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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 4.1(i), ARIZONA RULES OF CIVIL PROCEDURE.	Case No. R-11-0031 **COMMENT TO PETITION TO AMEND RULE 4.1(i), ARIZONA RULES OF CIVIL PROCEDURE**

Pursuant to Rule 28(D) of the Rules of the Supreme Court, Matthew W. Wright and Georgia A. Staton submit this comment to the above-noted Petition to Amend Rule 4.1(i), Arizona Rules of Civil Procedure.

The Petition seeks to amend Rule 4.1(i), Ariz.R.Civ.P., "as it applies to service of a 'notice of claim' under A.R.S. § 12-821.01(A)." Petition, p. 1. The amendment would allow service of a notice of claim on a "public entity's governing group, body, or board" by serving "any member of that group, body, or board," or if that member has an "administrative assistant or employee who opens mail or legal documents for that person, signs for mail or legal documents for that person, or is authorized to accept delivery of mail or legal documents for that person" service to those persons would be "sufficient." Petition, p. 10.

The current notice of claim process in Arizona can be complex and we would not object to well-crafted improvements to the process. But the language proposed in the Petition is short-sighted and suffers from significant legal and practical problems. Thus, the Court should not adopt the language proposed in the Petition because it: 1) would create bizarre results and further confusion; 2) ignores the intent of the Legislature expressed in A.R.S. § 12-821.01 and supporting case law; and 3) affects service of process without any analysis of due process.

I. Amending Rule 4.1(i), Ariz.R.Civ.P., as Proposed in the Petition Would Have Bizarre Consequences and Would Result in Further Confusion.

Petitioners' stated goal is to simplify the notice of claim process. But the approach and language proposed in the Petition would only complicate the notice of claim process in Arizona and create bizarre results.

For example, as has happened, individual board members have sued the school district they were elected to govern. In fact, undersigned counsel was recently involved in defending a school district in such a case. Under the proposed rule, this board member could have served himself with a notice of claim, sat on it for 60 days without informing the other board members, and then sued the district. And under the language proposed in the Petition, this would constitute sufficient service of the notice of claim.

Because Rule 4.1(i) also controls service of process, the board member could have then served the summons and complaint on himself, not informed the other board members of the claim or the fact that it was properly served (under the proposed rule), sat on it for an additional 20 days, and then defaulted the district. Nothing in the Petition's proposed amendment would prevent such an unintended consequence.

Additionally, that part of the amendment which allows service on "an administrative assistant or employee who opens mail or legal documents" would create a strong possibility that a notice of claim gets lost before it ever gets to the individuals who really need to see it. For example, a notice of claim could get lost in piles of paperwork before it ever reached a board member. Or administrative assistants or employees could intentionally fail to deliver such a notice to their employers. It is certainly not unheard-of for administrative assistants or

employees to become upset with their superiors. Disgruntled assistants or employees could "lose" a notice of claim or otherwise never inform their superiors of the crucial notice. Because such employees have much less at stake than does the public who funds these entities, these risks are simply too large to justify. And if administrative assistants or employees assert a claim against their public employer, they could, similar to the board members, serve themselves the notice of claim and the summons and complaint.

Additionally, the language proposed in the Petition is vague and confusing. The language providing that service would be proper if served on "an administrative assistant or employee who opens mail or legal documents for that person, signs for mail or legal documents for that person, or is authorized to accept delivery of mail or legal documents" is ripe for litigation. Every office has a different chain of command. Some offices are small, and some offices are extremely large. There may be multiple individuals permitted to sign for or open mail. Some individuals may be allowed to sign for mail but not open it or may be authorized to open or accept mail only under certain situations. Thus, the proposed language would most likely result in additional litigation, negating the very purpose of the proposed amendment.

II. Amending Rule 4.1(i) as Proposed in the Petition Would Disregard the Purpose of the Notice of Claim Statute.

The "notice of claim requirements serve to allow the public entity to investigate and assess liability, to permit the possibility of settlement prior to litigation, and to assist the public entity in financial planning and budgeting." *Falcon v. Maricopa County*, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006). The Court of Appeals has noted that "the claim statute protects the government from excess or unwarranted liability and facilitates settlement of claims by allowing the government to investigate the claim, know a certain amount the claimant will settle for, and budget for settlement or payment of large claims." *Yollin v. City of Glendale*, 219 Ariz. 24, 191 P.3d 1040, (App. 2008). The claims statute also "gives public entities a chance to avoid litigation expenses by investigating and settling before the plaintiff files a complaint." *Id*.

Thus, the notice provided for by A.R.S. § 12-821.01 is more than a formality. Notice of a pending claim is required for various reasons contemplated by the Legislature and protected by the service requirements of the statute. Indeed, this Court has recognized that "[a]ctual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01." *Id*.

If the Rule allowed service on just one member of a governmental board, the governmental entity would not receive the notice contemplated by A.R.S. § 12-

821.01. This conclusion is strengthened by the underlying legal principle that a "board cannot exercise its executive power except through collective action of the majority" and that "[i]ndividual [county] supervisors do not have the power to 'direct and control the prosecution and defense of all actions to which the county is a party.'" *Id*. (citing A.R.S. § 11-251).

In fact, this Court expressly recognized the same in *Falcon* when it stated that "[d]elivery of a notice of claim to only one board member does not further the purpose of A.R.S. § 12-821.01(A) by providing the county the opportunity to consider the claim and possibly settle it." *Id*. The intent of the statute is not to make it as difficult as possible to bring an action against such an entity. Instead, any complexity is an inevitable, even if cumbersome, consequence of the Legislature's requirement that a public entity, even one governed by a multi-member board, receive real notice of a pending claim.

Worse, the proposed change would also allow service of a notice of claim (and apparently a summons and complaint) on "an administrative assistant or employee who opens mail or legal documents for that person, signs for mail or legal documents for that person, or is authorized to accept delivery of mail or legal documents for that person." Petition, p. 10. Many administrative assistants and employees who open mail are not legally-trained and may not fully appreciate the

importance of a notice of claim. Considering these realities, such a rule would likely result in nonexistent or insufficient notice to the public body as a whole.

Indeed, the very facts evaluated by this Court in *Falcon*, which the Petition seeks to overturn, demonstrate that such a risk is real. In that case, the plaintiff sent a notice of claim by certified mail to only one member of the Maricopa County Board of Supervisors. 213 Ariz. at 526, 144 P.3d at 1255. The certified mail was signed for "by an agent of the county authorized to sign for such mail." *Id*. Subsequently, the letter was lost and the record did not show that the letter was ever delivered to the supervisor. *Id*. This Court noted, "As this case illustrates, service of a notice of claim upon a single member of a multi-member political entity does not necessarily result in successful notice to the entity as a whole, which is the point of A.R.S. § 12-821.01(A) and Rule 4.1(i)." *Id*. at 529, 1258. This Court also explained:

> An interpretation of Rule 4.1(i) that service may validly be completed on an individual member of a governing board has the potential for numerous problems, unintended or otherwise, considering the part-time nature of many of these positions. Many of the part-time members of political subdivisions, such as school boards, may not appreciate the significance of a notice of claim or realize that such a claim must be acted upon within 60 days. Moreover, the individual served may have no reason to think that he or she was the only member served, and so might not think it necessary to inform others. As a result, interpreting Rule 4.1(i) to permit filing of a notice of claim on a single member of a multi-member chief executive officer of such political subdivisions could undermine the purposes of A.R.S. § 12-821.01(A).

Id. (internal citations and quotations omitted).

Yet, the Petition presumes to "rectify the result from *Falcon* and its progeny." Petition, p. 5. Such a presumption assumes the decision was wrongly decided. But *Falcon* was not decided on a technical reading of Rule 4.1; it was decided on the basis that the Legislature requires successful notice of a pending claim against a multi-member governmental entity and that serving one individual of a multi-member board undermines the purposes intended by the Legislature.

Amending Rule 4.1(i) as proposed in the Petition would unjustifiably create a substantial and documented risk that a multi-member public entity would receive insufficient notice or no notice at all before being served with a summons and complaint. If the notice of claim requirements are onerous, it is not because Rule 4.1(i) is deficient, but because the Legislature requires real and successful notice of pending claims to what can be complex governmental structures.

Further, the Arizona Legislature enacted A.R.S. § 12-821.01 after the Supreme Court adopted Rule 4.1, Ariz.R.Civ.P. By so doing, the Legislature at least implicitly expressed its intent that a public entity covered by Rule 4.1(i) should receive notice of a claim as contemplated by Rule 4.1(i). Thus, arguably, amending Rule 4.1(i) to lessen service requirements on entities covered by Rule

4.1(i), including counties, municipal corporations, and school districts, would be directly contrary to the intent of the Legislature.[1]

III. The Petition Requests that Rule 4.1(i) be Amended Without Considering the Due Process Implications of Service of Process.

The Petition seeks to amend Rule 4.1(i), Ariz.R.Civ.P., "as it applies to service of a 'notice of claim' under A.R.S. § 12-821.01(A)." Petition, p. 1. Of course, Rule 4.1(i) applies first and foremost to service of process of a summons and complaint. "Completion of service of process is the event which brings the party served within the jurisdiction of the court. Conversely, as long as service remains incomplete, or is defective, the court never acquires jurisdiction." *Postal Instant Press, Inc. v. Corral Restaurants, Inc.*, 186 Ariz. 535, 536, 925 P.2d 260, 261 (1996). "In order to obtain a judgment In personam, personal service of the defendant is required." *Wells v. Valley Nat. Bank of Arizona*, 109 Ariz. 345, 347, 509 P.2d 615, 617 (1973). Further:

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[1] While the issue is admittedly complicated by the Legislature's adoption of a Court rule, an argument may exist that amending Rule 4.1(i) as proposed in the Petition violates the separation of powers doctrine in Arizona. "Where the legislature has spoken by statute, we will not construe our court rules, nor permit them to be utilized, so as to interfere with the proper application of those statutes." *In re Marriage of Worcester*, 192 Ariz. 24, 960 P.2d 624 (1998). Further, "[c]ourts cannot enact substantive law," and "substantive rights created by statute cannot be enlarged or diminished by rules promulgated by the Court." *City of Phoenix v. Johnson*, 220 Ariz. 189, 192, 204 Ariz. 447, 450 (App. 2009). The Court certainly has authority to amend its procedural rules. However, the Petition in this case does not seek to amend the court rules for purposes of court procedure. Instead, it seeks to modify the *Legislature's* notice of claim requirement.

> [W]here a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective. This is so even though the intended recipient of that notice does in fact acquire the knowledge contemplated by the law. Such a rule is no mere "legal technicality"; rather it is a fundamental safeguard assuring each citizen that he will be afforded due process of law. Nor may the requirement be relaxed merely because of a showing that certain complaining parties did have actual notice of the proceeding.

Hart v. Bayless Inv. & Trading Co., 86 Ariz. 379, 388, 346 P.2d 1101, 1108 (1959) (internal citation omitted).

In addition to changing the notice of claim requirements, the proposed amendment to Rule 4.1(i) would modify the manner in which governmental entities covered by that subsection are served process in Arizona. Rule 4.1(i) has been crafted so as to ensure that underlying due process requirements are met in obtaining *in personam* jurisdiction over such entities. The Petition seeks to change the Rule for purposes of notices of claim without addressing the unavoidable due process implications. This comment will not purport to undertake a complete analysis of whether the proposed language satisfies due process; that said, it strongly suggests that serving process on any random member of a multi-member unit, or worse, serving process on an "administrative assistant or employee who opens mail or legal documents for that person, signs for mail or legal documents for that person, or is authorized to accept delivery of mail or legal documents for that person," does <u>not</u> comply with the requirements of due process implicated in service of process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").[2]

IV. Conclusion.

While reasonable changes that would streamline service of notices of claim (and service of process) on governmental entities may be desirable, the language proposed in the Petition is short-sighted and suffers from significant legal and practical problems. Thus, the Court should not adopt the amendment proposed in the Petition.

DATED this 6th day of April, 2012.

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[2] This is especially true in light of the inherent problems in such a procedure demonstrated in *Falcon.*

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ORIGINAL of the foregoing electronically filed in Word and pdf formats this 6th day of April, 2012, with:

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