notice did not contain a clear aggregate claim amount and could have been read to demand a range of settlement amounts of substantial variation in value, 214 Ariz. at 296-97, ¶ 11, 152 P.3d at 493-94, Ryan's notice cannot reasonably be interpreted as anything other than an offer to settle his claim for $2 million. We reverse the trial court's summary judgment for the State on Ryan's claims on the basis that his notice was deficient as a matter of law.

CONCLUSION

¶39 For the foregoing reasons, we affirm the court's summary judgment for the State on Plaintiffs' statutory and constitutional claims. We also affirm the summary judgment on Plaintiffs' false imprisonment claim insofar as it arises out of Ryan's and Foster's incarceration prior to *McDonald II*, but reverse the remainder of the judgment and remand for further proceedings consistent with this decision.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICK IRVINE, Presiding Judge

/s/
MICHAEL J. BROWN, Judge