

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JIM COLLINS,
Plaintiff/Appellant,

v.

JASMINE SEARS, DANIEL KASPER, JARED BROCK, DANIELLE BLALOCK,
JUDE UDEOZOR, NINA AMELI, JOHN COSTANZA, JENNIFER SEDLER,
AUSTEN THOMPSON, TORBET MCNEIL, DUSTIN TRAN, MARQUEZ JOHNSON,
SEJIN CHUNG, VISHNU VIJAYAKUMAR, RAUL ITURRALDE GONZALEZ,
AND RAHUL KUMAR BHADANI,
Defendants/Appellees.

No. 2 CA-CV 2019-0082
Filed February 27, 2020

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pima County
No. C20181625
The Honorable Brenden J. Griffin, Judge

**AFFIRMED IN PART; REVERSED IN PART;
REMANDED**

COUNSEL

Jim Collins, Tucson
In Propria Persona

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Mark Brnovich, Arizona Attorney General
By Jason D. Corley, Assistant Attorney General, Tucson
*Counsel for Defendants/Appellees Sears, Kasper, Thompson, Johnson, Bhadani,
Ameli, and Tran*

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Jim Collins appeals the trial court’s dismissal of his claims against sixteen fellow graduate students at the University of Arizona, arguing, among other things, that the court improperly ruled that his claims were barred because of his failure to comply with Arizona’s notice of claim statute. We conclude that the trial court erred in dismissing his claims on that basis. But because the court dismissed some claims for other reasons that Collins does not challenge, we reverse only the trial court’s dismissal of his state-law claims and federal procedural due process claim, and otherwise affirm.

Factual and Procedural Background

¶2 In April 2018, Collins, a graduate student at the University of Arizona, sued sixteen other students, alleging various harassing and defamatory acts arising out of Collins’ and the students’ membership in the school’s Graduate and Professional Student Council (GPSC).¹ Collins asserted state law claims including libel, slander, intentional infliction of emotional distress, civil conspiracy, and negligence.

¶3 In May, the state filed a motion to dismiss for failure to state a claim on behalf of the defendants, arguing that Collins had failed to serve each defendant a required notice of claim pursuant to A.R.S. § 12-821.01, Arizona’s notice of claim statute. *See* Ariz. R. Civ. P. 12(b)(6) (establishing defense for “failure to state a claim upon which relief can be granted”). According to the state, the GPSC was an officially authorized entity of the

¹Collins initially included the GPSC as a defendant but voluntarily dismissed his claims against the GPSC soon after filing the complaint.

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University of Arizona, and by extension the Arizona Board of Regents and the state. The state argued that the defendants were therefore public employees when they acted as members of the GPSC. The state concluded that because the complaint alleged actions by the defendants within the scope of their officially authorized GPSC positions, Collins was required to serve a notice of claim on each of the defendants.

¶4 Collins opposed the motion, disputing the state's contention that the students were public employees, and arguing that even if they were, the acts he had alleged occurred outside the scope of that employment. Shortly after the state filed its motion, Collins filed an amended complaint, which included new federal-law claims under the First and Fourteenth Amendments and 42 U.S.C. §§ 1983 and 1985.

¶5 At the motion hearing in August, the court dismissed Collins' complaint, finding that the defendants were public employees under § 12-821.01. But the court allowed Collins to file an amended complaint to allege facts showing that the defendants had acted outside the scope of their GPSC positions. And because the court made its decision without considering the amended complaint Collins had already filed, the court allowed Collins to file supplemental briefing to address how the amendments prevented dismissal.

¶6 Later in August, Collins filed a second amended complaint, which the parties agreed to treat as the operative complaint in the case. In September, the state again filed on behalf of the defendants a motion to dismiss for failure to state a claim, repeating its contention that Collins could not be granted relief because he had failed to serve notices of claims. The state also argued that the allegations supporting the state law claims were either too conclusory to state a claim or did not rise to the level of tortious conduct and that the federal law claims were either too conclusory or the conduct described was insufficient to support the claims. Finally, the state argued that many of the claims were time-barred or should be dismissed because they had been raised by Collins in other cases.

¶7 Before the motion hearing, the state moved to withdraw its representation of the students other than Jasmine Sears and Daniel Kasper, acknowledging that its previous representation of the other students had been inappropriate because it had not obtained their consent for representation. At the motion hearing in December, the trial court dismissed Collins' state law claims against Sears and Kasper with prejudice, finding again that as members of the GPSC they were public employees for purposes of the notice of claim statute. The court also dismissed without

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prejudice the federal claims against Sears and Kasper, allowing Collins to attempt to remedy those claims in an amended complaint. The court did not rule as to the other defendants, however, because they had appeared only via the state's unauthorized representation. Because Collins had been misled to believe that the other defendants had voluntarily appeared via the state's representation, the court granted Collins ninety days to serve process on them.

¶8 In January 2019, Collins filed a third amended complaint, and the state moved on behalf of Sears, Kasper, and five other defendants to dismiss all remaining claims for failure to state a claim.² At an April 2019 hearing limited to the remaining federal claims against Sears and Kasper, the trial court dismissed Collins' third amended complaint against them, stating

I am going to grant the Motion to Dismiss and I'm doing it for a number of reasons. I think the 1983 claims, first of all, are not plead specifically enough. Even if they were the 14th Amendment substantive due process claim, I think there's no underlying protected property right here. We're talking about running for political office and benefits that are incidental to that. There's no—I don't think that gives a property right, no real expectation of a property right, and I don't read anything that would shock the conscience.

In terms of the 14th Amendment procedural due process right, I think there was a State post-deprivation remedy here, in particular the Notice of Claim statute that was not followed. I don't see a free speech claim. I see allegations that are vague and tenuous that rise to the level of being interrupted. The plaintiff has conceded that he did not allege a

²The five who joined in the motion were defendants Bhadani, Thompson, Johnson, Ameli, and Tran. On April 5, 2019, the trial court dismissed without prejudice the nine other defendants named in the complaint—Brock, Blalock, Udeozor, Costanza, Sedler, McNeil, Chung, Vijayakumar, and Gonzalez—under Rule 4(i), Ariz. R. Civ. P.

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claim for running for office and a conspiracy claim under the 1985.

So for all those reasons and the reasons also stated in the State's motion, the Motion to Dismiss is granted.

The court denied the defendants' motion to dismiss the claims with prejudice, reserving judgment on Collins' motion to file a fourth amended complaint, which he had just filed. Later that month, the court denied that motion and dismissed all Collins' remaining claims against Sears, Kasper, and the five other students with prejudice, certifying its ruling as a final, appealable order. Collins timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

Motion to Dismiss

Dismissal for failure to serve notices of claims

¶9 Collins appeals the trial court's rulings dismissing his claims for failure to state a claim, arguing the trial court erroneously concluded that the defendants were protected by the notice of claim statute. We review de novo dismissal of a complaint for failure to state a claim. *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, ¶ 9 (2016). In reviewing dismissal for failure to state a claim, we "assume all the facts alleged in the complaint are true," and do not affirm "unless satisfied as a matter of law that [the plaintiff] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Republic Nat'l Bank of N.Y. v. Pima County*, 200 Ariz. 199, ¶¶ 2, 10 (App. 2001).

¶10 To bring a claim against a "public entity, public school or a public employee," a person must serve notice of the claim on the public entity, public school or public employee within 180 days of its accrual. § 12-821.01. An assertion that the plaintiff has not complied with the notice of claim statute is an affirmative defense, *Lee v. State*, 225 Ariz. 576, ¶ 12 (App. 2010), and therefore the defendant carries the burden of so demonstrating, see *Pfeil v. Smith*, 183 Ariz. 63, 65 (App. 1995) ("In a civil action, . . . the defendant has the burden of proving an affirmative defense."). To meet this burden, the defendant must show, among other things, entitlement to a notice of claim by virtue of being a "public entity, public school or a public employee." § 12-821.01. A "public employee" is

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“an employee of a public entity,” A.R.S. § 12-820(6),³ and “employee” includes “an officer, director, employee or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does not include an independent contractor.” § 12-820(1).

¶11 Although the parties dispute whether the defendants were public employees when acting as members of the GPSC, the state effectively acknowledges that this question turns on whether the GPSC members derived authority to act from the university. The state contends that the GPSC derives its authority to act from the board of regents’ powers.⁴ Collins characterizes the GPSC as a student-created association with no authority derived from the university or board of regents and no connection to the school’s “official” student government body.

¶12 Nothing in the undeveloped record here conclusively establishes whether the GPSC members acted under authority conferred by the university or board of regents. Yet in ruling that the defendants were entitled to notices of claims, the trial court resolved this factual dispute in the defendants’ favor. In ruling on a motion to dismiss for failure to state a claim, “a court does not resolve factual disputes between the parties on an undeveloped record.” *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 46 (2012). To

³“Public entity’ includes this state and any political subdivision of this state.” § 12-820(7). “‘State’ means this state and any state agency, board, commission or department.” § 12-820(8).

⁴The state invites us, as it did the trial court, to take judicial notice of the GPSC’s page on the university’s website as proof that the defendants’ authority to act derived from the university. On appeal, the state adds several additional web pages for our consideration, citing *Jarvis v. State Land Dep’t*, 104 Ariz. 527, 530 (1969), for the proposition that we may take judicial notice of public records of state agencies. *Jarvis* does not establish that a court may take judicial notice of any fact found on a state agency website, however. Rather, a court may take judicial notice only of “a fact that is not subject to reasonable dispute.” Ariz. R. Evid. 201(b). The accuracy of the content within the web pages proffered here is subject to reasonable dispute. For example, Collins dismisses information on the GPSC’s page as “nothing more than an advertisement written by the students themselves to make their organization sound important” – just one plausible reason of many why information on such a web page might be inaccurate. We therefore decline to take judicial notice of any of the proffered pages.

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the extent introduction of information outside the pleadings⁵ converted a motion to dismiss to a motion for summary judgment, *see* Ariz. R. Civ. P. 12(d); *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, ¶ 8 (App. 2010), the court's resolution of this factual dispute in the defendants' favor was still erroneous, given the lack of anything in the record conclusively establishing the GPSC members as public employees, *see Pritchard v. State*, 163 Ariz. 427, 432-33 (1990) (dismissal and summary judgment inappropriate where whether plaintiff complied with the notice of claim statute hinges on disputed issue of fact); *see also Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 17 (App. 2008) (on summary judgment, evidence viewed in light most favorable to non-moving party and all justifiable inferences drawn in that party's favor); *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, ¶ 12 (App. 2010) ("Summary judgment is not intended to resolve factual disputes and is inappropriate if the court must . . . choose among competing inferences."). Therefore, the court erred in dismissing Collins' claims for failure to serve notices of claims.

Dismissal on other grounds

¶13 The trial court dismissed various federal claims on several grounds other than Collins' failure to serve notices of claims, and Collins did not challenge the court's dismissal on those grounds in his opening brief, waiving any claim of error for dismissal on those bases. *See State v. Moody*, 208 Ariz. 424, n.9 (2004) (failure to argue claim in opening brief usually constitutes abandonment and waiver). In particular, the court dismissed on other, independent grounds (1) substantive due process claims under 42 U.S.C. § 1983 and the Fourteenth Amendment; (2) claims under § 1983 and the First Amendment; and (3) conspiracy claims under 42 U.S.C. § 1985. We therefore do not disturb the court's dismissal of these claims. Collins' procedural due process claims under § 1983 and the Fourteenth Amendment were the only federal claims not dismissed on other, independent grounds; to dismiss those claims, the court relied on its erroneous ruling regarding failure to file notices of claims.⁶

⁵In dismissing Collins' claims, the trial court took judicial notice of the websites proffered by the state. Without deciding whether the court's action in doing so was improper, we remind the trial court on remand that it may not take judicial notice of facts subject to reasonable dispute. *See* Ariz. R. Evid. 201(b); *see also supra* n.3.

⁶Collins contends, in a conclusory manner and without citation to authority, that the trial court abused its discretion in failing to grant his

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Disposition

¶14 We reverse the trial court’s dismissal of Collins’ state-law claims and federal procedural due process claim. We affirm the trial court’s dismissal of the other federal claims. We remand for further proceedings consistent with this decision.

motion to remedy his federal claims in a fourth amended complaint. We do not consider this undeveloped and unsupported argument. *See Boswell v. Fintelmann*, 242 Ariz. 52, n.3 (App. 2017) (citing Ariz. R. Civ. App. P. 13(a)(7)) (unsupported, conclusory arguments waived). Nor do we consider Collins’ argument, similarly lacking in citation to authority, that the court erred in granting the state’s motion to withdraw representation. *See id.* While authorities may be found in trial court argument Collins “incorporated herein by reference,” argument may not be incorporated by reference in appellate briefs. *See Lake Havasu City v. Ariz. Dep’t of Health Servs.*, 202 Ariz. 549, n.4 (App. 2002).