IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SEAN SWENSON, A MARRIED MAN;
AND BRENT SWENSON, A SINGLE MAN,
Plaintiffs/Appellants,

v.

COUNTY OF PINAL, AN ARIZONA
MUNICIPAL CORPORATION AND PUBLIC ENTITY,
Defendant/Appellee.

No. 2 CA-CV 2017-0019
Filed August 22, 2017

Appeal from the Superior Court in Pinal County
No. S1100CV201502128
The Honorable Daniel A. Washburn, Judge

AFFIRMED

COUNSEL

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and

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OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Sean and Brent Swenson (collectively, Swenson) appeal from the trial court's dismissal of their complaint against Pinal County. Swenson argues the court erred in concluding the County had not waived the notice-of-claim requirement and statute of limitations under A.R.S. §§ 12-821 and 12-821.01 by obtaining liability insurance and contractual indemnification. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court's decision to grant a motion to dismiss, we assume the truth of the facts asserted in the complaint. *Sw. Non-Profit Hous. Corp. v. Nowak*, 234 Ariz. 387, ¶ 4, 322 P.3d 204, 206 (App. 2014). However, the relevant facts are undisputed. On November 18, 2013, Keith Swenson was driving on Ironwood Drive in Pinal County when he lost control. His vehicle spun and then rolled across the opposite lanes of traffic. Keith was ejected and died as a result of his injuries.

¶3 On November 13, 2015, Sean and Brent—Keith's sons—brought this wrongful-death action against Pinal County, alleging negligence.[2] The County moved to dismiss the complaint pursuant

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2] Swenson also named as defendants Kimley-Horn & Associates, Inc. and Sundt Construction, Inc., with whom Pinal County had contracted to improve Ironwood Drive. However, Kimley-Horn and Sundt are not parties to this appeal.

to Rule 12(b)(6), Ariz. R. Civ. P., arguing it was barred by the failure to file a notice of claim, *see* § 12-821.01(A), and the one-year statute of limitations, *see* § 12-821. In response, Swenson maintained the County had "waived its sovereign immunity protections provided in Title 12 . . . , including the notice of claim requirements and one year statute of limitations," because the County had "secur[ed] liability insurance and contractual indemnity." Swenson thus reasoned the claim was not barred. Contemporaneously with the response, Swenson also filed a motion for leave to amend the complaint, primarily seeking to add "factual allegations related to the County's securing of liability insurance and contractual indemnity rights to protect public funds."[3]

¶4 After hearing oral argument, the trial court granted the motion to dismiss because Swenson "did not file a notice of claim" and "did not file suit within the one-year statute of limitations." The court further explained that §§ 12-821 and 12-821.01 were procedural and not "some sort of implementation of sovereign immunity," as Swenson had urged. Consequently, the court also denied as moot Swenson's motion for leave to amend the complaint. This appeal followed.[4] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Motion to Dismiss

¶5 Swenson argues the trial court erred by granting the motion to dismiss because a public entity, like Pinal County, "waives its sovereign immunity rights," including the notice-of-claim requirement and statute of limitations in §§ 12-821 and 12-821.01, "when it secures liability [insurance] and contractual indemnity to protect public funds." We review de novo the dismissal of a complaint under Rule 12(b)(6). *Coleman v. City of Mesa*, 230 Ariz. 352,

[3]Specifically, Swenson alleged that the County had obtained "liability insurance" and "contractual indemnification through its contracts" with Kimley-Horn and Sundt.

[4]Although the lawsuit was still pending against Kimley-Horn and Sundt, the trial court certified its ruling as to Pinal County final and appealable pursuant to Rule 54(b), Ariz. R. Civ. P.

¶ 7, 284 P.3d 863, 866 (2012). Dismissal under that rule is appropriate "only if 'as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id.* ¶ 8, *quoting Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, ¶ 4, 954 P.2d 580, 582 (1998).

¶6 "The doctrine of sovereign immunity precludes bringing suit against the government without its consent." *Clouse v. State*, 199 Ariz. 196, ¶ 8, 16 P.3d 757, 759 (2001); *see also City of Phoenix v. Fields*, 219 Ariz. 568, ¶¶ 7-8, 201 P.3d 529, 532 (2009). After our supreme court abolished the common-law defense of sovereign immunity in 1963, our legislature codified the doctrine in 1984 by adopting the Actions Against Public Entities or Public Employees Act, A.R.S. §§ 12-820 to 12-826. *Clouse*, 199 Ariz. 196, ¶¶ 8-9, 13, 18, 16 P.3d at 759-60, 762. "The legislation provides for absolute immunity, qualified immunity, and affirmative defenses in favor of public entities and public employees." *Id.* ¶ 13, *quoting* James L. Conlogue, Note, *A Separation of Powers Analysis of the Absolute Immunity of Public Entities*, 28 Ariz. L. Rev. 49, 49 (1986); *see* §§ 12-820.01 to 12-820.05.

¶7 In addition, § 12-821.01(A) requires a claimant who wishes to bring an action against a public entity or employee to file a notice of claim with the entity or employee "within one hundred eighty days after the cause of action accrues." Section 12-821 further provides: "All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." Strict compliance with §§ 12-821 and 12-821.01(A) is generally required. *Martineau v. Maricopa County*, 207 Ariz. 332, ¶¶ 15, 17, 86 P.3d 912, 915 (App. 2004); *see also Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, ¶ 9, 269 P.3d 721, 724 (App. 2012) ("shall" denotes mandatory provision). Those statutes, however, are procedural in nature and therefore "subject to waiver." *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990); *see also Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, ¶ 24, 254 P.3d 360, 366 (2011) (describing statutes of limitations as procedural).

¶8 Relying on *Clouse*, Swenson argues that §§ 12-820 to 12-826 "work together to provide a public entity with substantive and procedural defenses to exercise its sovereign immunity protection." Swenson specifically characterizes §§ 12-821 and 12-821.01 as a form

of "immunity not enjoyed by others." Citing *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 149 Ariz. 524, 720 P.2d 499 (1986), Swenson then reasons that a public entity waives all of its sovereign immunity rights, including the notice requirement and time limitations under §§ 12-821 and 12-821.01, when it secures liability insurance and contractual indemnity.

¶9 In *Smith Plumbing*, the issue was whether the trial court's exercise of jurisdiction over Smith Plumbing's claim against Aetna and the White Mountain Apache Tribe violated the Tribe's right of sovereign immunity. 149 Ariz. at 525, 720 P.2d at 500. In a footnote, the court observed: "Although charities and municipalities may waive their immunity from suit by purchasing liability insurance and be subject to damages to the extent of the insurance coverage, the purchase of insurance has not been held to waive tribal immunity." *Id.* at 532 n.4, 720 P.2d at 507 n.4, *quoting* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 (1982). Swenson relies on this statement to support the argument. In response, the County maintains the statement is "merely dict[um]."

¶10 "A court's statement on a question not necessarily involved in the case before it is dictum." *Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App. 1996). "Dictum is not binding precedent because, inter alia, it is without the force of adjudication and the court may not have been fully advised on the question." *Id.*; *see also Harper v. Canyon Land Dev., LLC*, 219 Ariz. 535, n.3, 200 P.3d 1032, 1034 n.3 (App. 2008). Because *Smith Plumbing* involved tribal immunity, which our supreme court expressly distinguished from municipality immunity, its statement about a municipality purchasing liability insurance is dictum. It is therefore not binding precedent on which this court will base a waiver of sovereign immunity.

¶11 Swenson nevertheless contends that, even if the statement is dictum, "it is consistent with [the] law of other jurisdictions." *See, e.g.*, *Thomas v. Broadlands Cmty. Consol. Sch. Dist. No. 201*, 109 N.E.2d 636, 641 (Ill. App. Ct. 1952) ("[W]hen liability insurance is available to so protect the public funds, the reason for the rule of immunity vanishes to the extent of the available insurance."), *disapproved of on other grounds by Molitor v. Kaneland Cmty. Unit Dist.*

No. 302, 163 N.E.2d 89 (Ill. 1959); *Jackson v. Belcher*, 753 S.E.2d 11, 18 (W. Va. 2013) (when recovery sought against state's liability insurance, doctrine of constitutional immunity inapplicable); *Collins v. Mem'l Hosp. of Sheridan Cty.*, 521 P.2d 1339, 1344 (Wyo. 1974) (purchase of liability insurance constitutes waiver of immunity, at least up to amount of coverage). We are unconvinced.

¶12 First, while the laws of other jurisdictions are sometimes instructive, they are not binding upon this court. *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, ¶ 40, 47 P.3d 1119, 1129 (App. 2002). Second, we find Swenson's reliance on these cases misplaced because none of them extended the waiver of sovereign immunity, based on the procurement of liability insurance, to the related notice-of-claim requirements or statutes of limitations.

¶13 Indeed, even were the footnote from *Smith Plumbing* not dictum, we conclude it would not apply to §§ 12-821 and 12-821.01. In that footnote, the supreme court suggested that certain public entities "may" waive their sovereign immunity by purchasing liability insurance and "be subject to damages to the extent of the insurance coverage." *Smith Plumbing*, 149 Ariz. at 532 n.4, 720 P.2d at 507 n.4, *quoting* Note, *supra* at 1073. This plain language suggests that what is waived in those circumstances is the substantive right to immunity, such that a plaintiff could recover from the public entity the amount of its liability insurance policy limits. The language does not purport to also encompass the procedural provisions—specifically, §§ 12-821 and 12-821.01(A)—of the Actions Against Public Entities or Public Employees Act.

¶14 We disagree with Swenson's assertion that this is a "distinction without a difference." A substantive right to sovereign immunity is fundamentally different from the procedural provisions that help implement that right. *See Seisinger v. Siebel*, 220 Ariz. 85, ¶ 29, 203 P.3d 483, 490 (2009) (substantive law creates, defines, and regulates rights; procedural law prescribes method of enforcing substantive right or obtaining redress for its invasion).

¶15 Notably, this court has previously recognized that application of the notice-of-claim statute, § 12-821.01, "is contingent on the nature of the entity, not the nature of its fund[ing source]."

Pivotal Colo. II, L.L.C. v. Ariz. Pub. Safety Pers. Ret. Sys., 234 Ariz. 369, n.7, 322 P.3d 186, 190 n.7 (App. 2014). The same is true of the statute of limitations under § 12-821, which by its plain language applies to all public entities, regardless of how they are funded. Thus, these statutes apply notwithstanding the fact that a public entity may have liability insurance.

¶16 Our conclusion is further supported by *Middleton v. Hartman*, 45 P.3d 721, 729 (Colo. 2002), a case on which Swenson relies for the proposition that "[a] state enjoys sovereign immunity and thus has a right to determine the parameters of its waiver of sovereign immunity by permitting certain classes of suits while prohibiting others." That case explains that "application of the notice-of-claim provisions cannot turn on the existence of immunity." *Id.* at 731. In other words, "even if a claim falls within [a] statutory exception so that the public entity or employee would be liable, a plaintiff's failure to provide notice bar[s] the court from considering liability."[5] *Id.* This is consistent with our reading of *Smith Plumbing*—by obtaining liability insurance, all that a public entity potentially would waive is its actual liability for damages to the extent of its policy limits, not the procedure by which the claimant may seek those damages.

¶17 Swenson further argues that "public policy is served by finding that a public entity can waive sovereign immunity protections by securing liability insurance and contractual indemnity." Specifically, Swenson contends that "compensation to tort victims" is a "compelling public policy" that should guide our decision here. We are unpersuaded. Consistent with *Smith Plumbing*, even if we assume public entities can waive their sovereign immunity by securing liability insurance, extending that principle to §§ 12-821 and 12-821.01, as Swenson urges, does not, standing alone, compensate tort victims. Simply put, compensation to tort victims is achieved by creating an exception to sovereign immunity and allowing plaintiffs to recover up to the policy limits of the public entity's liability

[5]In *Middleton*, the court concluded that a notice of claim did not need to be filed because that case involved a retaliation claim under the Fair Labor Standards Act, 29 U.S.C. § 215, and the federal law preempted the state notice-of-claim statute. 45 P.3d at 731-34.

insurance, not by eliminating the notice-of-claim requirement and statute of limitations.

¶18 Swenson also maintains, "[I]f the securing of liability insurance and contractual indemnity is not a direct waiver of sovereign immunity, then at the very least, it is a factual issue for the jury to decide whether sovereign immunity works to bar some of [their] claims." We disagree. Given the undisputed, relevant facts, whether the County waived its rights under §§ 12-821 and 12-821.01 by obtaining liability insurance was a "matter of law" to be determined by the court. *Jones v. Cochise County*, 218 Ariz. 372, ¶ 29, 187 P.3d 97, 106 (App. 2008); *cf. Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993) (describing issue of whether state had absolute immunity under § 12-820.01 as question of law).

¶19 Lastly, Swenson contends that a notice of claim was unnecessary given "the facts of this case." The purpose of § 12-821.01 is to provide public entities with an opportunity to investigate the claim, evaluate potential liability, conduct settlement negotiations, and budget accordingly. *McKee v. State*, 241 Ariz. 377, ¶ 30, 388 P.3d 14, 21 (App. 2016). Swenson reasons that the notice of claim was "not needed" here because, "[e]ven before [it] was due," Pinal County officials had publicly recognized the safety problems with Ironwood Drive. Swenson further argues that the County did not need to "budget for its liability" because it was covered by liability insurance and contractual indemnity.

¶20 However, Swenson was required to provide a notice of claim despite any actual knowledge the County may have had of the safety issues and the availability of insurance coverage. "If a notice of claim is not properly filed within the statutory time limit, a plaintiff's claim is barred by" § 12-821.01(A). *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, ¶ 10, 144 P.3d 1254, 1256 (2006). "Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements." *Id.*; *see also Martineau*, 207 Ariz. 332, ¶¶ 15, 17, 86 P.3d at 915. Here, there is no dispute that Swenson never filed a notice of claim with the County. Accordingly, Swenson's claim is barred by § 12-821.01(A). Dismissal under Rule 12(b)(6) was appropriate as a matter of law, and the trial court

did not err in granting the County's motion.[6] *See Coleman*, 230 Ariz. 352, ¶ 7, 284 P.3d at 866.

Motion for Leave to Amend

¶21 Swenson also maintains that the trial court erred by denying the motion for leave to amend the complaint as moot. Swenson argues the amended complaint would have further established that "Pinal County secured liability insurance . . . for the purposes of waiver." We review for an abuse of discretion the denial of a motion for leave to amend. *Timmons v. Ross Dress For Less, Inc.*, 234 Ariz. 569, ¶ 17, 324 P.3d 855, 858 (App. 2014). "A court does not abuse its discretion in denying a motion for leave to amend if the amendment would be futile." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 26, 246 P.3d 938, 943 (App. 2010).

¶22 Swenson sought to amend the complaint to add "factual allegations relating to the County's securing of liability insurance and contractual indemnity," as well as "the dangerousness of Ironwood Drive," and a claim for punitive damages. But the proposed amendments did not cure the notice-of-claim deficiency. *Cf. id.* ("Elm's proposed amended complaint did not cure the defects in its original complaint. It did not present any new theories of recovery, nor did it allege additional facts that would have compelled a different interpretation of the contract."). Therefore, dismissal under Rule 12(b)(6) still would have been appropriate, and amendment of the complaint would have been futile.[7] The trial court did not abuse

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[6]Because the trial court did not err in granting the motion to dismiss based on the failure to file a notice of claim, we need not address the court's additional finding that the complaint was not filed within the one-year statute of limitations. *See Sw. Non-Profit Hous. Corp.*, 234 Ariz. 387, ¶ 10, 322 P.3d at 208 (we affirm dismissal if correct for any reason).

[7]Below, Swenson conceded that if the trial court "grant[ed] the motion to dismiss and [concluded] that sovereign immunity is not waived . . . then . . . it kind of moots the whole motion . . . to amend." *See Caruthers v. Underhill*, 235 Ariz. 1, ¶ 23, 326 P.3d 268, 273-74 (App.

its discretion in denying the motion for leave to amend. *See Timmons*, 234 Ariz. 569, ¶ 17, 324 P.3d at 858.

Disposition

¶23 For the foregoing reasons, we affirm the trial court's dismissal of Swenson's complaint against Pinal County. The County has requested its attorney fees on appeal pursuant to A.R.S. § 12-349. Specifically, the County relies on § 12-349(A)(1) and (3) to argue that Swenson brought this appeal "without substantial justification" and to "[u]nreasonably expand[] or delay[] the proceeding." Although we affirm the dismissal of Swenson's complaint, we cannot say that the record and appellate briefs support an award of attorney fees pursuant to § 12–349(A)(1) or (3). Accordingly, we deny the request. However, as the prevailing party, the County is entitled to its costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

2014). Because Swenson also argued in favor of the amendment, however, we address the issue.