COUNTY SUPERVISORS ASSOCIATION

County Governance Authority

Kent Volkmer, Former Pinal County Attorney
Chris Keller, Chief Civil Deputy Pinal County

County Governance Authority

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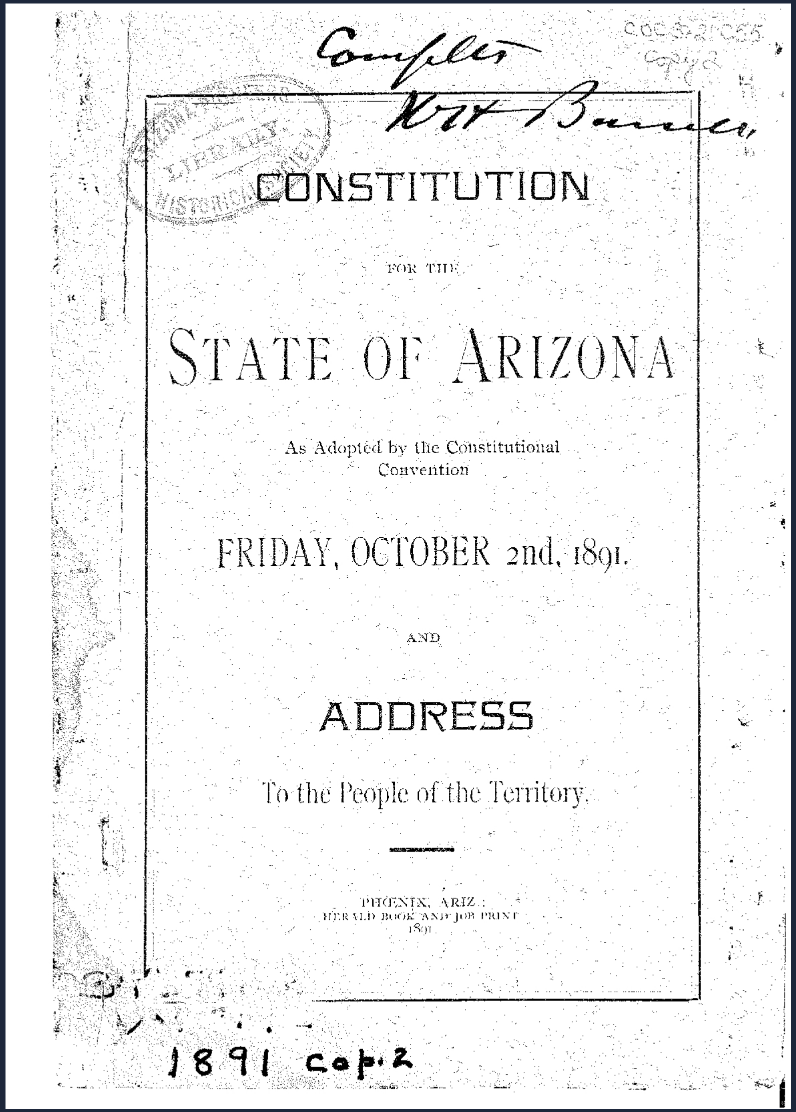
County Background


CONSTITUTION

FOR THE

STATE OF ARIZONA

As Adopted by the Constitutional Convention

FRIDAY, OCTOBER 2nd, 1891.

AND

ADDRESS

To the People of the Territory.

PHOENIX, ARIZ.:
HERALD BOOK AND JOB PRINT
1891

“Arizona Counties… are **separate legal entities**, whose power is derived from different articles of the Arizona Constitution and from different statutes.”

Home Builders Ass’n of Central Arizona vs. City of Maricopa,
215 Ariz. 146, 158 P.3d 869 (App. 2007)

Counties are "**created by the legislature**… for the purpose of exercising a certain portion of the general powers of the government in specified localities."

Asss'd Dairy Products vs. Page
68 Ariz. 393, 396, 206 P.2d 1041, 1043 (1949)

County Background

"Boards of supervisors of the various counties of Arizona have **only such powers as have been expressly or by necessary implication delegated** to them by the state legislature."

Home Builders Ass'n of Central Arizona vs. City of Apache Junction,198 Ariz. 493, 11 P.3d 1032 (App. 2000)

The question of whether authority exists for the county to act

"must be approached from the affirmative, that is, **what constitutional or statutory authority can the country rely upon** to support its questioned conduct?"

Maricopa County v. Black,
19 Ariz. App. 239, 241, 506 P.2nd 279, 281 (1973)

The **absence of a statutory prohibition does not mean the county has inherent authority** to engage in certain conduct.

Hancock v. McCarroll,
188 Ariz. 492, 488, 937 P.2nd 682, 688 (1996)

County Powers

Powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law.

It has the power to:

- Sue and be sued
- Purchase and hold lands within its limits
- Contract for and purchase personal property necessary to exercise its powers
- Use or dispose of property
- Levy and collect taxes as authorized by law
- **Determine the budgets of all elected and appointed county officers**

County Powers

A.R.S. § 11-251 enumerates 62 powers of the board, and other statutes throughout Title 11 list additional subjects the board may address.

Examples of Specific Powers:

Supervise official conduct of all county officers and…see that such officers faithfully perform their duties…" *(A.R.S. § 11-251(A)(1))*

In the exercise of its supervisory authority **the board can "refuse to fund inappropriate activities"** or coercively "use its power to withhold approval for capital expenditures, salary' increases and the like."

United States v. Maricopa County,
151 F. Supp. 3rd 998, 1015 (D. Ariz. 2015)

"County exercises supervision of all county officers…inasmuch as the Sheriff is a county officer…**the County exercises supervision of the official conduct of the Sheriff**. However, the County, having no right of control is not responsible for the Sheriff's torts."

Fridena vs. Maricopa County,
18 Ariz. App 257, 504 P.2d 58 (Ariz.App 1972)

County Powers

A.R.S. § 11-251 enumerates 62 powers of the board, and other statutes throughout Title 11 list additional subjects the board may address.

Other Enumerated Powers in A.R.S. § 11-251

- Layout and maintain roads
- Levy taxes
- Fill vacancies in legislative and county offices
- Exercise legislative authority of counties
- Regulate bath houses
- Acquire land for roads, drainage ways and other public purposes
- Provide plans for employee benefits
- License, lease or sell county property

- **Fee for service authority** *(A.R.S. § 11-251.08)*
- **Economic development** *(A.R.S. § 11-254.04)*
- **Procurement procedures** *(A.R.S. § 11-254.01)*
- **Erect buildings, issue bonds** *(A.R.S. § 11-271, et seq.)*
- **Indigent medical care** *(A.R.S. § 11-952)*
- **Intergovernmental agreements** *(A.R.S. § 11-952)*
- **Animal control** *(A.R.S. § 11-1001, et seq.)*
- **Public health** *(A.R.S. § 36-787)*
- **Emergency management** *(A.R.S. § 26-301, et seq.)*

Under A.R.S. § 11-251.05 The Board of Supervisors may:

- "**Adopt, amend and repeal ordinances necessary** or proper to carry out the duties…"
- "**Prescribe punishment** by fine or imprisonment, or both, for violation of an ordinance…"
- Public **hearing required** for any ordinance
- May apply to **unincorporated and incorporated areas absent a conflict** or state regulation.

Caveat:

- Ordinance **cannot conflict or be inconsistent with the state law**
- Must be **necessary and proper** to carry out county's duties
- The subject of an ordinance must be **within the "duties, responsibilities and functions" of the county**

An act is ministerial where the law **requiring it to be performed,** prescribes the time, manner, and occasion of its performance **with such certainty that nothing remains for judgement or discretion.**

Magma Copper Co. v. Arizona State Tax Commission,
67 Ariz. 77, 85, 191 P.2d 169, 174 (1948)

Examples of Ministerial Obligations

- Setting independent fire districts, school districts, community College tax rates every year;
- Canvassing election

County Powers

The Board of Supervisors may act as the Board of Directors over certain special taxing districts

- Flood Control District
- Jail District
- Library District
- Public Health Services District
- Sanitary District
- County Improvement District

Relationship with Other Elected Officials

The board of supervisors has the **power to determine the budgets of all elected and appointed county officers** enumerated under A.R.S. §11-401 pursuant to A.R.S. § 1-201(A)(6).

Caveat

So long as the board **does not prevent** the court, county elected official **from being able to carry out their legal obligations.**

Lockwood v. Board of Supervisors of Maricopa County,
80 Ariz. 311, 297 P.2nd 356 (1956)

Relationship with Other Elected Officials

"… the board of supervisors **may control the purchase and operation of automobiles used by the court.** This assumes, of course, that **such control does come within the orbit of hampering action that would prevent the court from operating** as contemplated by juvenile code. The board of supervisors has the power to make orders concerning the use of county property and to prescribe adequate identification thereof so long as its action is not arbitrary." *(A.R.S. § 11-201)*

Lockwood v. Board of Supervisors of Maricopa County, 80 Ariz. 311, 297 P.2d 356 (1956)

Courts have held the necessity of these expenses is left to the discretion of the board of supervisors.

"This court is not a super-board of supervisors and, in the absence of statutes or constitutional provisions mandating otherwise, **we are not going to substitute our judgment for that of the board of supervisors**."

Gregory v. Thompson,
159 Ariz. 512, 515, 768 P.2d 674, 676 (1989)

The Board also has the overarching responsibility for **compliance with laws that prohibit spending for a purpose not included in the budget** or "in excess of the amount stated for each purpose in the finally adopted budget for that year." *(A.R.S. § 42-17106)*

- It is difficult to image how those legal requirements could be met if elected county officials independently made their own budgets and controlled their own spending.

Sumner v. Lunt, et al., Superior Count Graham County, CV202300024 (3/20/2024)

Relationship with County Attorney

County Attorney Role

- Legal advisor to Board *(A.R.S. § 11-532(9))*
- Attends meetings
- Opposes claims
- Gives written opinions to county officers

If actions are done in good faith on written opinion of County Attorney, you are not personally liable *(A.R.S. § 38-446)*

Board is vested with final authority to **"direct and control" and "compromise" actions where county is a party** *(A.R.S. § 11-251.14)*

Board may "employ outside counsel to represent and advise the Board regarding whether county attorney has one or more conflicts of interest with the board."

Romley v. Daughton,
225 Ariz. 521, 527 (App. 2010)

The board lacks authority to hire private legal counsel to **ADVISE** it and other county officers or employees except to the extent necessary or advisable to employ counsel **IN ADDITION TO** county attorney.

Board of Supervisors of Maricopa County v. Woodall,
120 Ariz. 379, 586 P.2nd 628 (1978)

What if Board disagrees with County Attorney on strategy/advice? (i.e. "lack of harmony")

- Courts have determined that "lack of harmony" means "**a disagreement about legal strategy in a particular case, not some general disharmony** in the personal relationship between the County Attorney on one hand and members of the Board on the other." (*Romley v. Daughton)*

- **The Board determines** whether a "lack of harmony" exists, not the County Attorney

What is executive session and the County Attorney's role as enumerated in A.R.S. § 38-431.03?

- Personnel matters – hire, demote, salary, etc.
- Records/information exempt from public disclosure
- Legal advice
- Pending/contemplated litigation
- Contracts subject to negotiation
- Settlement discussions
- Dealing with employee organizations
- International/interstate negotiations
- Purchase, sale, lease of real property
- Security plans/assessments

Common Misconceptions

- I can hire whomever I want
- I can fire/reorganize/discipline however and whoever I want (*Hounshell v. White*)
- I can purchase whatever I want if I don’t exceed my budget
- I can execute contracts with whomever I want
- If I copy the county attorney on email/correspondence it is protected from disclosure
- If I use my private phone/computer on county matters I don’t have to disclose the content

Prohibitions to be Aware of

- Misconduct in office by county supervisor *(A.R.S. § 11-223)*
- Nonfeasance in public office *(A.R.S. § 38-443)*
- Use of county resources to influence elections *(A.R.S. § 11- 410)*
- Asking or receiving an illegal gratuity or reward *(A.R.S. § 38-444)*
- Nepotism *(A.R.S. § 38-481)*
- Sale of appointment to public office *(A.R.S. § 38-466)*
- Pecuniary interest of supervisor *(A.R.S. § 11-222)*
- Effect of personal interest of county officer *(A.R.S. § 11-627)*
- Conflict of interest *(A.R.S. § 38-501, 38-503)*

Recommendations for Success

- Get familiar with your county's policies and procedures
- Board meeting policies
- Internet/phone/social media/vehicle
- Records retention/Public records policy
- Discrimination/leave/code of conduct
- Gift policy
- Discipline/HR
- Be wary of lobbyist bearing gifts
- When in doubt - recuse or disclose to avoid perception conflict of interest

KeyCite Yellow Flag - Negative Treatment
Distinguished by Span v. Maricopa County Treasurer, Ariz.App. Div. 1, February 19, 2019

18 Ariz.App. 527
Court of Appeals of Arizona, Division 1, Department A.

Christine FRIDENA, a widow, Appellant,
v.
MARICOPA COUNTY, a political subdivision of the State of Arizona, and J. Robert Stark, Barney Burns and Henry H. Haws, as members of and constituting the Board of Supervisors of Maricopa County, John Mummert, Sheriff of Maricopa County, and Georgiana Mummert, his wife, Robert H. Renaud and Margaret Renaud, husband and wife, Appellees.

No. 1 CA-CIV 1641
|
Dec. 14, 1972.

Synopsis
Tort action arising out of issuance and service of writ of restitution. The Superior Court, Maricopa County, Cause No. C—235301, Irwin Cantor, J., granted defendants' motions for summary judgment and plaintiff appealed. The Court of Appeals, D. L. Greer, Superior Court Judge, held that where court, on May 20, made minute order settling and approving judgment in forcible entry and detainer proceeding but judgment was not entered by clerk until May 21, writ of restitution issued May 28 was not premature notwithstanding requirements that writ shall not issue until expiration of five days after rendition of judgment and intervening Saturday and Sunday could not be counted in computing time. The Court further held that summary judgment record created fact issues as to certain claims against sheriff.

Affirmed in part and reversed in part.

Donofrio, did not participate.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (15)

[1] **Counties** ⚩ Acts of officers or agents
Public Employment ⚩ Law enforcement personnel
County having no right of control over sheriff or his deputies in service of writ of restitution could not be liable under doctrine of respondeat superior for tortious conduct of sheriff or deputies in serving writ. A.R.S. §§ 11–251, subsec. 1, 11–401, subsec. A, par. 1.

26 Cases that cite this headnote

[2] **Forcible Entry and Detainer** ⚩ Restitution
Time ⚩ Judgment and execution
Where court, on May 20, made minute order settling and approving judgment in forcible entry and detainer proceeding but judgment was not entered by clerk until May 21, writ of restitution issued May 28 was not premature notwithstanding requirements that writ shall not issue until expiration of five days after rendition of judgment and intervening Saturday and Sunday could not be counted in computing time. A.R.S. § 12–1178, subsec. C; 16 A.R.S. Rules of Civil Procedure, rules 6(a), 58(a).

1 Case that cites this headnote

[3] **Judgment** ⚩ Necessity and nature in general
Judgment ⚩ Proceedings for entry
"Entry of judgment" and "rendition of judgment" are not synonymous. 16 A.R.S. Rules of Civil Procedure, rules 6(a), 58(a).

[4] **Judgment** ⚩ Necessity and nature in general
Judgment in forcible entry and detainer was rendered when court entered minute entry ordering written judgments signed, settled and approved. A.R.S. § 12–1178, subsec. C; 16 A.R.S. Rules of Civil Procedure, rules 6(a), 58(a).

1 Case that cites this headnote

[5] **Forcible Entry and Detainer** ⚩ Execution and Enforcement of Judgment

Forcible entry and detainer statute provision that writ of execution shall not issue until five days after rendition of judgment controls over civil rule provision that judgment is not effective before filing with clerk. 16 A.R.S. Rules of Civil Procedure, rules 6(a), 58(a).

[6] **Forcible Entry and Detainer** ⚷ Restitution

Provision of forcible entry and detainer statute that writ of restitution may issue five days after rendition of judgment is substantive in nature and rule providing that judgment was not effective until filed with clerk could not supersede procedure outlined in statute. 16 A.R.S. Rules of Civil Procedure, rules 6(a), 58(a).

[7] **Summary Judgment** ⚷ Necessity

Where officer of tenant who had been evicted pursuant to writ of restitution issued against tenant brought tort action against landlord based on landlord's having directed deputy sheriffs to execute writ in illegal manner but officer did not controvert landlord's affidavit denying any complicity in service of writ landlord was entitled to summary judgment.

[8] **Forcible Entry and Detainer** ⚷ Wrongful dispossession

One in whose behalf writ of restitution is executed is not liable for manner in which it is executed if he did not direct its execution.

[9] **Forcible Entry and Detainer** ⚷ Restitution

Generally, in forcible entry and detainer action, officer executing writ of restitution should remove not only defendant but also remove his property to place for safekeeping.

[10] **Summary Judgment** ⚷ Torts; premises liability

Where officer of tenant who was evicted pursuant to writ of restitution issued against tenant brought tort action against sheriff for deprivation of use of her personal property, and officer made no allegations that sheriff did not take property into his possession and safely store it, sheriff was entitled to summary judgment.

[11] **Forcible Entry and Detainer** ⚷ Restitution

One who is privy to defendant in forcible entry and detainer action may be removed from premises by officers executing writ of restitution.

[12] **Summary Judgment** ⚷ Torts

Summary judgment record in action against sheriff by officer of tenant who claimed she was assaulted by deputies in execution of writ of restitution against tenant created fact issue as to officer's legal status and precluded grant of sheriff's motion for summary judgment.

1 Case that cites this headnote

[13] **Appeal and Error** ⚷ Witnesses and opinion evidence

Where there was no notation in trial court's record that trial judge took judicial notice of transcripts in criminal proceeding brought against plaintiff, it must be assumed that he did not do so.

1 Case that cites this headnote

[14] **False Imprisonment** ⚷ Effect of subsequent adjudications

Certified copies of criminal complaint and matters from city court indicating that trial was set for specified date and on that date bail was forfeited but without any indication that counsel for state and defendant who claimed she was never informed that she was required to appear before city court and had never entered any plea did not show any abandonment of criminal proceedings which would amount to admission by either side.

[15] **Summary Judgment** ⇔ Torts: premises liability

Summary judgment record in action against sheriff by officer of tenant who claimed that she was falsely arrested for obstructing justice by sheriff who was executing writ of restitution created fact issue precluding grant of sheriff's motion for summary judgment.

1 Case that cites this headnote

Attorneys and Law Firms

***528 **59** Miller & Haggerty, by Philip M. Haggerty, Phoenix, for appellant.

Jennings, Strouss & Salmon, by William R. Jones, Jr., and E. Lee, Phoenix, for appellees Maricopa County, Stark, Burns, Haws, and Mummert.

Val A. Cordova, J. Gordon Cook, Joseph B. Miller and John H. Seidel, Phoenix, for appellees Renaud.

D. L. GREER, Superior Court Judge.

Appellant Christine Fridena brings this appeal from a judgment granting defendants summary judgment in Maricopa County Superior Court. In her complaint plaintiff Fridena alleged several counts of tortious conduct by defendants in the issuance and service of a writ of restitution.

***529 **60** Defendant Robert H. Renaud previously brought an action of forcible entry and detainer against Physicians and Surgeons Hospital, Inc. The forcible detainer action was assigned Maricopa County Superior Court No. 222278. Plaintiff Fridena was not joined in the action. The case was tried to a jury before the Honorable William A. Holohan on 16 May 1969. At the close of the case the Court pronounced a directed verdict in favor of Renaud, finding the Physicians and Surgeons Hospital, Inc., guilty of forcible detainer. A minute entry was entered on May 16 reflecting the Court's pronouncement of verdict and findings.

A formal written judgment was presented to the trial judge on 20 May 1969. Simultaneously the following minute entry was entered:

'A form of judgment having been presented, the Court finds that there is a forceable detainer action and therefore, pursuant to the spirit of the statute made and provided in said cause that there is no necessity for said judgment to be lodged and it is

'ORDERED that the formal written judgment is signed, settled and approved this date.'

By the judgment, Renaud was granted possession of the premises and further granted judgment against the Physicians and Surgeons Hospital for rent due in the sum of $15,000 and: '. . . that a Writ of Restitution will issue out of this court in favor of the Plaintiff and against the Defendant five days after the date of this judgment if the Defendant has not surrendered the premises prior to that date.'

The judgment was delivered to the trial court's deputy clerk on said May 20, 1969. However, the filing stamp indicating filing not affixed until 21 May 1969. Thereafter with the Superior Court Clerk's office was on 28 May 1969 a writ of restitution was issued and executed. It is worded as follows:
'Whereas, the plaintiff above named, on the 20th day of May, 1969, recovered a judgment in the Superior Court of the State of Arizona in and for the County of Maricopa, against PHYSICIANS AND SURGEONS HOSPITAL, INC., an Arizona corporation, that he, the above-named Plaintiff, have restitution of the following described premises situated in the County of Maricopa, State of Arizona, to wit:

(Property description incorporated by reference thereto)

and that he recover from the said PHYSICIANS AND SURGEONS HOSPITAL, INC., an Arizona corporation, the sum of FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS for rent due and unpaid at the date of judgment.

'NOW, THEREFORE, you the said officer to whom this Writ is directed, are hereby commanded to cause the said PHYSICIANS AND SURGEONS HOSPITAL, INC., an Arizona corporation, to be forthwith removed from the said premises, and that you deliver the peaceable possession thereof to the said Plaintiff ROBERT H. RENAUD and that you maintain and defend his peaceable possession of said premises, and that out of the personal property of said PHYSICIANS AND SURGEONS HOSPITAL, INC., an Arizona corporation, you cause to be levied the rents aforesaid, together with the sum of ONE HUNDRED FIVE

AND 10/100 ($105.10) DOLLARS costs and that you return this Writ with your doings thereon.'

At the time the writ was executed, deputy sheriffs of Maricopa County physically removed plaintiff Fridena from the hospital premises and caused her arrest for obstructing justice during the process of removing her.

The case Sub judice was filed by Mrs. Fridena against Robert H. Renaud and Margaret Renaud, husband and wife (hereinafter ***530** ****61** referred to as 'Renaud'), John Mummert, the Maricopa County Sheriff, and his wife, Georgiana Mummert (hereinafter referred to as 'the Sheriff'), and Maricopa County, together with its Board of Supervisors (hereinafter referred to as 'the County'). Plaintiff alleges tortious conduct by the County in that:

1) The writ of restitution was prematurely issued and that the deputy sheriffs acting as agents of the County were negligent to plaintiff by failing to ascertain the legality of the writ;

2) That the County deprived the Plaintiff of the lawful use and benefit of her property; and

3) That, at the time the writ was served, the County committed an assault and battery upon Mrs. Fridena by 'laying hands upon her' which was not privileged by the terms of the writ;

4) That the County caused the arrest of Mrs. Fridena for obstructing justice while knowing or should have known that the charges were false;

5) That the above acts of the County subjected her to grave humiliation and were the direct cause of her severe emotional distress and that these acts were done for the purpose of said distress or with the knowledge that such distress would occur.

Plaintiff's complaint further alleges tortious conduct against Renaud in that he:

1) Caused the writ of restitution to be issued and served prematurely;

2) Directed the deputy sheriffs to execute the writ in the illegal manner as described in the allegations against the County.

The several defendants by their respective counsel filed general denials, then moved for summary judgment. Defendant Renaud's motion for summary judgment incorporated attached affidavits alleging that Renaud did not direct or advise the Maricopa County Sheriff in the manner of executing the writ nor instruct the Sheriff in the amount of force to be used and that he was not present at the time nor did he ratify or affirm the actions of the officers.

The County's motion for summary judgment incorporated a copy of a criminal complaint charging plaintiff with obstructing police officers in the performance of their duties. Plaintiff did not allege controverting facts but merely alleged facts concerning her arrest and incarceration in the City of Phoenix jail. Judge Irwin Cantor granted summary judgment on 13 October 1970. Appeal is taken from said judgment.

On appeal we are asked to review the decision of the trial court in granting summary judgment as to each of the allegations in the complaint.

[1] We are aware of the fact that there are numerous actions brought each year in this state against the Sheriff, his deputies, and the various counties. The State Supreme Court has never been called upon to determine whether a county is automatically liable for every tort committed by its deputies. The County exercises supervision of all county officers as provided by A.R.S. s 11—251, subsec. 1. Inasmuch as the Sheriff is a county officer under A.R.S. s 11—401 subsec. A, par. 1. the County exercises supervision of the official conduct of the Sheriff. However, in the instant case, the County, having no right of control over the Sheriff or his deputies in service of the writ of restitution, is not liable under the doctrine of Respondeat superior for the Sheriff's torts. 77 C.J.S. Respondeat Superior p. 319. In 57 Am.Jur. 2d, Municipal, etc., Tort Liability, Sec. 86 at pp. 97, 98, it is stated:

'When duties are imposed upon a county treasurer, or upon a board of county commissioners by law rather than by the county, the latter will not be responsible for their breach of duty or for their nonfeasance or misfeasance in relation to such duty. Furthermore, where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and ***531** ****62** agent does not exist and the maxim 'respondeat superior' does not govern.'

See also Moore v. Maricopa County, 11 Ariz.App. 505, 466 P.2d 56 (1970), wherein the Court of Appeals found no tort liability as to Maricopa County in the operation of a jail with the City of Tolleson for the reason that the County had no right to control. The motion for summary judgment was properly granted as to the County.

[2] The next question for review is whether the writ of restitution was prematurely issued. A.R.S. s 12—1178, subsec. C reads as follows:

'No writ of restitution shall issue until the expiration of five days After the rendition of judgment.' (Emphasis supplied)

Rule 58(a), Rules of Civil Procedure, 16 A.R.S., as amended, provides:
'Entry. All judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry, . . .'

Plaintiff argues that because the judgment was filed with the clerk's office on 21 May 1969 and the writ of restitution was issued and executed on 28 May 1969, the writ was issued on the fifth day after the judgment became effective under Civil Rule 58(a) and therefore was issued in violation of A.R.S. s 12—1178, subsec. C. Plaintiff includes in her time computation the omission of an intervening Saturday and Sunday as mandated by Civil Rule 6(a), Rules of Civil Procedure, 16 A.R.S.

We do not agree that the writ of restitution was issued prematurely.

[3] There are several cases from the Arizona Supreme Court which make it clear that 'entry of judgment' and 'rendition of judgment' are not synonymous. Moulton v. Smith, 23 Ariz. 319, 203 P. 562 (1922); Kinnison v. Superior Court, 46 Ariz. 133, 46 P.2d 1087 (1935); American Surety Co. v. Mosher, 48 Ariz. 552, 64 P.2d 1025 (1936).

In the American Surety Co. case just cited, the distinction is well drawn:
'The rendition of a judgment is the act of the court in pronouncing its judgment, and differs from the entry or filing of the judgment in that the former act is the declaration of the court from the bench announcing its decision, while the entry is the act of the clerk in writing it upon the records of the court. . . . rendition is generally, if not always, an oral act by the court from the bench, . . .' 48 Ariz. at 561, 562, 64 P.2d at 1029.

The case goes on to state that the proper method of showing the time of the rendition of the judgment is the minute entry which reflects the oral rendition.

[4] We hold, therefore, that the judgment in cause number C—222278 was rendered on 20 May 1969.

Although the cases cited were decided prior to the adoption of Civil Rule 58(a), we do not believe that this should alter our holding.

In Moore's Federal Practice (2nd Ed.) Vol. 6, s 54.02, p. 102 (1953), where the word 'judgment' is discussed as used in Federal Rules, Professor Moore points out that the distinction between 'rendition of judgment' and 'entry of judgment' must be kept in mind. He states:
'Rendition of judgment signifies the pronouncement or annunciation of the adjudication or judgment of the court, not the entry nor the recordation of the judgment.'

Since the adoption of Rule 58(a) we find no cases interpreting the effect of the word 'rendition' as used in A.R.S. s 12—1178, subsec. C. However, we find two cases which we believe are helpful in supporting our holding.

In Black v. Industrial Commission, 83 Ariz. 121, 317 P.2d 553 (1957), Justice Struckmeyer's dissent, concurred with by Justice Johnson, the distinction between **63 *532 'rendition' and 'entry' of judgment was again drawn. The majority's opinion made no disagreement with this distinction but disagreed with the conclusion reached by the dissent on other grounds. It is also material to note that the case involved the validity of a Nunc pro tunc order in a divorce case where the statutes involved made no reference to rendition of judgment and thus did not present the statutory-procedural conflict.

The second case we deem important is Jackson v. Sears, Roebuck & Co., 83 Ariz. 20, 315 P.2d 871 (1957). There, the timeliness of a writ of execution was in issue under A.R.S. s 12—1551, subsec. A which provided for the issuance of a writ of execution to enforce a judgment within five years 'after entry of the judgment.' The case recognized that the weight of authority and statutory trend in other jurisdictions did not require formal entry after pronouncement or rendition of judgment in order for valid execution to issue. It went on to hold, however, that in this state both the statute and Rule 58(a) made it mandatory that judgment be entered prior to execution.

[5] [6] Because the statute in the case at bar specifically refers to 'rendition', it is our opinion that the statute is controlling over the civil rule. We further believe that, because the statutory action of forcible entry and detainer is well recognized to have been adopted to provide a summary and speedy remedy for obtaining possession of premises illegally withheld, Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 167 P.2d 394 (1946); Heywood v. Ziol, 91 Ariz. 309, 372 P.2d 200 (1962), the procedural language of the statute is substantive in nature and an integral part of the right itself. Thus, Civil Rule 58(a) cannot be held to supersede the procedure outlined in the statute. Hinton v. Hotchkiss, 65 Ariz. 110, 174 P.2d 749 (1946).

The writ of restitution was not prematurely issued as the rendition of judgment on 20 May 1969 was more than five (5) days prior to the issuance of the writ on 28 May 1969.

[7] [8] Further, Renaud's affidavit denying any complicity in the service of the writ, in encouraging its service or ratifying the acts of the deputy sheriffs in its service was not controverted by any deposition, answers to interrogatories, admissions or affidavits submitted by plaintiff. Under these circumstances the plaintiff cannot rest on the mere allegations in her complaint. Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Patton v. Paradise Hills Shopping Center, Inc., 4 Ariz.App. 11, 417 P.2d 382 (1966); and Abernethy v. Smith, 17 Ariz.App. 363, 498 P.2d 175 (1972). Having failed to come forward with facts showing there was a genuine issue for trial, the remaining allegations as to the Renauds were properly dismissed on summary judgment. One in whose behalf a writ of restitution is executed is Not liable for the manner in which it is executed if he did not direct its execution. 35 Am.Jur.2d, Forcible Entry and Detainer, Sec. 53, p. 927 (1967). The summary judgment in favor of Renaud is affirmed.

[9] [10] The next question for review pertains to whether the complaint states a claim against the Sheriff for the deprivation of the use of plaintiff's personal property. Plaintiff argues that, even if her eviction was legal, she should have been given the opportunity to remove her personal property. Generally, in a forcible entry and detainer action, it has been held that an officer executing a writ of restitution should remove not only the defendant, but should also remove his property to a place for safekeeping. 36A C.J.S. Forcible Entry and Detainer s 75, p. 1045 (1961). There are no allegations in the pleadings to indicate the Sheriff did not take plaintiff's property into his possession and safely store it. Summary judgment as to these allegations is therefore affirmed.

[11] [12] [13] The next question for review is whether plaintiff's complaint alleges assault ***533** ****64** by the deputies in laying their hands on plaintiff in the execution of said writ. The Sheriff maintains on appeal that plaintiff was a vice-president of Physicians and Surgeons Hospital, Inc., and, therefore, had a possessory interest in the premises. It is clearly the law that one who is privy to the defendant in a forcible entry and detainer action may be removed therefrom by officers executing a writ of restitution. 36A C.J.S. Forcible Entry and Detainer s 75, p. 1046, and cases cited therein. There is no allegation of privity in the complaint and no allegation of such relationship in the affidavits attached to the motion for summary judgment. Therefore, it appears there is a genuine factual issue as to plaintiff's legal status at the time the writ was served. We hold that summary judgment should not have been granted the Sheriff on this claim and the judgment is reversed as to this claim. Appellant's opening brief refers to the transcript in a criminal action brought against Mrs. Fridena. Although plaintiff referred to these transcripts in her responding motion to the motion for summary judgment and again referred to them in the briefs before this Court, they are not a part of the record on appeal and we cannot consider them. Lawless v. St. Paul Fire and Marine Insurance Company, 100 Ariz. 392, 415 P.2d 97 (1966); Patton v. Paradise Hills Shopping Center, 4 Ariz.App. 11, 417 P.2d 382 (1966). Even had the transcripts been transferred to this Court, we would not have been able to consider them. There is absolutely no notation in the trial court's record that the trial judge took judicial notice of the transcripts and, therefore, it must be assumed that he did not do so. State v. Flowers, 9 Ariz.App. 440, 453 P.2d 536 (1969); Finger v. Beaman, 14 Ariz.App. 18, 480 P.2d 41 (1971).

Finally, we are asked to review the issue of false arrest and subjecting plaintiff to humiliation and emotional distress. From the pleadings, we are uncertain as to whether the plaintiff is alleging false arrest or malicious prosecution. Whichever the case may be, we believe that plaintiff has sufficiently pled that there was tortious conduct committed upon her arising out of the arrest for obstructing. While the Sheriff denies the tort, he admits that arrest occurred and that criminal charges were filed. Ignoring the references to the transcript in the Fridena criminal matter, the facts relating to this issue are the certified copies of the criminal complaint charging Mrs. Fridena with obstructing the deputies in the performance of their duty and the matters from city court indicating that the trial was set for 18 June 1969 and on that date bail was forfeited. The minutes do not indicate that counsel for the State and Mrs. Fridena were present and there is an affidavit by Mrs. Fridena that she was never informed that she was required to appear before the city court; that after her release on bond she made no further appearances in the city court and never entered a plea of any kind to the charge.

[14] [15] We reject the arguments of both plaintiff and the Sheriff that these facts show any type of abandonment of the criminal proceedings which would amount to an admission by either side. There is a genuine issue of material fact as to this count. Granting of summary judgment was improper and this case is remanded for further proceedings on this count.

As to the count alleging that the actions of the Sheriff subjected plaintiff to grave humiliation and caused severe emotional distress, summary judgment is affirmed except insofar as the claim charges humiliation and emotional distress relating to false arrest or malicious prosecution.

The case is affirmed in part, reversed in part and remanded to the trial court for further proceedings not inconsistent with this opinion.

STEVENS, P.J., and CASE, J., concur.

Opinion

NOTE: FRANCIS J. DONOFRIO, J., having requested that he be relieved from the consideration of this matter, D. L. GREER, a Judge of the Superior Court, was called to sit in his place.

All Citations

18 Ariz.App. 527, 504 P.2d 58

End of Document

Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. Span v. Maricopa County Treasurer MOST NEGATIVE 437 P.3d 881 , Ariz.App. Div. 1 TAXATION — Real Property. Property owner was not entitled to relief for unjust enrichment based on county's receipt of his payment to redeem property tax lien, following purchase...	Feb. 19, 2019	Case		—

United States v. Maricopa, County of

United States District Court, D. Arizona. • June 15, 2015 • 151 F.Supp.3d 998 (Approx. 71 pages)

151 F.Supp.3d 998
United States District Court, D. Arizona.

UNITED STATES of America, Plaintiff,
v.
MARICOPA, COUNTY OF, et al., Defendants.

No. CV-12-00981-PHX-ROS
Signed June 15, 2015

Synopsis

Background: United States brought action alleging that county and its sheriff engaged in pattern or practice of discriminatory police conduct directed at Latinos, in violation of Title VI of Civil Rights Act, Violent Crime Control and Law Enforcement Act, and Due Process and Equal Protection Clauses, and of retaliation against their critics, in violation of First Amendment. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Roslyn O. Silver, Senior Judge, held that:
1 action was not rendered moot by judgment against sheriff in private class action;
2 United States had standing to bring action;
3 United States was authorized to bring suit against county to enforce Title VII's prohibition against discrimination;
4 county was subject to liability under Title VI based on sheriff's actions;
5 application of non-mutual, offensive issue preclusion would not be unfair;
6 practice of making traffic stops of Latinos without reasonable suspicion violated Violent Crime Control and Law Enforcement Act;
7 state law privilege for state bar complaints did not preclude First Amendment retaliation claim; and
8 sheriff's purported voluntary cessation of retaliatory actions against his critics did not render case moot.

United States' motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (42)

1 Federal Civil Procedure
Standing is measured at time action is commenced.

1 Case that cites this headnote

170A	Federal Civil Procedure
170AII	Parties
170AII(A)	In General
170Ak103.1	Standing in General
170Ak103.2	In general; injury or interest

2 Federal Courts
Mootness doctrine prevents courts from ruling when issues presented are no longer live and therefor parties lack cognizable interest for which courts can grant remedy.

170B	Federal Courts
170BIII	Case or Controversy Requirement
170BIII(A)	In General
170Bk2108	Mootness
170Bk2110	Rights and interests at stake

3 Federal Courts

perform acts of retaliation, and he offered no facts showing that any fear or chilling his actions might have caused had permanently ended or abated since his claimed cessation. U.S. Const.Amend. 1.

More cases on this issue

118A	Declaratory Judgment
118AII	Subjects of Declaratory Relief
118AII(K)	Public Officers and Agencies
118Ak209	Counties and municipalities and their officers

[41] Injunction

Blanket injunctions to obey the law are disfavored. Fed. R. Civ. P. 65(d).

212	Injunction
212IV	Particular Subjects of Relief
212IV(E)	Governments, Laws, and Regulations in General
212k1250	Injunctions to enforce laws and regulations in general

[42] Federal Courts

When appellate court finds trial court abused its discretion by issuing overly broad injunctive order, it may strike those provisions dissociated from those acts that defendant has committed.

170B	Federal Courts
170BXVII	Courts of Appeals
170BXVII(L)	Determination and Disposition of Cause
170Bk3771	Modification

Attorneys and Law Firms

*1004 Edward G. Caspar, Jennifer Larissa Mondino, Jonathan M. Smith, Puneet Cheema, Brian Buehler, Paul Killebrew, Thomas Jackson Morse, Jr., U.S. Dept of Justice, Washington, DC, for Plaintiff.

Charles W. Jirauch, Richard K. Walker, Roger Stephen Owers, Walker & Peskind PLLC, Scottsdale, AZ, Dan K. Webb, Joel E. Connolly, Winston & Strawn LLP, Chicago, IL, John T. Masterson, Joseph John Popolizio, Lori Lea Voepel, William R. Jones, Jr., Justin Michael Ackerman, Jones Skelton & Hochuli PLC, Phoenix, AZ, for Defendants.

ORDER

Honorable Roslyn O. Silver, Senior United States District Judge

Before the Court are the parties' cross-motions for summary judgment (Doc. 332, 334, 345).

BACKGROUND

I. The Parties

Plaintiff the United States brought the present action alleging a pattern or practice of discrimination against Latinos in Maricopa County, Arizona by Defendants Joseph M. Arpaio ("Arpaio") and Maricopa County in violation of the Constitution and federal statutes. Defendant Arpaio is the Sheriff of Maricopa County and heads the Maricopa County Sheriff's Office ("MCSO"). As MCSO's chief officer, Arpaio directs law enforcement throughout Maricopa County. [1] He is responsible for MCSO's policies and operations, which include all facets of policing and prison administration. MCSO is a subdivision of Maricopa County. Maricopa County's primary governing body is the Board of Supervisors (the "Board"). The Board consists of five Supervisors, each of whom is elected from one of Maricopa County's five districts. Maricopa County determines the budgets and provides the funding for its subdivisions, including municipal courts, public schools, and law enforcement (i.e.MCSO). Maricopa County receives federal financial assistance from the United States, which it distributes to various county subdivisions, including MCSO.

II. The Prior Litigation: *Melendres v. Arpaio*

In 2007, private individual plaintiffs initiated a class action lawsuit against Arpaio, MCSO, and Maricopa County, alleging MCSO officers engaged in racial discrimination against Latinos "under the guise of enforcing immigration law." *Ortega–Melendres v. Arpaio*, 836 F.Supp.2d 959, 969 (D.Ariz.2011), *aff'd sub nom. Melendres v. Arpaio*, 695 F.3d 990 (9th Cir.2012) (hereinafter "*Melendres* "). The case focused on "saturation patrols," which were described as "crime suppression sweeps" in which officers saturate a given area and target persons who appeared to be Latino for investigation of their immigration status. (2:07–CV–02513–GMS, Doc. 26 at 10). Jose de Jesus Ortega–Melendres, the named plaintiff, was stopped in his vehicle by members of the MCSO's Human Smuggling Unit and detained without probable cause while officers investigated his immigration status, along with those of his passengers. *Melendres v. Arpaio*, 989 F.Supp.2d 822, 880 (D.Ariz.2013); (2:07–CV–02513–GMS, Doc. 26 at 17). The certified class of plaintiffs encompassed "[a]ll Latino persons who, since January 2007, *1005 have been or will be in the future stopped, detained, questioned or searched by [the defendants'] agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona." *Melendres v. Arpaio*, 695 F.3d 990, 995 (9th Cir.2012). *See also Ortega–Melendres v. Arpaio*, 836 F.Supp.2d 959, 994 (D.Ariz.2011).

In May 2009, Maricopa County requested a stay pending the outcome of the United States' investigation of Arpaio's practices, which had begun one month earlier. The United States opposed the motion, as did Arpaio, and the court denied the stay due to the timing and uncertainty regarding the outcome of the United States' investigation. *Melendres v. Maricopa Cnty.*, No. 07-cv-02513, 2009 WL 2515618, at *4 (D.Ariz. Aug. 13, 2009). Over the course of the *Melendres* litigation, the United States requested deposition transcripts and filed motions for protective orders regarding discovery. It also sought to transfer a 2010 Title VI enforcement action to the *Melendres* court.

In October 2009, the *Melendres* court granted a joint motion and stipulation to dismiss Maricopa County without prejudice. (2:07-CV-02513-GMS, Doc. 194). The stipulation stated, "Defendant Maricopa County is not a necessary party at this juncture for obtaining the complete relief sought." (2:07-CV-02513-GMS, Doc. 178).

On May 24, 2013, the *Melendres* court issued Findings of Fact and Conclusions of Law. *Melendres v. Arpaio*, 989 F.Supp.2d 822 (D.Ariz.2013) ("*Melendres* Order"). The court held MCSO's "saturation patrols all involved using traffic stops as a pretext to detect those occupants of automobiles who may be in this country without authorization," *Id.* at 826, and "MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws relating to immigration status violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 899. The court also found MCSO conducted discriminatory traffic stops outside of saturation patrols. *Id.* at 844-845, 889-890. The *Melendres* Order enjoined MCSO from "using Hispanic ancestry or race as [a] factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country, and [ ] unconstitutionally lengthening [vehicle] stops." *Id.* at 827.

After the ruling, the United States filed a statement of interest concerning potential forms of relief. [2] On October 2, 2013, the court issued its Supplemental Permanent Injunction/Judgment Order. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS, 2013 WL 5498218, at *1 (D.Ariz. Oct. 2, 2013) ("Supplemental Order"). The order permanently enjoined Defendants from: 1) "[d]etaining, holding or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization"; 2) "[u]sing race or Latino ancestry as a factor in deciding whether to stop any vehicle" or in deciding whether a vehicle occupant was in the United States without authorization; (3) "[d]etaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of the *1006 vehicle's occupants have committed or are committing a violation of federal or state criminal law"; (4) "[d]etaining, holding or arresting Latino occupants of a vehicle ... for violations of the Arizona Human Smuggling Act without a reasonable basis for believing the necessary elements of the crime are present"; and (5) "[d]etaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act." *Id.* The Supplemental Order also contained numerous provisions regarding the implementation of bias-free policing, including standards for bias-free detention and arrest policies and training, as well as detailed policies and procedures for ensuring and reviewing MCSO's compliance with the *Melendres* Order. The procedures included the appointment of an independent monitor to report on Arpaio and MCSO's compliance and collection of traffic stop data. *Id.*

Arpaio and MCSO appealed the *Melendres* Order and the Supplemental Order (collectively, the "*Melendres* injunction"), challenging provisions which addressed non-saturation patrol activities and arguing the evidence was insufficient to sustain the district court's conclusion that Arpaio and MCSO's unconstitutional policies extended beyond the context of saturation patrols. *Melendres v. Apraio*, No. 13-16285, Opening Brief of Defendant/Appellant Arpaio, Doc. 32-1, at 2, 13-15, 17-18 (March 17, 2014). MCSO also argued it was not a proper party in the case. *Id.*

On April 15, 2015, the Ninth Circuit issued an opinion holding MCSO was not a proper party because it is a non-jural entity lacking separate legal status from Maricopa County. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir.2015). The Ninth Circuit ordered Maricopa County substituted as a party in lieu of MCSO. *Id.* at 1260. But the court also stated, "[o]n remand, the district court may consider dismissal of Sheriff Arpaio in his official capacity because 'an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.' " *Id.* [3] In addition, the court held the *Melendres* injunction was not overbroad because it applied to activities beyond saturation patrols: "Although the evidence largely addressed [the] use of race during saturation patrols, the district court did not clearly err in finding [Arpaio's] policy applied across-the-board to all law enforcement decisions--not just those made during saturation patrols." [4] *Id.* However, the court found the requirements for the independent monitor "to consider the 'disciplinary outcomes for *any* violations of departmental policy' and to assess whether Deputies are subject to 'civil suits or criminal charges ... for off-duty conduct" were not narrowly tailored and ordered the district court "to tailor [these provisions] to address only the constitutional violations at issue." *Id.* at 1267.

III. The Litigation Before This Court: *U.S. v. Maricopa County*

On March 10, 2009, the United States Department of Justice ("DOJ") sent Arpaio a letter notifying him it was commencing an investigation of his office. (Doc. 333-3 at 6). Over a year later, on August 3, 2010, DOJ issued a "Notice of noncompliance with the obligation to cooperate with the Department of Justice investigation *1007 pursuant to Title VI of the Civil Rights Act of 1964." (Doc. 333-3 at 9) ("Notice Letter"). Although the Notice Letter appears to have been mailed only to counsel for MCSO, counsel for Maricopa County responded to it. (Doc. 333-3 at 9). On August 12, 2010, Maricopa County's private counsel wrote to the United States to express Maricopa County's "desire[ ] to cooperate in any way possible with the [United States'] investigation referenced in the Notice Letter," emphasizing, "[a]s a recipient of Title VI funds, Maricopa County believes it has an obligation to cooperate." *Id.* Maricopa County offered to use its subpoena power to procure documents in aid of DOJ's investigation. *Id.* at 10. The letter also stated Maricopa County would "[notify] MCSO that it [could] not expend any public funds, including on outside counsel, to resist any DOJ Title VI inquiry," and that "Maricopa County [would] not pay those bills as resisting a Title VI inquiry is outside the scope of the employment of any elected or appointed official." *Id.*

On December 15, 2011, DOJ sent Maricopa County Attorney Bill Montgomery ("Montgomery") a 22-page letter notifying him of the investigation into MCSO and announcing "the findings of the Civil Rights Division's investigation into civil rights violations by the [MCSO]." (Doc. 333-2 at 2) ("Findings Letter"). The Findings Letter did not reference Maricopa County, specifically. Montgomery immediately responded that DOJ had "noticed the wrong party." (Doc. 333-3 at 12). On January 17, 2012, DOJ responded it would continue to include Maricopa County in all correspondence because its "investigation potentially affect[ed] Maricopa County as the conduit of federal financial assistance to MCSO." (Doc. 333-3 at 14).

On May 9, 2012, DOJ advised Maricopa County:

> [I]n accordance with the notice requirements set forth in DOJ's Title VI regulations, 42 C.F.R. § 108(d)(3), it is the intention of the Department of Justice to file a civil action against Maricopa County, the Maricopa County Sheriff's Office, and Sheriff Joseph M. Arpaio in order to remedy the serious Constitutional and federal law violations, including noncompliance with Title VI, as noted in our December 15, 201[1] Findings Letter.

(Doc. 333-3 at 25). The following day, the United States filed a complaint in this Court, outlining six claims for relief against Arpaio, MCSO, and Maricopa County:

(1) Intentional discrimination on the basis of race, color or national origin in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (" Section 14141") and the Due Process and Equal Protection clauses of the Fourteenth Amendment.

(2) Unreasonable searches, arrests and detentions lacking probable cause or reasonable suspicion in violation of Section 14141 and the Fourth Amendment.

(3) Disparate impact and intentional discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d– 2000d-7 ("Title VI").

(4) Disparate impact and intentional discrimination against limited English proficient ("LEP") Latino prisoners in violation of Title VI.

(5) Disparate impact and intentional discrimination in violation of Defendants' contractual assurances under Title VI.

(6) Retaliation against Defendants' critics in violation of Section 14141 and the First Amendment.

(Doc. 1).

Arpaio, MCSO, and Maricopa County moved to dismiss. On December 12, 2012, *1008 the Court denied Maricopa County's motion and granted Arpaio and MCSO's motion in part. (Doc. 56). MCSO was dismissed from the case based on the Arizona Court of Appeals decision, *Braillard v. Maricopa County*, which held MCSO is a non-jural entity, lacking the capacity to sue and be sued. 224 Ariz. 481, 487, 232 P.3d 1263 (Ariz.Ct.App.2010).

The remaining parties proceeded with discovery. The United States and Arpaio now each move for partial summary judgment. (Doc. 332, 345). Maricopa County moves for summary judgment on all claims. (Doc. 334).

ANALYSIS

I. Legal Standard

Under Rule 56, summary judgment is appropriate when the moving party demonstrates the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *United States v. Kapp*, 564 F.3d 1103, 1114 (9th Cir.2009). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The moving party can satisfy this burden in two ways: either (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proof at trial. *Id.* at 322–23, 106 S.Ct. 2548. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

Once the moving party establishes the absence of genuine disputes of material fact, the burden shifts to the nonmoving party to set forth facts showing a genuine dispute remains. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. The nonmoving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505. The party opposing summary judgment must also establish the admissibility of the evidence on which it relies. *Orr v. Bank of America, NT & SA*, 285 F.3d 285 F.3d 764, 773 (9th Cir.2002) (a court deciding summary judgment motion "can only consider admissible evidence"); *see also Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988) ("It is well settled that only admissible evidence may be considered

In addition, the *Melendres* injunction does not moot the portions of the United States' claims which overlap with *Melendres* because continued violations by Arpaio and MCSO following the issuance of the injunction demonstrate a real and immediate threat of future harm, as well as the importance of granting the United States authority to enforce injunctive relief addressing MCSO's discriminatory traffic stops. *See Borden Co.*, 347 U.S. at 519, 74 S.Ct. 703; (2:07-CV-2513-GMS, Doc. 948) (Arpaio's stipulation to violations of the *Melendres* injunction by Arpaio and MCSO); (2:07-CV-2513-GMS, Doc. 0127 at 118-125). In addition, in the context of the United States' broader claims, its claims regarding traffic stops may lead to different injunctive measures than those put forth in *Melendres*, where the allegations of discriminatory traffic stops were brought in isolation. In other words, the *Melendres* injunction may afford some, but only partial relief for the United States' claims. *See Flagstaff Med. Ctr., Inc.*, 962 F.2d at 885.

In sum, it is premature for the Court to conclude the United States' allegations would lead to a replica of the *Melendres* injunction. And, even if portions of the order were replicated, the United States' unique interest in enforcing those provisions and the continuing threat of future harm it faces render the claims justiciable.

B. Justiciability of Claims Against Maricopa County

Maricopa County argues the United States does not have standing because it has failed to show "the harms it alleges are 'likely to be redressed' by a judgment against the County." (Doc. 334 at 8). The United States contends it has shown a likelihood of redress and that the "law of the case" precludes the County's argument. (Doc. 348 at 8).

7 To have Article III standing, a plaintiff must demonstrate: (1) it has suffered "injury in fact—an invasion of a legally protected interest which is ... concrete and particularized"; (2) "a causal connection between the injury and the conduct complained of"; and (3) the likelihood "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted).

In a previous order, the Court held, "Under Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional violations resulting from these policies," (Doc. 56 at 13), and denied Maricopa County's motion to dismiss, including the allegation of lack of standing. [8]

8 9 "Law of the case" doctrine "preclude[s a court] from reexamining an issue previously decided by the same court, or a higher court, in the same case." *United States v. Jingles*, 702 F.3d 494, 499 (9th Cir.2012) (citation omitted). The doctrine applies where an issue was "decided explicitly or by necessary implication in [the] *1014 previous disposition." *Id.* (internal quotation marks and citation omitted).

In finding Maricopa County could be held responsible for Arpaio's constitutional violations, the Court ruled, by necessary implication, the County was capable of redressing those violations. Nonetheless, Maricopa County now claims the Court's previous analysis was flawed because it relied on precedents from § 1983 cases involving claims for monetary, rather than injunctive relief. Maricopa County acknowledges A.R.S. § 11-201 gives it the power to determine MCSO's budget, but maintains that authority is insufficient to influence or control how MCSO is run. Maricopa County also claims: 1) the County cannot "cure the alleged violations here" (Doc. 356 at 10); 2) the United States has failed to show Arpaio and MCSO engage in "assessing, collecting, safekeeping, managing or disbursing the public revenues" such that they would fall under Maricopa County's supervisory authority pursuant to A.R.S. § 11-251(1); and 3) A.R.S. § 11-444 severely limits its authority to withhold funding.

Although the cases on which the Court's previous order relied involved claims under § 1983, which allows for monetary as well as injunctive relief, the reasoning applied to find Maricopa County potentially liable for MCSO's constitutional violations was not premised on the form of relief sought, but rather on the bases for "policymaker" liability. *See Flanders v. Maricopa Cnty.*, 203 Ariz. 368, 378, 54 P.3d 837 (Ariz.Ct.App.2002).

As will be discussed at greater length in Part III(B)(i), *infra*, the logic of "policymaker" liability under § 1983 applies to produce institutional liability under Title VI and its sister statute, Title IX, as well. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (holding that a successful showing of a Title VI violation rests on the actions of a decisionmaker). The Court's previous order relied on numerous state court decisions identifying the sheriff as a policymaker for Maricopa County, *United States v. Maricopa Cnty., Ariz.*, 915 F.Supp.2d 1073, 1082-84 (D.Ariz.2012), (Doc. 56), and that determination is the law of this case. *See United States v. Jingles*, 702 F.3d 494, 499 (9th Cir.2012).

10 Regarding Maricopa County's argument that its inability to "cure the alleged violations" destroys the United States' standing, the United States is correct that it need only show the potential for partial redress. *See Meese v. Keene*, 481 U.S. 465, 476, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987). [9]

The sheriff is independently elected. Ariz. Const. art. XII, § 3. And his duties are statutorily required. A.R.S. § 11-441. Those duties range from "[p]reserve[ing] the peace" to "[a]rrest[ing] ... persons who attempt to commit or who have committed a public offense" to "[t]ak[ing] charge of and keep[ing] the county jail." A.R.S. § 11-441.

However, A.R.S. § 11-251(1) provides:

> The board of supervisors, under such limitations and restrictions as are prescribed by law, may: ... Supervise the *1015 official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing,

> collecting, safekeeping, managing or disbursing the public revenues, see that such officers faithfully perform their duties and direct prosecutions for delinquencies.

A.R.S. § 11-251(1). And the Arizona Court of Appeals has held the sheriff is an "officer" within the definition provided in this subsection. *Fridena v. Maricopa Cnty.*, 18 Ariz.App. 527, 530, 504 P.2d 58 (Ariz.Ct.App.1972). Therefore, the Board of Supervisors is charged with supervising the sheriff under the statute.

The Board's authority over the sheriff's budget is somewhat constrained by A.R.S. § 11-444(A), which states: "The sheriff shall be allowed actual and necessary expenses incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal business." But the statute also provides that the Board meet monthly to allocate funds to the sheriff for the payment of such expenses and that the sheriff "render a full and true account of such expenses" every month to the Board. A.R.S. § 11-444(B)-(C).

In 1965, the Arizona Attorney General's Office issued an opinion interpreting A.R.S. § 11-444, [10] which stated:

> [T]he board of supervisors, being the agency of the county vested with responsibility for allowing claims, must be satisfied in each instance when examining the claims of sheriffs ... that the expenses claimed are for a public purpose and are the actual and necessary expenses thereof.

Op. Atty. Gen. No. 65-18. This reading harmonizes the funding requirements of A.R.S. § 11-444 with the Board's duty under A.R.S. § 11-251(1) to "see that such officers faithfully perform their duties and direct prosecutions for delinquencies." A.R.S. § 11-251(1). *Cf. Pinal Cnty. v. Nicholas*, 20 Ariz. 243, 179 P. 650, 651-52 (1919) (holding, in executing its duty to pay "necessary expenses" of the County Attorney, "the board of supervisors is charged with the duty of supervising all expenditures incurred by him, and rejecting payment of those which are illegal or unwarranted"). Therefore, the Board can refuse to fund inappropriate activities, which is exactly what the United States wants Maricopa County to do.

Maricopa County's argument centers on its purported inability to initiate any authorized action to affect Arpaio's compliance with the law or a court order, given the sheriff's statutory duties and electoral independence and the Board's statutory obligation to fund his activities. But Maricopa County admits it has the ability and duty "to facilitate compliance of the Sheriff and other constitutional officers with judicial orders." (Doc. 334 at 9, n. 2). And the United States identified numerous ways in which Maricopa County could, within its authority, exercise oversight and influence over Arpaio. For instance, Maricopa County could put the sheriff on a line-item budget and use its power to withhold approval for capital expenditures, salary increases and the like to encourage compliance with court orders. (Docs. 348 at 10-12; 349 at ¶ 13-26). The United States also discussed actions Maricopa County has already taken to oversee and control MCSO's fiscal management to ensure its compliance with county policy. (Docs. 348 at 13; 349 at ¶ 13). In the name of sound fiscal management, and at *1016 least partially in response to constituent complaints, the Board has, in the past, ordered audits and "operational efficiency reviews" of MCSO's vehicle use, extradition and travel policy, and staffing practices and ordered "oversight functions" be performed by the County Office of Management and Budget. (Docs. 349-2, 349-3). In fact, Maricopa County's own initial response to DOJ's investigation stated the County could deny MCSO reimbursement for funds expended in an effort to resist the investigation, as such resistance was "outside the scope of the employment of any elected or appointed official." (Doc. 333-3 at 10). This evidence and the Arizona Attorney General's interpretation of the relevant statutes, show Maricopa County has the ability to afford at least partial redress for violations committed by Arpaio, MCSO, and Maricopa County.

In addition, another district court recently upheld taxpayers' standing to sue Maricopa County in challenging the expenditure of municipal funds for MCSO's enforcement of an allegedly discriminatory statute. *Puente Arizona v. Arpaio*, 76 F.Supp.3d 833, 853 (D.Ariz.2015) ("[A] favorable decision would ... prevent[ ] further expenditures for enforcement of the identity theft laws.") (citing *Hinrichs v. Bosma*, 440 F.3d 393, 397-98 (7th Cir.2006) ("Such an injury is redressed not by giving the tax money back ... but by ending the unconstitutional spending practice.")). [11] *See also We Are Am./Somos Am., Coal. of Arizona v. Maricopa Cnty. Bd. of Supervisors*, 809 F.Supp.2d 1084, 1104 (D.Ariz.2011) (finding plaintiffs had alleged injury sufficient to confer standing to sue county/Board of Supervisors, the sheriff, and others in action seeking suspension of the use of municipal funds for MCSO enforcement of discriminatory policy). In *Puente,* as here, Maricopa County argued its inability to control the County's criminal law enforcement meant that allowing Maricopa County to remain a party "could result in it being 'bound by an injunction that is not within its authority to comply with under Arizona law.' " 76 F.Supp.3d at 868. The court held "[t]his fact might limit [Maricopa County's] exposure to contempt or other remedies if an injunction is disregarded, but it does not alter the fact that the County is a proper defendant." *Id.*

Even assuming Maricopa County's control over MCSO's operations is limited to control over funding, as opposed to direct and complete oversight and control of enforcement operations, that control establishes Maricopa County could contribute to the requested relief, which is all the law requires to create standing. Therefore, summary judgment on this issue will be denied. [12]

III. Maricopa County's Liability Under Title VI and 42 U.S.C. § 14141

Maricopa County advances several arguments for granting summary judgment in its favor with respect to the United States' claims under Title VI (Counts Three, Four, and Five) and § 14141 (Counts One, Two, and Six). First, Maricopa County claims Title VI does not authorize the United States to file suit to enforce its provisions. Next, Maricopa County claims neither Title VI nor § 14141 authorize imputation of

Romley v. Daughton

Court of Appeals of Arizona, Division 1, Department D. • October 28, 2010 • 225 Ariz. 521 • 241 P.3d 518 • 594 Ariz. Adv. Rep. 33 (Approx. 12 pages)

225 Ariz. 521
Court of Appeals of Arizona, Division 1, Department D.

Richard M. ROMLEY, in his official capacity as Maricopa County Attorney, Petitioner, v. The Honorable Donald DAUGHTON, Retired Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, Maricopa County Board of Supervisors; and its Members; Fulton Brock; Don Stapley; Andrew Kunasek; Max Wilson; and Mary Rose Wilcox, in their official capacities as Maricopa County Supervisors; Maricopa County, Real Parties in Interest.

No. 1 CA-SA 09-0212
Oct. 28, 2010.

Synopsis

Background: County attorney brought declaratory judgment action against county board of supervisors challenging board's authority to retain independent legal counsel to advise it about whether the county attorney had conflicts of interest in representing the board and in creating and funding litigation departments, separate from the county attorney's office, to handle the county's civil legal matters. The board counterclaimed seeking declaratory relief, alleging the county attorney had several conflicts of interest that prohibited him from acting as the board's attorney. The Superior Court, Maricopa County, No. CV2008-033194, Donald **Daughton**, Judge Pro Tempore, granted board summary judgment. County attorney filed petition for special action.

Holdings: The Court of Appeals, Gemmill, J., held that:
1 in a matter of first impression, board of supervisors was authorized to hire an outside attorney to advise board about whether the county attorney had conflicts of interest, and
2 in a matter of first impression, board of supervisors was not authorized to divest the county attorney on a wholesale basis of his duty and authority to represent the county.

Jurisdiction accepted; relief granted in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (7)

1 Courts

Special action jurisdiction is appropriate where the case involves pure questions of law that are issues of first impression and statewide significance.

106	Courts
106VI	Courts of Appellate Jurisdiction
106VI(A)	Grounds of Jurisdiction in General
106k207	Issuance of Prerogative or Remedial Writs
106k207.1	In general

2 Counties

County board of supervisors was authorized to hire an outside attorney to advise board about whether the county attorney had conflicts of interest in representing the board. A.R.S. § 11-532(A).

104	Counties
104V	Contracts
104k113	Powers of County Board
104k113(5)	Employment of counsel

3 Counties

When the county attorney has conflicts of interest that render him unavailable to represent the county in certain matters, the board of supervisors may retain outside counsel to advise the board in those matters. A.R.S. § 11-532(A).

1 Case that cites this headnote

104	Counties
104V	Contracts
104k113	Powers of County Board
104k113(5)	Employment of counsel

4 District and Prosecuting Attorneys

Neither the county board of supervisors nor the county attorney may determine alone whether the county attorney is unavailable due to a conflict of interest; the parties should first attempt to settle the matter among themselves, and, if they are unable to resolve the matter themselves, they should request assistance from the Attorney General's office. A.R.S. § 11-532(A).

1 Case that cites this headnote

131	District and Prosecuting Attorneys
131k8	Powers and Proceedings in General
131k8(9)	Ethical standards and conflicts of interest

5 District and Prosecuting Attorneys

County board of supervisors was not authorized to divest the county attorney on a wholesale basis of his duty and authority to represent the county in civil litigation. A.R.S. § 11-532(A).

1 Case that cites this headnote

131	District and Prosecuting Attorneys
131k7	Representation of State or County in General
131k7(1)	In general

6 Counties

County board of supervisors may retain outside counsel when the county attorney has a conflict of interest, and therefore is unavailable to represent the county or when there is a lack of harmony between the board and the county attorney regarding the handling of a particular legal matter; lack of harmony in this context refers to a disagreement about legal strategy in a particular case, not some general disharmony in the personal relationship between the county attorney on one hand and members of the board on the other.

104	Counties
104V	Contracts
104k113	Powers of County Board
104k113(5)	Employment of counsel

7 District and Prosecuting Attorneys

County board of supervisors would exceed its authority in effectively divesting the county attorney of his power to represent the county and its agencies without the requisite determination on a case-by-case basis of unavailability of the county attorney or a lack of harmony between the board and the county attorney.

1 Case that cites this headnote

131	District and Prosecuting Attorneys
131k7	Representation of State or County in General
131k7(1)	In general

Attorneys and Law Firms

**519 Jennings, Strouss & Salmon, P.L.C. By J. Scott Rhodes, Phoenix, Attorneys for Petitioner.

Polsinelli Shughart, P.C. By Thomas K. Irvine, Phoenix, Attorneys for Real Parties in Interest.

Opinion

GEMMILL, Judge.

*522 ¶ 1 In this special action, the Maricopa County Attorney challenges the trial court's determination that the Maricopa County Board of Supervisors ("Board") was lawfully entitled to (1) retain independent legal counsel to advise it about whether the County Attorney had conflicts of interest in representing the Board and (2) create and fund litigation departments, separate from the County Attorney's office, to handle the county's civil legal matters. Resolving these issues requires harmonizing applicable statutes and balancing the often-competing powers granted by law to the County Attorney and the Board. After considering the applicable statutes, Arizona Supreme Court precedents, and the arguments of the parties, we accept special action jurisdiction, grant partial relief, and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 In March 2009, the County Attorney filed a two-count complaint in superior court seeking declaratory and injunctive relief against the Board and the Board's five members. [1] Count One of the complaint challenged certain decisions by the Board to reject the County Attorney's legal services in favor of outside legal counsel. Count Two is not at issue in this special action. The following events preceded the filing of the County Attorney's complaint.

¶ 3 On December 5, 2008, the Board held a special meeting at which it appointed a private law firm, Shughart, Thomson & Kilroy, P550938.C., to be special counsel to the Board. [2] The firm was asked to evaluate whether the County Attorney had conflicts of interest in representing the Board, advise the Board about any such conflicts, and file "any actions necessary as a result of any conflict with the County Attorney." [3]

¶ 4 Based on advice from the private firm, on December 23, 2008, the Board voted to approve a motion to "take back its authority to direct and control the prosecution, defense and compromise of all civil legal actions to which the County is a party or has an interest." The Board effectively divested the County Attorney of his power to handle the County's civil legal matters and appointed Shughart, Thomson & Kilroy to file "any actions necessary as a result of any conflict with the County Attorney" and to provide the Board advice and support necessary to implement the motion.

¶ 5 In January 2009, the acting county manager informed the County Attorney that, "pending additional developments, Maricopa County will no longer be sending new civil litigation matters to the [County Attorney's *523 **520 Civil Division] for assignment to its attorneys." In March 2009, the Board approved the creation and funding of a General Litigation Department outside the purview of the County Attorney. Since its creation, this department has represented the County in all new civil legal matters in which the County has an interest except for property tax cases, which the record indicates are still handled by the Civil Division of the County Attorney's Office. The Board also created a Special Litigation Department to handle cases with which the General Litigation Department has a conflict of interest.

¶ 6 Count One of the County Attorney's complaint in this action asked the superior court to, *inter alia,* declare that:

> A. The Board has no authority or power to appoint ... the Shughart Firm ... or any other legal counsel to provide advice to the Board regarding whether the County Attorney has a conflict of interest with the Board, for the filing of any actions necessary as a result of whether any conflict exists with the County Attorney, to act as the Board's legal advisor, or to defend or oppose claims brought against the County.
>
> B. The Board is enjoined from appointing, employing and/or retaining independent legal counsel for the purpose of obtaining legal advice or for the purpose of defending the County without the consent of the County Attorney.
>
> C. The Board is enjoined from accessing, reviewing or reassigning pending civil claims and litigation involving the Maricopa County Attorney.
>
> D. In the event the County Attorney is unable to represent the Board, ... the Board has no authority or power to appoint outside counsel to represent it.
>
> E. No officer or board of the County, with the exception of the County Attorney, has the power or authority to declare a conflict of interest of the County Attorney. When there is a conflict of interest, the County Attorney has the authority to appoint counsel.

¶ 7 The Board filed an answer and a counterclaim seeking declaratory relief, alleging the County Attorney had several conflicts of interest that prohibited him from acting as the Board's attorney. The counterclaim asked the court to declare that "the County Attorney's conflicts of interest make him unavailable and incapable of acting as attorney for Maricopa County" and that "Maricopa County can appoint legal counsel to provide it legal advice because the County Attorney is unavailable."

¶ 8 The County Attorney and the Board each moved for summary judgment. In August 2009, the trial court granted the Board's motion and denied the County Attorney's motion. The court found that the County Attorney "is subject to and required to follow the Arizona Rules of Professional Conduct" and that he, "in his relationship with ... [the Board,] has not complied with those professional obligations." The court further concluded:

> The Board of Supervisors was therefore legally entitled to take the actions it took on December 5, 2008 and December 23, 2008. Although it is the opinion of this Court that the actions of the Maricopa County Board of Supervisors on December 23, 2008 were appropriate at that time, the Board of Supervisors must bear in mind that

> when the County Attorney follows the Ethical Rules in his relationship as attorney for Maricopa County and the Board of Supervisors, his office will then be the appropriate attorney of record for Maricopa County in those cases in which no conflict of interest exists.

The County Attorney filed this petition for special action to challenge the court's ruling.

JURISDICTION

1 ¶ 9 Special action jurisdiction is appropriate here because the case involves pure questions of law that are issues of first impression and statewide significance. *See State ex rel. Pennartz v. Olcavage,* 200 Ariz. 582, 585, ¶ 8, 30 P.3d 649, 652 (App.2001). In addition, the essential facts of this case are undisputed and the parties have supplied the court with an adequate record to make a determination. *See Piner v. Superior Court,* 192 Ariz. 182, 185, ¶ 10, 962 P.2d 909, 912 (1998) (accepting special action jurisdiction when facts uncontested and legal issue could *524 **521 "properly be decided on the present record"). Also, resolving these issues now promotes judicial economy. *See Marshall v. Superior Court,* 131 Ariz. 379, 381, 641 P.2d 867, 869 (1982); *Pompa v. Superior Court,* 187 Ariz. 531, 533, 931 P.2d 431, 433 (App.1997); *Harris Trust Bank of Ariz. v. Superior Court,* 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App.1996). [4]

ANALYSIS

¶ 10 The issues presented are whether the Board, believing the County Attorney has conflicts of interest in representing the Board, may on its own initiative lawfully: (1) employ outside counsel to advise it about such conflicts, and (2) divest the County Attorney of his power to represent the County by creating in-house legal departments to handle the County's civil legal matters. Our analysis focuses on Arizona statutes and pertinent Arizona Supreme Court opinions.

Outside Advice Counsel

2 ¶ 11 In accordance with A.R.S. § 11–532(A), the county attorney of each county shall "[a]ct as the legal advisor to the board of supervisors." A.R.S. § 11–532(A)(9) (2001). He shall also, "[w]hen required, give a written opinion to county officers on matters relating to the duties of their offices." A.R.S. § 11–532(A)(7).

¶ 12 The Arizona Supreme Court has held that the board of supervisors *generally does not* have the authority to employ private counsel to advise it:

> [T]he first question to which we address ourselves is whether the Board has the power to hire "in-house" counsel independent of the County Attorney for the purpose of advising it and the various county officers relative to legal matters. *Our conclusion is that it may not….*
>
> From the foregoing and from an examination of Arizona's statutes, we think it is clear that the Board has no authority to employ private counsel to advise the Board and other county officers or employees. The Constitution of Arizona created the Office of County Attorney and the statute prescribes the duties attached thereto…. *Of course if a county attorney* refuses to act or is incapable of acting or *is unavailable for some other reason, a county board may hire outside counsel to assist it.*

Bd. of Supervisors of Maricopa County v. Woodall, 120 Ariz. 379, 381–82, 586 P.2d 628, 630–31 (1978) (emphasis added).

3 ¶ 13 The Board in this case appointed Shughart, Thomson & Kilroy to advise it whether the County Attorney had conflicts of interest in representing the Board. As explained in *Woodall,* the Board may retain outside counsel to advise it only when the County Attorney "refuses to act or is incapable of acting or is unavailable for some other reason." *Id.* A conflict of interest is sufficient to render a public attorney "unavailable." *Salt Lake County Comm'n v. Salt Lake County Attorney,* 985 P.2d 899, 907 (Utah 1999). We conclude that when the county attorney has conflicts of interest that render him "unavailable" to represent the county in certain matters, the board may retain outside counsel to advise the Board in those matters.

4 ¶ 14 The Board and the County Attorney each claim the sole discretion to determine whether the County Attorney is unavailable due to a conflict of interest. We conclude, however, that neither the Board nor the County Attorney may resolve this issue alone. The Utah Supreme Court, in addressing a similar situation, has set out a reasonable course of action for the parties to follow when they disagree about whether the county attorney has a conflict of interest that precludes him from representing the county in a matter. *Salt Lake,* 985 P.2d at 908–09.

¶ 15 According to *Salt Lake,* "the parties should [first] attempt to settle the matter among themselves." *Id.* at 908. Second, if they are unable to resolve the matter themselves, they should request assistance from the Attorney General's office. *Id.* In both Arizona and Utah, the Attorney General has the statutory authority to offer guidance to *525 **522 the parties on such issues. [5] *See id.* As a last resort, the parties should " resort to the courts by seeking a declaratory judgment." *Id.* at 909.

¶ 16 The court in *Salt Lake* also noted that the board of supervisors, in seeking a declaratory judgment, will need to retain outside counsel to represent it and to appear in court on its behalf. *Id.* at 909 n. 10. We agree that under similar circumstances, a board of supervisors may need to retain outside counsel to advise it about whether the county attorney has conflicts of interest and to represent it in the resolution procedures set out in *Salt Lake*. This is because the question of whether conflicts of interest exist and the issue of how to proceed to resolve the matter, including whether to bring such a declaratory action, require legal advice, which of course the county attorney would not be in a position to offer.

¶ 17 We endorse the approach set forth in *Salt Lake* for resolving a disagreement about whether the County Attorney has a conflict of interest. And we emphasize that neither the Board nor the County Attorney has sole discretion to determine the matter. In any future disagreement, we encourage the filing of a declaratory judgment action only as a final resort.

¶ 18 Under the principles set forth above, the Board may lawfully retain outside counsel to represent and advise it when the County Attorney has a conflict of interest that renders him "unavailable." The Board also may retain outside counsel for advice and representation regarding whether the County Attorney has conflicts of interest, alternatives available to resolve issues short of litigation (*see supra* ¶ 15), and to file an action for declaratory judgment to determine if the County Attorney is therefore unavailable to carry out his ordinary representation. Accordingly, we agree with the trial court that the Board acted lawfully on December 5, 2008, in retaining outside counsel for this category of advice and representation.

The Board's New Litigation Departments

¶ 19 The county attorney of each county also has a duty (and the authority) to represent the county in civil litigation. Under A.R.S. § 11–532(A), the county attorney shall "defend actions brought against the county" and "oppose claims against the county which the county attorney deems unjust or illegal." A.R.S. § 11–532(A)(4), (9).

¶ 20 The County Attorney's authority in representing a county in civil litigation is not, however, unlimited. Under A.R.S. § 11–251(14), the Board has the authority to "[d]irect and control the prosecution and defense of all actions to which the county is a party, and compromise them." In *County of Santa Cruz v. Barnes*, 9 Ariz. 42, 49, 76 P. 621, 623 (1904), the Territorial Supreme Court held that, because of this authority, the board has the power to hire outside counsel for litigation matters when the county attorney (called "district attorney" then) has consented to the hiring:

> It is and should be the law that the supervisors of the county, on motion of, or with the consent of the district attorney, have the power, when they find it necessary or advisable, to employ counsel in addition to the district attorney to protect the interests of the county, not only in the conduct of, but in the preparation for, any litigation to which the county may be a party.

¶ 21 In *Pima County v. Grossetta*, 54 Ariz. 530, 540, 97 P.2d 538, 542 (1939), our supreme court explained that the board of supervisors also has the power to retain outside litigation counsel even without the consent of the county attorney. The supreme court stated that the board of supervisors is the "final authority" in controlling the cases in which the county has an interest, and it reasoned that:

> **523 *526 It may frequently occur that the county attorney has one idea as to the advisability of bringing an action for the county, or as to how it should be handled, while the supervisors have a different one, so that there would be a *lack of harmony* between them. Under such circumstances it would seem that the public interest would require that the men who had the final authority in all matters in regard to the action should be allowed to choose the counsel who actually handled its legal phases. Since there is no specific prohibition against it in the statutes, we think [A.R.S. § 11–251(14)] gives implied authority to the board of supervisors in its discretion to employ counsel in the handling of all matters to which the county is a party.

Id. (emphasis added).

¶ 22 The supreme court in *Woodall*, 120 Ariz. at 382, 586 P.2d at 631, addressed whether the Board could "engage counsel independent of the County Attorney for the purpose of prosecuting and defending legal actions brought on behalf of or against the county." The court quoted at length from the opinions in *Barnes* and *Grossetta* before reversing the trial court's order "insofar as it forbids the Board of Supervisors from hiring all outside legal counsel for the purpose of litigation." *Id.* at 383, 586 P.2d at 632.

5 ¶ 23 The *Woodall–Grossetta–Barnes* trilogy of cases does not, in our view, authorize the Board to divest the County Attorney on a wholesale basis of his duty and authority to represent the county in civil litigation, as the Board has done here. Such an approach was not endorsed by *Barnes*, where the court explicitly did not consider whether the board of supervisors could "disregard or supersede the district attorney as the law officer of the county, and employ other counsel to transact the county business in his stead." 9 Ariz. at 49, 76 P. at 623. Instead, the court in that case upheld the hiring of independent legal counsel for a limited purpose when the board finds it "necessary or advisable." *Id.* Nor was a substantial displacement of the county attorney's

duty to represent the county in litigation contemplated by our supreme court in *Grossetta,* where the board of supervisors hired outside counsel for a limited period of time to perform limited, specified tasks. 54 Ariz. at 533–34, 97 P.2d at 539–40. And the court in *Woodall* merely rejected the notion that the Board is prohibited in all circumstances from hiring outside litigation counsel.

6 ¶ 24 The Board may retain outside counsel when the County Attorney has a conflict of interest, and therefore is unavailable to represent the County, *see Salt Lake,* 985 P.2d at 907, or when there is a "lack of harmony" between the Board and the County Attorney regarding the handling of a particular legal matter. *See Grossetta,* 54 Ariz. at 540, 97 P.2d at 542. "Lack of harmony" in this context refers to a disagreement about legal strategy in a particular case, not some general disharmony in the personal relationship between the County Attorney on one hand and members of the Board on the other. Furthermore, according to our supreme court, it is for the Board alone to decide when such a lack of harmony exists and its decision in this regard is not subject to judicial review. *See Woodall,* 120 Ariz. at 382, 586 P.2d at 631 (suggesting that the board should not unnecessarily put county to expense of extra counsel but "in any event, it is a matter in which their judgment and discretion is not open to review by the courts") (quoting *Hornblower v. Duden,* 35 Cal. 664 (1868) as quoted in *Barnes,* 9 Ariz. at 48, 76 P. at 623). But it is only "[u]nder such circumstances" that the board can lawfully hire outside counsel. *Grossetta,* 54 Ariz. at 540, 97 P.2d at 542.

7 ¶ 25 Applying these principles, we conclude that a county board of supervisors would exceed its authority in effectively divesting the county attorney of his power to represent the county and its agencies without the requisite determination on a case-by-case basis of unavailability of the county attorney or a lack of harmony between the board and the county attorney. We emphasize that, based on the *Woodall–Grossetta–Barnes* trilogy of cases and the applicable statutes, any determination of unavailability or lack of harmony must be made on a case-by-case basis. *See supra* ¶¶ 19–24.

¶ 26 The trial court in this case found that the County Attorney has not complied with *527 **524 the Arizona Rules of Professional Conduct in his relationship with the Board. We presume the court found, as the Board alleged, that the County Attorney had conflicts of interest that precluded him from representing the Board and the County. Based on our determination that a case-by-case determination must be made, however, a remand is necessary to allow the trial court to conduct further proceedings, including any necessary fact-finding, in order to specify the matters in which the County Attorney has conflicts of interest. Additionally, the resignation of County Attorney Thomas, the appointment of Interim County Attorney Romley, and the anticipated November 2010 election of a new county attorney, may affect the determinations of the trial court regarding conflicts of interest and unavailability. Also, the Board's own determinations regarding lack of harmony in particular civil cases may be affected by these changes in the officeholders.

¶ 27 Accordingly, we remand for a determination of those specific matters on which the County Attorney has a conflict of interest.[6] In such cases, the Board may lawfully assign representation of the County to legal counsel of its own choosing. Similarly, when the Board has determined that a lack of harmony exists between the Board and the County Attorney in the handling of a particular litigation matter, the Board is entitled to retain counsel separate from the County Attorney for the representation.

CONCLUSION

¶ 28 Regarding the Board's authority to retain counsel separate from the County Attorney to provide day-to-day advice to the Board, the County, and County employees and entities, our supreme court in *Woodall* made it clear that the Board generally does not have such authority. 120 Ariz. at 381–82, 586 P.2d at 630–31. We conclude, however, that the Board may, on its own initiative, employ outside counsel to represent and advise the Board regarding whether the County Attorney has one or more conflicts of interest with the Board that render him unavailable and also regarding the appropriate actions that may be taken by the Board under such circumstances, including the filing of actions for declaratory judgment to determine if the County Attorney is unavailable because of conflicts of interest.

¶ 29 Regarding the Board's authority to retain other counsel to represent the County and its officers and entities in civil litigation, we hold that the Board may divest the County Attorney of his duty and authority to represent the County on a case-by-case basis, when the County Attorney is unavailable due to a conflict of interest or when there exists the type of "lack of harmony" in the handling of a particular case contemplated by our supreme court in *Grossetta,* 54 Ariz. at 540, 97 P.2d at 542.

¶ 30 We exercise our special action jurisdiction and grant relief by remanding for further proceedings consistent with this opinion.

CONCURRING: JON W. THOMPSON and DIANE M. JOHNSEN, Judges.

All Citations

225 Ariz. 521, 241 P.3d 518, 594 Ariz. Adv. Rep. 33

220 Ariz. 1
Court of Appeals of Arizona,
Division 1, Department B.

Brian R. HOUNSHELL, the Sheriff in and for Apache County, Plaintiff/Petitioner/Appellee, v. Tom M. WHITE, Jr.; David A. Brown; and Jim Claw; all duly elected members of the Board of Supervisors of Apache County, a Body Politic and Corporate of the State of Arizona in their capacities as Supervisors, Defendants/Respondents/Appellants.

No. 1 CA-CV 06-0730.
Jan. 29, 2008.
Review Denied Jan. 6, 2009.

Synopsis

Background: County sheriff filed a special action complaint against county manager and the county board of supervisors, challenging classified employee's suspension and seeking a declaration that only sheriff had the authority to discipline classified employees in the sheriff's office. The Superior Court, Apache County, No. CV-2006-155, Kenneth L. Fields, J., granted summary judgment in favor of sheriff, and appeal was taken.

Holding: The Court of Appeals, Barker, J., held that county sheriff was the sole "appointing authority" with respect to his or her own deputies and employees pursuant to statute which permits only the "appointing authority" to dismiss, suspend, or reduce in rank.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (5)

1 Public Employment

Generally speaking, merit systems are designed to ensure that the hiring, retention, and dismissal of public employees is based on the employees' merit and competence, and not on political considerations.

316P	Public Employment
316PIV	Creation of Relationship; Election, Appointment, and Hiring
316PIV(B)	Grounds for and Propriety of Selection; Eligibility and Qualification
316Pk82	Merit in general

(Formerly 283k11.3 Officers and Public Employees)

316P	Public Employment
316PVII	Employment Practices
316PVII(B)	Discharge, Suspension, and Other Adverse Action

Pima County Attorney's Office By Barbara LaWall, Pima County Attorney, Regina L. Nassen, Deputy Pima County Attorney, Tucson, Attorneys for Amicus Curiae Pima County Officers.

Greenberg Traurig, LLP By Pamela M. Overton, Jennifer M. Dubay, Phoenix, Attorneys for Amicus Curiae Maricopa and La Paz County Officers.

*2 OPINION

BARKER, Judge.

¶ 1 Appellants Tom M. White, Jr., David A. Brown, and Jim Claw, in their official capacities as members of the Apache County Board of Supervisors (the "Board"), appeal from the trial court's determination that a county board of supervisors or its designated agent may not discipline the classified employees of other county officers. For the following reasons, we affirm.

Facts and Procedural History

¶ 2 In early 2006, Apache County retained Jim Humphrey ("Humphrey") to conduct an administrative investigation concerning overtime issues in the Sheriff's Office. In connection with his investigation, Humphrey interviewed a number of employees in the Sheriff's Office, all of whom were instructed in writing not to discuss or divulge the issues raised or questions asked without first seeking permission from Humphrey to do so.

¶ 3 One of the employees interviewed by Humphrey was Travis Simshauser ("Simshauser"), a classified employee who holds the rank of Commander. During a regularly scheduled meeting of the Board on February 7, 2006, Apache County Sheriff Brian Hounshell ("Hounshell") indicated that Simshauser had spoken to him about his interview with Humphrey. Simshauser had not been granted permission to discuss his interview with anyone.

¶ 4 As a result of this disclosure, County Manager Delwin Wengert ("Wengert") initiated a separate administrative investigation into Simshauser's apparent breach of confidentiality and other matters. During an interview related to this investigation, at which he was accompanied by Hounshell, Simshauser refused to answer any questions. Wengert provided Simshauser an opportunity to reconsider his position, but he again refused to answer any questions. Wengert subsequently suspended Simshauser without pay for thirty days. Simshauser filed a grievance pursuant to the Apache County Human Resources Policy Manual (the "Manual").

¶ 5 Hounshell filed a special action complaint against Wengert and the Board, challenging Simshauser's suspension and seeking a declaration that only Hounshell had the authority to discipline classified employees in the Sheriff's Office. Wengert and the Board answered the complaint and moved to dismiss on the grounds that Simshauser was pursuing an "equally plain, speedy and adequate remedy" in accordance with the Manual and the issue before the court was not one of broad public significance. The motion to dismiss was denied.

¶ 6 The parties submitted cross-motions for summary judgment concerning the legal issues raised in the pleadings. The trial court considered the motions without oral argument. By minute entry order dated August 31, 2006, the trial court granted summary judgment in favor of Hounshell and against Wengert and the Board. The trial court concluded, in relevant part:

> Under ARS 11-356 only the appointing authority may dismiss, suspend or reduce in rank a county employee in the classified civil service of a county. Here the Sheriff is the appointing authority.... See, *ARS 11-409*.
>
> In order for a county manager to impose discipline, the county has to be given specific authority to act. *Marsoner v. Pima County,* 166 Ariz. 486 [803 P.2d 897] (1991). The Arizona Legislature has not empowered county managers to impose discipline unless the manager happens to be the appointing authority under ARS 11-356. The legal power to grant or withhold *3 **468 consent and to set salaries does not give the County Board of Supervisors or its agent, the County Manager, the ability to act as an appointing authority for those County Officers enumerated in ARS 11-404 [sic].

¶ 7 The trial court entered a signed judgment on October 11, 2006, and the Board timely filed a notice of appeal. [1] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶ 8 On appeal, the Board contends that the trial court erred by concluding that its agent, the County Manager, did not have the authority to discipline a Sheriff's deputy. "We review this matter de novo because it involves a matter of statutory interpretation." *Melgar v. Campo,* 215 Ariz. 605, 606, ¶ 6, 161 P.3d 1269, 1270 (App.2007); *see also Willie G. v. Ariz. Dep't of Econ. Sec.,* 211 Ariz. 231, 233, ¶ 8, 119 P.3d 1034, 1036 (App.2005) ("Matters of statutory interpretation are questions of law, which we review de novo.").

A. Relevant Statutory Provisions

1. County Officers and the Power of Appointment

¶ 9 The "county officers" are identified in A.R.S. § 11-401(A) (2001), and include the sheriff, recorder, treasurer, school superintendent, county attorney, assessor, supervisors, clerk of the board of supervisors, and tax collector. The legislature has granted these county officers the following power of appointment:

> The county officers enumerated in § 11-401 may, by and with the consent of, and at salaries fixed by the board, appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices. The appointments shall be in writing, and filed in the office of the county recorder.

A.R.S. § 11-409 (2001).

2. County Merit Systems

1 ¶ 10 Independent of the foregoing, any county in Arizona may "adopt a limited county employee merit system as is adaptable to its size and type." 1969 Ariz. Sess. Laws, ch. 117, § 1; *see also* A.R.S. § 11-352(A) (2001) ("Any county may by resolution of the board adopt a limited county employee merit system for any and all county appointive officers and employees. Elected officers shall not be included in such merit system."). Generally speaking, merit systems are designed to ensure that the "hiring, retention, and dismissal of public employees [is] based on the employees' merit and competence, and not on political considerations." *Pima County v. Pima County Law Enforcement Merit Sys. Council,* 211 Ariz. 224, 227, ¶ 14, 119 P.3d 1027, 1030 (2005).

¶ 11 Within the merit system statutory scheme, employee disciplinary decisions are made by the "appointing authority" as follows:

> Any officer or employee in the classified civil service may be dismissed, suspended or reduced in rank or compensation *by the appointing authority* after appointment or promotion is complete only by written order, stating specifically the reasons for the action....

A.R.S. § 11-356(A) (2001) (emphasis added). An employee who is dissatisfied with the decision of the appointing authority may appeal to the merit system commission, which has the authority to "affirm, modify or revoke the order." A.R.S. § 11-356(B)-(C). [2]

**469 *4 *B. Identifying the "Appointing Authority"*

¶ 12 In this case, we are asked to determine whether the Board is an "appointing authority" such that it may discipline a Sheriff's deputy pursuant to A.R.S. § 11-356(A). In making this determination, we look first to the plain language of the applicable statutes as the most reliable indicator of their meaning. *See City of Phoenix v. Harnish,* 214 Ariz. 158, 161, ¶ 11, 150 P.3d 245, 248 (App.2006).

2 ¶ 13 Pursuant to A.R.S. § 11-409, each county officer has the power, with the consent of the Board, to "appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices." We believe it is clear from the plain language of this statute that the county officer—in this case, the Sheriff—is the appointing authority with respect to his or her own deputies and employees.

¶ 14 The fact that the Board must consent to the appointment of a given employee does not make the Board a separate appointing authority. This situation is somewhat analogous to the President's power to appoint cabinet-level department heads, ambassadors, and justices of the United States Supreme Court. U.S. Const. art. II § 2. While the Constitution requires such appointments to be made "by and with the Advice and Consent of the Senate," it is clear that the President remains the sole "appointing authority." *Id.* The Senate's power to withhold consent determines whether the appointment will take effect.

¶ 15 Our conclusion in this regard is also consistent with our prior recognition, albeit in a different context, that the "appointing authority" vested with primary discretion over public employee disciplinary matters is "the county employee's immediate departmental or agency employer." *Pima County v. Pima County Merit Sys. Comm'n,* 186 Ariz. 379, 381, 923 P.2d 845, 847 (App.1996) (citing A.R.S. § 11-356(A)); *see also* *Maricopa County v. Gottsponer,* 150 Ariz. 367, 371, 723 P.2d 716, 720 (App.1986), *disapproved on other grounds by Maricopa County Sheriff's Office v. Maricopa County Employee Merit Sys. Comm'n,* 211 Ariz. 219, 119 P.3d 1022 (2005) (same).

¶ 16 The Board contends that our supreme court's decision in *Mann v. Maricopa County,* 104 Ariz. 561, 456 P.2d 931 (1969), compels a different result in this case. In *Mann,* two court employees sought to continue to work past the age of 70 by requesting a special exception to a statute that prohibited employment past that age for county employees. *Id.* at 562, 456 P.2d at 932. After the board of supervisors denied their request without articulating any reason for its decision, the individuals appealed, successfully arguing that allowing the board to exercise control over the employees of a judge violated separation of powers because it gave an executive body (the board) too much control over the judiciary (the judges). *Id.* at 566, 456 P.2d at 936. Thus, *Mann* merely stands for the proposition that the judiciary must retain the power of control over personnel directly connected with the operation of the courts. *Id.; see also Winter v. Coor,* 144 Ariz. 56, 58, 695 P.2d 1094, 1096 (1985). The *Mann* decision does not address the authority of a county board of supervisors to discipline the classified employees of other county officers. Moreover, to the extent the *Mann* court analyzed A.R.S. §§ 11–401 and 11–409, it did so merely to illustrate the legislature's intent to exclude court personnel from the county employee merit system. *Mann,* 104 Ariz. at 565–66, 456 P.2d at 935–36. Nothing in *Mann* is inconsistent with this Opinion.

¶ 17 We also must reject the Board's argument that the legislature's enactment of the county merit system statutes and/or its amendment of A.R.S. § 11–409 nearly forty years ago evidenced an intent to make the county board of supervisors an appointing authority for the deputies or employees of other county officers. We acknowledge that the statute previously included a subsection B, which provided that "[d]eputies appointed by and with the advice and consent of the board of supervisors may be removed by the board or by the officer appointing them." *Mann,* 104 Ariz. at 566, 456 P.2d at 936. However, even that provision clearly distinguished "the board" from "the officer appointing" the deputies in question. Moreover *5 **470 to the extent a board of supervisors arguably could have been considered an appointing authority under that provision, its removal from the statute in 1969 eliminated any such possibility. *See* 1969 Ariz. Sess. Laws, ch. 117, § 3.

¶ 18 In view of the foregoing, we conclude that the Sheriff is the sole appointing authority with respect to his or her deputies and other classified employees pursuant to A.R.S. § 11–409. Moreover, we find that A.R.S. § 11–356(A)—which permits only the "appointing authority" to dismiss, suspend, or reduce in rank—by its plain terms does not confer such authority upon the Board or its agent, the County Manager.

C. Powers of Board of Supervisors

¶ 19 Apart from A.R.S. §§ 11–356(A) and 11–409, the Board has not asserted that any other statute confers on a county board of supervisors the power to discipline the classified employees of other county officers. [3] The absence of any such authority is critical because "[t]he only powers possessed by boards of supervisors are those expressly conferred by statute or necessarily implied therefrom." *Bd. of Supervisors of Apache County v. Udall,* 38 Ariz. 497, 506, 1 P.2d 343, 347 (1931); *see also Marsoner v. Pima County,* 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991) ("Our courts have consistently required counties and county boards of supervisors to show an express grant of power whenever they assert that such statutory authority exists."). [4]

3 4 ¶ 20 We decline to find, as the Board urges, that the legislature "necessarily implied that a board of supervisors ... had the authority to ... discipline 'any and all appointive officers and employees' " when it enacted the county merit system statutes. "[T]he only function of an implied power is to aid in carrying into effect a power expressly granted." *Associated Dairy Prods. Co. v. Page,* 68 Ariz. 393, 395, 206 P.2d 1041, 1043 (1949). Thus, implied powers do not exist independently of the grant of express powers. *Id.* Because our legislature has not expressly granted a county board of supervisors the power to discipline the classified employees of other county officers, we may not—and do not—find such authority by implication.

¶ 21 We also note that the legislature has, in some limited circumstances, specifically granted the county boards of supervisors the authority to supervise and/or discipline county officers. For example, a board of supervisors may

> [s]upervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing or disbursing the public revenues, see that such officers faithfully perform their duties and direct prosecutions for delinquencies, and, when necessary, require the officers to renew their official bonds, make reports and present their books and accounts for inspection.

A.R.S. § 11–251(1). Likewise, a board of supervisors may "[e]xamine and exhibit the accounts of all officers having the care, management, collection or disbursement of money belonging to the county or appropriated by law or otherwise for the use and benefit of the county." A.R.S. § 11–251(10). A Board of supervisors has the authority to "suspend the county assessor or county treasurer for defalcation or neglect of duty." A.R.S. § 11–664(A) (2001). The legislature has also provided that a county board of supervisors may require a county officer to post a bond and that "an officer who neglects or refuses ... to give the bond within ten days after being so required, may be removed from office by the board...." A.R.S. § 11–253(A). [5]

**471 *6 ¶ 22 The foregoing statutes demonstrate that the Arizona legislature knows how to expressly grant a board of supervisors the power to supervise and impose discipline when it wishes to do so. It has not done so with respect to deputies and employees of other county officers, and we can only conclude that its choice in this regard was intentional. *See Reinke v.*

Alliance Towing, 207 Ariz. 542, 545, ¶ 19, 88 P.3d 1154, 1157 (App. 2004) (" 'Where the legislature has included a specific provision in one part of a statute and omitted it in another part, we must conclude that it knows how to say what it means, and its failure to do so is intentional.' ") (quoting *Paragon Health Servs., Inc. v. Cent. Palm Beach Cmty. Mental Health Ctr., Inc.*, 859 So.2d 1233, 1235 (Fla.Dist.Ct.App.2003)); *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) (explaining that fundamental to statutory interpretation "is the presumption that what the Legislature means, it will say.").

D. Checks and Balances

¶ 23 Finally, the Board and various *amici* caution that the result we reach here may (1) permit a county officer to choose not to discipline a "rogue" employee on the basis of favoritism or collusion; (2) create nine separate "fiefdoms" in each of the counties; and/or (3) subject the county to *respondeat superior* liability where a county officer declines to address employee misconduct.

¶ 24 With respect to the Board's first concern, we acknowledge the risk that county officers may, in some circumstances, abuse their power. However, the Board itself is comprised of elected officers who are no less immune from such abuses. *See* A.R.S. § 11–401(7). Moreover, while a county officer may not be accountable to the Board itself, he or she is accountable to the voting public. [6] Thus, a county officer choosing to overlook egregious employee misconduct may not be reelected, may be subject to a recall election, or may be impeached to the extent the officer's inaction amounts to "wilful or corrupt misconduct in office." A.R.S. § 38–341(A) (2001). Additionally, such elected officers are still subject to the criminal justice system. Elected officials who violate criminal statutes or who direct their employees to do so may be prosecuted and removed from office. A.R.S. § 38–343(c).

5 ¶ 25 Second, while we acknowledge the potential for inconsistent disciplinary decisions—i.e., that different county officers might impose different discipline under similar circumstances—we do not agree with the Board that each of the nine county officers would "need to create his or her own set of employee disciplinary rules" or that "[o]nly those county employees not employed by one of the elected county officers would be covered by a county's merit system." We hold that the elected county officers are the sole appointing authority for their respective employees within such a system.

¶ 26 Finally, we recognize that a complaining party can argue that a county may incur liability in the event that a county officer declines to discipline an employee engaged in misconduct. *See* *Estate of Abdollahi v. County of Sacramento*, 405 F.Supp.2d 1194, 1200–01, 1206–07 (E.D.Cal.2005) (explaining that failure to discipline county jail employee supported imposition of county liability); *Ware v. Jackson County, Mo.*, 150 F.3d 873, 883 (8th Cir.1998) (explaining that failure to discipline county jail employees for misconduct supported finding of county liability). While we appreciate the Board's desire to take action of its own in such circumstances, the county merit system statutory scheme simply does not permit it to do so. Absent such a legislative grant of authority, however, we cannot judicially create such a power.

**472 *7 *Conclusion*

¶ 27 For the foregoing reasons, we affirm the trial court's summary judgment in favor of Hounshell.

CONCURRING: ANN A. SCOTT TIMMER and PATRICIA A. OROZCO, Judges.

All Citations

220 Ariz. 1, 202 P.3d 466

Footnotes

1 Wengert is not a party to this appeal.

2 There appears to be some dispute as to whether Apache County has actually adopted a limited county employee merit system. According to Hounshell, the County's Manual specifically provides that the policies set forth therein "are not intended to be a 'limited merit system' as defined by A.R.S. § 11–351 *et seq.*" The Board, on the other hand, argues that the County has adopted a "modified" employee merit system that meets the requirements of A.R.S. § 11–351 *et seq.* To the extent there is a factual issue in this regard, we must view the facts and any inferences drawn from those facts in the light most favorable to the Board as the party against whom summary judgment was entered below. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App.1996). Thus, we assume without deciding, for purposes of this Opinion, that Apache County has adopted an employee merit system as contemplated by the legislature.

3 While the powers of a county board of supervisors are set forth generally in A.R.S. § 11–251 (Supp. 2006), the Board does not contend that any of the powers enumerated therein grant it the authority to make disciplinary decisions affecting the deputies or employees of other county officers.

4 Thus, even assuming, as the Board appears to suggest, that Hounshell failed to object to the County Manager's imposition of discipline in previous cases, the Board's authority may not be derived from a purported "waiver" in the absence of any statutory grant of authority.

2021 WL 1991857
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

Anthony SARKIS, Plaintiff/Appellant,
v.
MARICOPA COUNTY, et al., Defendants/Appellees.

No. 1 CA-CV 20-0271
|
FILED 5/18/2021
|
Review Denied December 7, 2021

Appeal from the Superior Court in Maricopa County, No. CV 2018-002136, The Honorable Rosa Mroz, Judge. **AFFIRMED**

Attorneys and Law Firms

Cameron A. Morgan Attorney at Law, Scottsdale, By Cameron A. Morgan, Counsel for Plaintiff/Appellant

Maricopa County Attorney's Office, Civil Services Div., Phoenix, By Joseph Branco, Counsel for Defendants/Appellees

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge David B. Gass and Judge David D. Weinzweig joined.

MEMORANDUM DECISION

BROWN, Judge:

***1** ¶1 Anthony Sarkis appeals the superior court's order granting Maricopa County's ("County") motion for summary judgment on his claim that the County negligently damaged his personal property. For the following reasons, we affirm.

BACKGROUND

¶2 Sarkis was involved with the manufacturing and distribution of synthetic cannabinoids, more commonly known as "spice." In October 2013, the Maricopa County Sheriff's Office ("MCSO") seized Sarkis's property connected with his spice business, including a Ford truck, a Kachina boat and trailer, a Yamaha all-terrain vehicle, a flatbed trailer, and a McKenzie Dune Chaser ("Seized Property").

¶3 Sarkis was later indicted in federal district court for multiple drug offenses. As part of a plea agreement entered in January 2016, Sarkis agreed to forfeit all interest in the Seized Property but retained the right to pay a specified sum in lieu of forfeiture. In November, Sarkis paid $507,507.82 to the U.S. Government. After federal prosecutors informed the district court of the accepted payment, the court ordered that the Seized Property be returned to Sarkis.

¶4 Sarkis sued the County and MCSO in superior court, alleging the Seized Property was stored "without sufficient provision to protect it from the elements," resulting in severe damage caused by the "negligence of the Maricopa County officials and employees." The County moved for summary judgment, arguing (1) Sarkis did not have an interest in the Seized Property at the time of the alleged damage because of the forfeiture action, and (2) the County could not be held vicariously liable for MCSO's actions.

¶5 The superior court granted the County's motion, finding Sarkis did not own the Seized Property when it "was damaged because he lost his right, title and interest in the property when the property was forfeited," citing 21 USCA § 853(c). The court did not address the vicarious liability issue but noted Sarkis agreed that MCSO should be dismissed as a non-jural entity. Sarkis timely appealed.

DISCUSSION

¶6 Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review the superior court's grant of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the non-moving party. *Ochser v. Funk*, 228 Ariz. 365, 369, ¶ 11 (2011).

¶7 Sarkis argues the superior court erred by granting summary judgment based on its finding that Sarkis did not own the Seized Property at the time it was allegedly damaged while in MCSO's care. Because we affirm the court's ruling on the grounds that the County was not vicariously liable, we need not address this ownership issue. *See KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014) (explaining that an appellate court "will affirm summary judgment if it is correct for any reason supported by the record, even if not explicitly considered by the superior court").

***2** ¶8 "For an employer to be held vicariously liable for an employee's negligent acts, the employee must be (1) subject to the employer's control or right of control, and (2) acting in furtherance of the employer's business." *Engler v. Gulf Interstate Eng'g, Inc.*, 227 Ariz. 486, 491, ¶ 17 (App. 2011), *aff'd*, 230 Ariz. 55, 60, ¶ 21 (2012). A county is generally not vicariously liable for the conduct of an elected official whose duties are imposed by state statutes and constitutional provisions. *Hernandez v. Maricopa County*, 138 Ariz. 143, 146 (App. 1983). As an extension of that principle, we have previously held that a county is not liable for torts committed by its sheriff's office because it lacks control over how the sheriff conducts its official duties. *Fridena v. Maricopa County*, 18 Ariz. App. 527, 530 (1972).

¶9 Nonetheless, Sarkis contends it is appropriate to hold the County vicariously liable for MCSO's alleged torts here. Given that MCSO is a non-jural entity and lacks the capacity to be sued, *Braillard v. Maricopa County*, 224 Ariz. 481, 487, ¶ 13 (App. 2010), Sarkis argues that denying him recovery against the County under vicarious liability would make it impossible to hold anyone accountable for alleged damages to the Seized Property. This result, he argues, is tantamount to granting the County governmental immunity.

¶10 To support his argument, Sarkis notes that our supreme court generally rejected "the rule of governmental immunity from tort liability." *Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 387 (1963); *see also Ryan v. State*, 134 Ariz. 308, 311 (1982) ("Employing the spirit of the Stone decision, we propose to endorse the use of governmental immunity as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy."). Thereafter, the Arizona legislature enacted "Actions Against Public Entities or Public Employees," which defined the boundaries of absolute and qualified immunity. A.R.S. §§ 12-820 to 12-826. In enacting this law, the legislature declared it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." 1984 Ariz. Sess. Laws ch. 285, § 1. Given this judicial and legislative history, Sarkis argues we should allow the County to be held vicariously liable for the acts of MCSO to advance Arizona's public policy of governmental accountability.

¶11 We recognize that policy, but it cannot be applied to abrogate fundamental principles of tort law requiring that an employer exercise control over its employee to be held vicariously liable. *See Engler*, 227 Ariz. at 491, ¶ 17. Although the County has fiscal authority over the MCSO under A.R.S. § 11-251 because a sheriff is a county officer under A.R.S. § 11-401(A)(1), the power and responsibilities of the sheriff are established by the legislature, not the County. *See* A.R.S. § 11-441; *see also Fridena*, 18 Ariz. App. at 530. Thus, the County cannot be held vicariously liable for the actions MCSO carries out in furtherance of its statutory duties. *See Fridena*, 18 Ariz. App. at 530 (holding that "the County, having no right of control over the Sheriff or his deputies in service of the writ of restitution, is not liable under the doctrine of [r]espondeat superior for the Sheriff's torts").

¶12 Sarkis further notes that preservation of property seized under forfeiture laws is not one of MCSO's enumerated duties under § 11-441 and contends the County could have exercised control over how MCSO stored the Seized Property. He argues this is enough to hold the County vicariously liable. We disagree.

***3** ¶13 Although storage of seized property is not specifically enumerated under § 11-441, it is a natural consequence of the Sheriff's law enforcement duties, and Sakris does not identify any other department in the County with authority to store such property. *See Norton v. Arpaio*, No. CV-15-00087-PHX-SPL, 2015 WL 13759956, at *6 (D. Ariz. Nov. 20, 2015) (explaining that "*Fridena* and *Braillard*, read together, appear to bar all state-law claims against a county for the acts of a sheriff's department"). Indeed, the legislature has delegated the authority to store property seized under a warrant exclusively to law enforcement officials. *See* A.R.S. § 13-3920 ("All property or things taken on a warrant shall be retained in the custody of the seizing officer or agency which he represents, subject to the order of the court in which the warrant was issued, or any other court in which such property or things is sought to be used as evidence."). Moreover, a county does not generally have the authority to supervise and discipline the employees of a county officer. *See Hounshell v. White*, 220 Ariz. 1, 6, ¶ 22 (App. 2008).

¶14 Sarkis also relies on *Span v. Maricopa County Treasurer*, 246 Ariz. 222 (App. 2019) and *Flanders v. Maricopa County*, 203 Ariz. 368 (App. 2002). His reliance is misplaced. First, the claim in *Span* involved direct liability. *See Span*, 246 Ariz. at 225, ¶ 10 ("Because Span's claim includes allegations that are not based solely on vicarious liability or respondeat superior, *Fridena* does not dispose of the claim."). Second, *Flanders* did not involve vicarious liability for a common law tort, but rather constitutional claims brought under 42 U.S.C. § 1983. 203 Ariz. at 378, ¶ 61 ("Liability is imposed, not on the grounds of *respondeat superior*, but because the agent's status cloaks him with the governmental body's authority."). Thus, the County cannot be held vicariously liable for the alleged torts committed by the MCSO.

CONCLUSION

¶15 We affirm the superior court's entry of summary judgment in favor of the County.

All Citations

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