IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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CHARLES PICKARD,
*Plaintiff/Appellant*,

*v.*

THE CITY OF TUCSON AND THE TUCSON POLICE DEPARTMENT,
*Defendants/Appellees*.

No. 2 CA-CV 2016-0027
Filed January 10, 2017

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

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Appeal from the Superior Court in Pima County
No. C20143287
The Honorable Richard S. Fields, Judge

**AFFIRMED**

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COUNSEL

Todd Hale Law, PLLC, Tucson
By Todd E. Hale
*Counsel for Plaintiff/Appellant*

Michael G. Rankin, City Attorney
By Michelle Saavedra, Principal Assistant City Attorney, Tucson
*Counsel for Defendants/Appellees*

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**MEMORANDUM DECISION**

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

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H O W A R D, Presiding Judge:

**¶1** Charles Pickard appeals from the trial court's grant of summary judgment in favor of the City of Tucson on his claim for unpaid wages based on A.R.S. § 23-351 and breach of contract. He argues the court erred because the statute of limitations did not bar his action and he had a valid basis for both of his claims. Because Pickard's action is time-barred, we affirm.

**Factual and Procedural Background**

**¶2** "We view the facts in the light most favorable to the party against whom summary judgment was entered." *Thompson v. Pima County*, 226 Ariz. 42, ¶ 2, 243 P.3d 1024, 1026 (App. 2010). In 2008, Pickard was promoted from the position of Officer with the Tucson Police Department to a Police Hazardous Devices Technician with the bomb squad. Although his overall hourly wage increased after taking into account factors like hazard pay, Pickard was downgraded from a Merit Step 5 to a Merit Step 4, which resulted in a lower base pay. The City's human resources department told Pickard that calculation was correct because, after removing the "assignment pay" he had been earning based on his pre-promotion position, his base pay fell within the Merit Step 4 pay scale.

**¶3** In July 2012, Pickard learned another officer had retained his pre-promotion merit step level after being promoted. A representative from the Tucson Police Officer's Association (TPOA) informed Pickard he should have retained his merit step post-promotion, while the City continued to assert his merit step had been properly calculated. Pickard questioned the City again and, in June 2013, the City agreed to increase Pickard's base pay to a Merit Step 5 and reimburse him the difference for the prior twelve months.

**¶4** Pickard sued the City in June 2014, alleging a wage violation pursuant to § 23-351 and breach of contract claim. The City moved for summary judgment, arguing that Pickard's action was barred by the relevant time limitation, that his claim did not actually fall under § 23-351, and that no employment contract existed between Pickard and the City. Following an oral argument at which Pickard did not appear, the trial court granted the City's motion "in its entirety." Pickard timely appealed. We have jurisdiction over Pickard's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

**Discussion**

**¶5** Pickard argues the trial court erred in granting summary judgment based on A.R.S. § 12-821, the statute of limitations for claims against public entities, because when his claim accrued is a question of fact for the jury to determine. On appeal from summary judgment, we determine de novo whether the court correctly applied the law and whether there are any genuine disputes as to any material fact. *Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 711-12 (App. 2012). When a cause of action accrued is generally a question of fact for the jury, but may be decided as a matter of law if the record shows when the plaintiff was "unquestionably . . . aware of the necessary facts underlying their cause of action." *Thompson*, 226 Ariz. 42, ¶ 14, 243 P.3d at 1029.

**¶6** Section 12-821 provides that an action against a public entity must be brought within "one year after the cause of action accrues." A cause of action under § 12-821 "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B); *see also Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, ¶ 7, 311 P.3d 1075, 1078 (App. 2013). The plaintiff "must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury," but "need not know all the facts underlying the cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d 951, 961 (1998) (emphasis omitted). Put another way, "[t]he core question" of when a claim accrued is not when the plaintiff was

conclusively aware he had a cause of action against a particular party, but instead when "a reasonable person would have been on notice to investigate." *Walk v. Ring*, 202 Ariz. 310, ¶¶ 23-24, 44 P.3d 990, 996 (2002).

**¶7** The basis of Pickard's claim is that the City erroneously downgraded him from a Merit Step 5 to Step 4 after his promotion. Pickard was aware that he had been downgraded when he was promoted in 2008. And in 2012 he was aware that another officer retained his pre-promotion merit step level and was told by a TPOA representative that he, too, should have retained his merit step after his promotion. Pickard was thus put on notice to investigate his claim, at the very latest, in 2012, making his June 2014 complaint untimely. *See* §§ 12-821, 12-821.01; *see also Walk*, 202 Ariz. 310, ¶ 24, 44 P.3d at 996. The trial court did not err in granting summary judgment to the City on this issue.

**¶8** Pickard argues, however, that the City should be equitably estopped from relying on the statute of limitations as a defense. Pickard bears the burden of showing the elements of equitable estoppel. *Lowe v. Pima County*, 217 Ariz. 642, ¶ 34, 177 P.3d 1214, 1222 (App. 2008). Those elements are (1) specific promises by the City that were intended to prevent him from filing an action; (2) those promises actually induced him to forbear filing the action; (3) the City's conduct would have induced a reasonable plaintiff to forebear filing the action; and (4) he filed the action within a reasonable amount of time after termination of the conduct warranting estoppel. *Nolde v. Frankie*, 192 Ariz. 276, ¶ 20, 964 P.2d 477, 482 (1998).

**¶9** Pickard argues the City's assertions from 2008 to 2012 that he was being paid correctly, and then in 2012 and 2013 that it was "working on it" and "would get back to him" induced him to forestall filing an action. But the City's repeated statements of its position, directly contrary to Pickard's and the TPOA representative's position, are not the sort of statements that could be intended to or reasonably should result in Pickard delaying the filing of an action. *See Roer v. Buckeye Irrigation Co.*, 167 Ariz. 545, 548, 809 P.2d 970, 973 (App. 1990) ("non-committal acts" cannot induce reasonable person to believe defendant will rectify the problem). Indeed, the City has never admitted it miscalculated Pickard's merit

step, but instead stated the post-promotion retention of a merit step was a policy decision made after Pickard's promotion and, "out of fairness and equity," the City decided to raise Pickard to a Merit Step 5 in 2013.

**¶10** Additionally, in order to invoke equitable estoppel against a public entity, Pickard was required to demonstrate "absolute, unequivocal, and formal state action." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, ¶ 36, 959 P.2d 1256, 1268 (1998). Further, he was required to show that any statements were made by "a person authorized to act in the area under consideration." *Id*. Pickard, however, did not provide the City's actual statements[1] or indicate who had made those statements. He therefore cannot show that they were made with the required degree of formality or by a person authorized to take action. *See id.* Accordingly, Pickard has failed to show the City is estopped from asserting the statute of limitations as a defense.[2]

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[1]Pickard's opening brief refers to exhibits he claims were submitted below with his response to the City's motion for summary judgment and which contain copies of the City's correspondence. Those exhibits, however, were not transmitted as part of the record on appeal. In his motion to supplement the record, Pickard argued this omission was incorrect and he had, in fact, submitted the exhibits below and they had been considered by the trial court. The City disputed this contention and argued the exhibits had never been properly filed. We requested that the court clarify whether the disputed exhibits had, in fact, been admitted. Ariz. R. Civ. App. P. 11(g)(2). The court stated that Pickard's exhibits had not been properly admitted and, moreover, the content of the exhibits were not "familiar." Because Pickard's exhibits were not admitted below, they are not a part of the record on appeal and we do not consider them. *See LaWall v. Pima Cty. Merit Sys. Comm'n*, 212 Ariz. 489, n.3, 134 P.3d 394, 396 n.3 (App. 2006); *see also* Ariz. R. Civ. App. P. 11(a).

[2]Because Pickard's claim was time-barred by § 12-821, we need not address his other argument that he presented valid claims for a wage violation under § 23-351 and for breach of contract.

## Disposition

**¶11** For the foregoing reasons, we affirm the trial court's judgment.