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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-017113 07/02/2014

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

CAVE CREEK UNIFIED SCHOOL DISTRICT, et al.

DONALD M PETERS

v.

DEAN MARTIN, et al.

KEVIN D RAY

PETER A GENTALA
WILLIAM A RICHARDS

UNDER ADVISEMENT RULING

This is a case about funding for public schools. It is back on remand from the Arizona Supreme Court "for entry of a declaratory judgment in favor of Cave Creek and further proceedings consistent with this opinion." (Supreme Court Opinion, ¶ 27.) Both the Court of Appeals and Supreme Court determined that the State is required to make annual inflationary adjustments to state aid to public schools. At issue now is the scope and form of relief due Plaintiffs (referred to as "Cave Creek") in light of this ruling.

Cave Creek asks this court to enter a Judgment with three parts:

1) a declaratory judgment that all components of the revenue control limit defined in A.R.S. § 15-947(A) (i.e. funds for school districts) be adjusted each year pursuant to A.R.S. § 15-901.01;

2) establish the base level amount with the inflation adjustment applied for each fiscal year since 2009-2010 which will reset the current base level for FY 2013-14 to $3,559.62; and

3) order the State to disburse the funds necessary to correct for those adjustments not made since 2009, with payments to be made over the next five years starting in 2014-15.

The State and Intervenors President of the State Senate and Speaker of the House (collectively referred to as the "State") object to any order that includes parts 2 (revising the base level) and 3 (disbursements). They contend that this court may only issue an order that the Legislature adjust for inflation in the future.

After receiving Cave Creek's Memorandum of Law re Remaining Issues and proposed Judgment filed January 21, 2014, the court held a status conference. The State identified numerous objections to the proposed Judgment. The court requested a joint Case Management Plan and, based on the issues outlined in the CMP, requested briefing on three areas of law:

1) the procedural/affirmative defenses advanced by the State;

2) the scope of the trial court's jurisdiction; and

3) the calculation of the adjustments to the base level.

The Court then heard oral argument regarding:

Plaintiffs' Memorandum No. 1 Regarding Affirmative Defense and Joint Memorandum No. 1 Regarding Affirmative Defenses of Defendants/ Special Intervenors, filed April 4, 2014; and Defendants/Special Intervenors' Joint Rebuttal to Plaintiffs' Memorandum No. 1 Regarding Affirmative Defenses, filed April 21, 2014;

Plaintiffs' Memorandum No. 2 Regarding Scope of Jurisdiction; Defendants/Special Intervenors' Memorandum, filed April 4, 2014; Plaintiffs' Rebuttal Memorandum No. 2, filed April 21, 2014; and Defendants/Special Intervenors' Rebuttal on Memorandum No. 2 Issues, filed April 21, 2014; and

Plaintiffs' Memorandum No. 3 Regarding Calculation of Base Level; Defendants/Special Intervenors' Memorandum, filed April 4, 2014; and Defendants/Special Intervenors' Rebuttal on Memorandum No. 3 Issues, filed April 21, 2014.

Having also considered the affidavits and other exhibits submitted, the Court of Appeals and Supreme Court opinions in this case, and the applicable law, the court concludes:

1. All components of the revenue control limit, as defined in A.R.S. §15-947(A) must be adjusted each year pursuant to A.R.S. §15-901.01.

2. The base levels for fiscal years 2009 through 2014 shall be reset to what they would have been if adjusted for inflation. In making the inflation adjustment for FY 2014-15, the Legislature shall treat the base level for 2013-14 as having been $3,559.62.

3. The revenue control limit for school districts for fiscal years 2009-14 shall be corrected in accordance with the base levels properly adjusted for those years.

4. An evidentiary hearing is necessary regarding Cave Creek's request that the State disburse funds equal to the amount of the inflation adjustments not made in FYs 2009 through 2014.

5. The request for disbursement to correct for FY 2009-10 is not yet pled and, therefore, is not before the court at this time.

BACKGROUND

A.R.S. §15-901.01 is a law drafted by the Arizona Legislature, approved by the voters and, until 2009, applied as written by the Legislature and State. It provides for automatic inflation adjustments to state aid for education. The adjustments offset the decrease in purchasing power caused by inflation. They do not increase funds for schools in constant dollars.

School districts rely on the funding at issue to pay salaries and other recurring costs. A statutory formula determines the amount each district receives. The "base level" serves as the starting point for that formula. The base level is a dollar figure that is multiplied by the number of students in each district. "Weights" are applied where additional funding is needed for special needs students or other factors. A.R.S. §15-943. Additional calculations (not at issue in this case) are then applied. The end result, known as the "revenue control limit," is what each district receives.

The base level is the component in contention. It is set by the Legislature and enacted into law in A.R.S. §15-901(B)(2).

In 2000, voters approved Proposition 301 which became codified as A.R.S. §15-901.01. Among other things, Prop 301 required the Legislature adjust the base level each year for inflation as follows:

> If approved by the qualified electors voting at a statewide general election, for fiscal years 2001-2002 through 2005-2006, the legislature shall increase the base

> level or other components of the revenue control limit by two per cent. For fiscal year 2006-2007 and each fiscal year thereafter, the legislature **shall increase the base level or other components of the revenue control limit by a minimum growth rate of either two per cent or the change in the GDP price deflator**, as defined in § 41-563, from the second preceding calendar year to the calendar year immediately preceding the budget year, whichever is less, except that the base level shall never be reduced below the base level established for fiscal year 2001-2002. (Emphasis added.)

The formula is cumulative. Each year, the adjustment should be two percent or the change in the GDP price deflator, whichever is less. Each year's adjustment includes the prior year's adjustment, so that the base level keeps pace with inflation. If an adjustment is not applied in a particular year, the base level for the following years is thrown off unless corrected.

For example, the base level for FY 2013-14 as set in 901(B)(2) is $3,326.54. Had the base level for prior years been properly adjusted, the base level for FY 2013-14 would be $3,559.62.

For several years, the Legislature followed the formula and made the adjustments. However, as the Court of Appeals and Arizona Supreme Court found, it did not make the required adjustments for FYs 2010-11, 2011-12, and 2012-13. (Court of Appeals Opinion, 231 Ariz. 342, 346, ¶4, 295 P.3d 440, 444 (2013); Supreme Court Opinion, 233 Ariz. 1, ¶4, 308 P.3d 1152 (2013)) In addition, Cave Creek asserts the Legislature made no adjustment for 2009-10 and only a partial adjustment for 2013-14.

Cave Creek filed suit seeking a declaratory judgment that the State violated A.R.S. §15-901.01 and that it must adjust all components of the revenue control limit, including the base level. The trial court dismissed Cave Creek's Amended Complaint, finding that voters could not direct the Legislature in this way. The Court of Appeals and Supreme Court disagreed. Both concluded that, in approving Prop 301/A.R.S. §15-901.01, voters could (and did) direct the Legislature to make the adjustments.

AFFIRMATIVE DEFENSES

The State asserts several affirmative defenses to Cave Creek's relief claims for mandamus and injunctive relief. As explained, the Court finds that Cave Creek's relief claims are not waived, judicially estopped, or otherwise procedurally barred.

Waiver

According to the State, Cave Creek waived their claims for mandamus and injunctive relief by not raising them on appeal. The court finds the claims are not waived because 1) the trial court never addressed these claims; and 2) they are consistent as forms of relief for the failure to adjust the base level for inflation as the law requires.

First, an issue or claim is waived if addressed by the trial court but not raised on appeal. *Schabel v. Deer Valley School District No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996). Here, the trial court (Judge Kenneth Mangum) did not decide what is or is not appropriate relief. He addressed only the threshold constitutional issue of voters' authority to direct the Legislature. Finding no such authority and no appropriation required, the trial court never reached the question of relief.

The cases cited by the State underscore this principle. In each case, the trial court actually ruled on the claim or issue but the appellant did not challenge the dismissal on appeal. *Schabel, supra. (*trial court dismissed negligent supervision claim); *ELM Retirement Center, LP v. Callaway, 226 Ariz. 287, 292, 246 P.3d. 938, 943 (App. 2010) (*trial court expressly dismissed contract claims, including the claim for breach of the covenant of good faith and fair dealing); and *Bogard v. Cannon & Wendt Elec. Co. Inc.*, 221 Ariz. 325, 328, 212 P.3d 17, 20 (App. 2009) (trial court addressed and granted defendant's request for judgment on the plaintiff's damages claims).

In contrast, in *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331, 909 P.2d 393, 398 (App. 1995), the plaintiff's claim for *injunctive relief* was not waived even though the trial court granted defendants summary judgment on the *declaratory judgment* claim. The Court of Appeals stated that, because summary judgment was granted, the trial court never addressed the plaintiff's claim for injunctive relief:

> "We conclude that the remedy in the instant case should be left to the discretion of the trial court. An injunction is an equitable remedy, which allows the court to structure the remedy so as to promote equity between the parties. The discretion in injunctive proceedings lies with the trial court, not the reviewing court. **In the instant case, because summary judgment was entered in favor of defendants, the trial court did not have the opportunity to consider what equitable relief would be appropriate."** (Emphasis added, citations omitted.) *Id.*

Judge Mangum ruled that Cave Creek failed to state a claim and dismissed the action. As a result, he did not reach or rule on the scope or form of relief available should Cave Creek's

claims prove valid. There was no ruling to appeal. Issues not addressed by the trial court are not ordinarily considered on appeal. *McDowell Mountain Ranch Coalition v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997).

Nevertheless, Cave Creek preserved their appeal of all claims by appealing from the entire Judgment. (Notice of Appeal filed 3/8/11.) Also, the appellate court opinions observe that the relief claims were not before them. They do not state these claims were waived.

Second, the claims survive appeal because they do not conflict with the Arizona Supreme Court's ruling. In fact, they are vehicles for giving effect to the decision. A party may raise issues on remand provided those issues are consistent with the appellate decision. *Harbel Oil Co. v. Superior Court of Maricopa County*, 86 Ariz. 303, 307, 345 P.2d 427, 429 (1959).

The Arizona Supreme Court has held that the Legislature is required to adjust the base level funding for public school for inflation. Cave Creek seeks an order directing the Legislature to make the adjustment both retroactively and prospectively. The claims for relief, if granted, will fulfill, not controvert, the Supreme Court's directive.

The claims are not waived, and no cross-appeal was necessary to preserve them.

Estoppel

The State contends that Cave Creek is estopped to pursue a claim for FY 2009-10 based on a statement it made in a response to an amicus brief on appeal. In this response, Cave Creek stated that it sought only prospective relief.

The Amended Complaint seeks relief starting with FY 2010-11. It does not state a claim for monetary relief for FY 2009-10. Cave Creek's responsive amicus brief, however, does not preclude it from moving to amend the Amended Complaint to add a claim for 2009-10 for two reasons.

First, estoppel does not apply to inconsistent statements about a party's *legal* position. It prevents a party from taking inconsistent *factual* positions. *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). Cave Creek asserts that the statement was incorrect. Whether accurate or not, it was not about the facts; it was a statement regarding a stance on relief.

Second, for judicial estoppel to apply, (1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding. *Id.* As to (3), the inconsistent statement must have

been a significant factor in the relief granted. *Flood Control Dist. of Maricopa County v. Paloma Inv. Ltd. Partnership*, 230 Ariz. 29, 41, 279 P.3d 1191, 1203 (App. 2012).

As stated above, it was not necessary for Cave Creek to raise the relief claims on appeal. As a result, there is no estoppel. The issue – the form of relief – cannot be same then and now if *now* is the first time it appears. In addition, there is nothing in the appellate opinions to suggest that prospective relief was a significant factor in those decisions. Elements (2) and (3) are not met. Judicial estoppel does not apply to bar a potential claim for FY 2009-10.

Notice of Claim

The State attempts to assert a defense under Arizona's Notice of Claim statute, A.R.S. §12-821.01(A). This statute requires a party to submit a claim against a public entity or employee within 180 days after the claim accrues. The claim must state a specific settlement demand and facts to support it. Failure to comply bars the party's lawsuit later.

Notice of claim does not apply to claims for declaratory judgment, injunction, or specific performance. That includes Cave Creek's claims in this case. Cave Creek seeks enforcement of A.R.S. §15-901.01 and the Arizona Supreme Court's ruling that the Legislature is required to make the inflation adjustments. Specific performance in this case is not compensation for an injury under A.R.S. §12-821.01. Even if §12-810.01 did apply, the State waived this defense by not asserting it before now.

First, the Court of Appeals has held that the statute does not apply to claims brought to compel government compliance with the law, even if compliance involves the disbursement of public funds. *State v. Mabery Ranch, Co., LLC*, 216 Ariz. 233, 245, 165 P.3d 211, 223 (App. 2007). Rejecting the statute's application in the context of an injunctive relief claim, the Court wrote:

> "[W]e know from its plain language that the drafters intended the statute to apply to claims for money damages. We may infer that by contrast the drafters intended the statute **not to apply to claims that seek only to restrain government conduct**. Because such claims for injunctive relief by definition seek no money damages, it would be nonsensical for the statute to command such a claimant to state a 'specific amount for which the claim can be settled.'" (Emphasis added.)

The same reasoning applies to declaratory judgment and mandamus orders. A claim under the Uniform Declaratory Judgments Act, A.R.S. §12-1831 et seq., asks the court to determine a party's rights under a contract or law. It does not seek money damages. A mandamus order is often the opposite of an injunction. Mandamus asks the court to compel

action. An injunction stops or limits conduct. In this case, mandamus would compel compliance with A.R.S. §15-901.01 by restoring the base level and the disbursement of funds to correct for missing adjustments. Per *Mabery Ranch*, a mandamus order to secure government compliance with the law does not constitute a claim for monetary damages subject to A.R.S. §12-821.01.

Second, Cave Creek's claims do not trigger the statute. The purpose of §12-821.01 is to allow a public entity to investigate and assess liability, to explore settlement prior to litigation, and to assist the public entity in financial planning and budgeting. *Martineau v. Maricopa County*, 207 Ariz. 332, 336, 86 P.3d 912, 916 (App. 2004) (citations omitted). It applies when a party seeks compensation for an injury. *Id.*

The Amended Complaint does not state a prayer for damages. It pleads declaratory and equitable relief from a continuing violation of the law. To the extent that that request translates into a dollar figure, it is not compensation for an injury. It is the cost of complying with the law. Cave Creek wants a court-ordered specific remedy to ensure that compliance. *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) ("Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.") (citations omitted).

Cave Creek's claim is different from the claim in *Arpaio v. Maricopa County Board of Supervisors*, 225 Ariz. 358, 238 P.3d 626 (App. 2010) cited by the State. *Arpaio* involved a one-time appropriation, a finite amount of public funds. This case involves a continuing violation for several years and a cumulative formula for calculating what the State owes. A cash settlement alone could not have been proposed as a complete remedy. Settlement would have meant non-monetary relief – the State's agreement to re-set the base level and make adjustments in the future. These are forms of relief that take Cave Creek's claim outside the bounds of §12-821.01.

Third, even if A.R.S. §12-821.01 applied, the State waived this defense. To be timely, the defense must be made in an answer or Rule 12(b)(6) motion to dismiss. *City of Phoenix v. Fields*, 219 Ariz. 568, 575, 201 P.3d 529, 536 (2009). Even then, a party waives the defense if it undertakes litigation that could have been avoided had the defense been asserted promptly. *Id.*

> "Given that a government entity may entirely avoid litigating the merits of a claim with a successful notice of claim statute defense, waiver of that defense should be found when the defendant 'has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense.'" *Id.*,citing *Jones v. Cochise County*, 218 Ariz. 372, 380, 187 P.3d 97, 105 (App. 2008).

The State raises the notice of claim defense for the first time after four years of litigation. The State had the opportunity to assert the defense in two motions to dismiss. (Motion to Dismiss the initial Complaint filed November 11, 2011: Motion to Dismiss Amended Complaint filed January 11, 2011.) Neither mentions Notice of Claim.

The State argues that, even if the State waived, the Intervenors did not because they were not parties to this litigation until recently. In fact, Intervenors have been actively involved in this case since the beginning. Their counsel, Peter Gentala and Gregory Jernigan, are included on the State's Motion to Dismiss Amended Complaint and/or Response and Reply filed in early 2011. As Amicus Curiae, Intervenors also appeared prominently in the appellate proceedings. The Court of Appeals addressed their arguments regarding legislative discretion and the meaning of A.R.S. § 15-901.01 specifically.

Intervenors share the State's interest in this litigation. They have behaved as parties. The fact that they only recently filed an Answer that asserts Notice of Claim does not make that defense timely. Given Intervenors involvement for four years, the Supreme Court's reasoning in *Fields, supra.,* applies equally to them as well as to the State.

Class Action

The State argues that Cave Creek's case fails for lack of a Rule 23 class certification.

Rule 23 certification requires that the elements of Rule 23(a) and (b) be met. The court must find a class action is necessary to avoid inconsistent results, or to ensure that an order regarding the opposing party applies uniformly, or because it is superior to other methods for the fair and efficient adjudication of the matter. Rule 23(b).

No class action is necessary. The State is a defendant. A judgment that binds the State binds its agencies and officials. School districts are political subdivisions of the State. They are bound by the result in this action whether joined or not. The State takes the same position with respect to all districts, not just the Cave Creek plaintiffs. A class will not produce a more fair or efficient resolution of the issues. *Arizona Downs v. Superior Court of Arizona, Maricopa County*, 128 Ariz. 73, 75-76, 623 P.2d 1229, 1231-32 (1981); *Amphitheater Unified School District No. 10 v. Harte*, 128 Ariz. 233, 234, 624 P.2d 1281, 1282 (1981).

Even if class certification was warranted, the State waived this argument as a defense also. Like the Notice of Claim defense, this argument is late. *Wieman v. Roysden*, 166 Ariz. 281, 286, 802 P.2d 432, 437 (App.1990) ("[f]ailure to specifically plead an affirmative defense results in waiver of the defense"); *Rose v. City of Hayward, supra*, 126 Cal.App.3d at p. 937, 945, 179 Cal.Rptr. 287, 295 (1981) (defendant that seeks resolution on the merits waives right to

a class certification.) In its motions to dismiss, the State argued that the Cave Creek plaintiffs lacked standing, but did not move in the alternative for a class action. Had the argument been made timely, either 1) Cave Creek would have corrected the problem and sought certification from the court, or 2) if certification was denied, the case would have terminated without the expense that has been incurred by both sides.

SCOPE OF JURISDICTION

Next, the State contends that this court lacks jurisdiction to do anything other than enter a narrow declaratory judgment because:

1. The Supreme Court's mandate is limited to one decision -- that the failure to implement the inflation adjustment for one year, FY 2010-11, violated A.R.S. §15-901.01 and the Voter Protection Act.

2. Further relief would violate the separation of powers clause and political questions doctrine by ordering the Legislature to manipulate budget priorities, preclude the Governor from exercising her veto powers, and directing the Treasurer to disburse money without a legislative appropriation.

3. The request is not authorized by the Uniform Declaratory Judgments Act (UDJA).

4. The State does not have the money.

Cave Creek argues that 1) the Supreme Court's mandate acknowledges that further relief may be granted; 2) the proposed Judgment does not violate any constitutional prohibitions; 3) the UDJA does not bar equitable remedies; and 4) the State's financial situation is not a jurisdictional defense.

For the reasons stated, the Court concludes that Cave Creek is correct. This court has jurisdiction to grant Cave Creek appropriate relief.

Supreme Court Mandate

According to the State, the Supreme Court has instructed this court that it may only enter declaratory judgment on the legal issue regarding the VPA's applicability to A.R.S. §12-901.01. After that, this court's job is done. Respectfully, this court disagrees for these reasons.

First, the mandate does not say that. It states: "We affirm the court of appeals' opinion and remand the case to the superior court for entry of a declaratory judgment in favor of Cave

Creek **and further proceedings consistent with this opinion."** (S. Ct. Opinion, ¶ 27, emphasis added.) Why would the Supreme Court, in sending the case back, allow for "further proceedings" if all of the issues, including the form of relief, were resolved?

"[A]n appellate mandate, along with the decision it seeks to implement, is binding on the trial court and enforceable according to its 'true intent and meaning.'" *Raimey v. Ditsworth*, 227 Ariz. 552, 555, 261 P.3d 436, 439 (App. 2011).

Considering the Supreme Court's opinion and mandate together, this court finds that the Supreme Court anticipated "further proceedings" regarding remedies. Footnote 1 of their Opinion states that Cave Creek's request for injunctive and mandamus relief "are not before us." Footnote 2 states in part: "Even if the legislature fully funded both components in the current fiscal year [2013-14], a point not conceded by Cave Creek, that does not moot Cave Creek's claims regarding prior or future years' funding levels." Deciding nothing regarding the form of relief, the Supreme Court returned the case to this court which may decide issues not decided by the appellate courts and consistent with their rulings. *Cyprus Bagdad Copper Corp. v. Arizona Dept. of Revenue,* 196 Ariz. 5, 7, 992 P.2d 5, 7 (App. 1999).

Second, this court has jurisdiction to take appropriate action to give effect to the Supreme Court's decision. *Arkules v. Board of Adjustment of Town of Paradise Valley*, 161 Ariz. 598, 601, 780 P.2d 431, 434 (App. 1989)("[o]n remand the superior court has the jurisdiction to take whatever action is appropriate under the rules of procedure for special actions and the rules of civil procedure to give effect to our decision"). *See also Harbel Oil Co. v. Steele*, 1 Ariz. App. 315, 317, 402 P.2d 436, 438 (1965) (if no mandate or opinion to the contrary, issues on remand may be enlarged or restricted).

Arkules, supra., is on point. The parties appealed the trial court's ruling that a variance granted to homeowner DeMuro was void. The Court of Appeals held the variance invalid. It remanded the case for entry of judgment declaring the variance invalid. Arkules moved for entry of an injunction in addition to the declaratory judgment. The court granted Arkules leave to file an amended complaint to assert a claim for an injunction. DeMuro argued that the trial court lacked jurisdiction to do anything other than enter a judgment declaring the variance void.

On appeal the second time, the Court of Appeals disagreed with DeMuro. It held that its mandate on remand directed a judgment declaring the variance invalid and such proceedings as required to comply with its opinion. The Court stated that it did not intend to prevent the trial court from allowing leave to amend or issuing an injunction:

> "The superior court's original judgment did not provide for injunctive relief.…There were no issues raised on appeal from that judgment by the parties

> regarding an injunction….All we decided in the first appeal was the validity of the variance. **On remand the superior court has the jurisdiction to take whatever action is appropriate under the rules of procedure for special actions and the rules of civil procedure to give effect to our decision.**" *Id.* at 601, 780 P.2d at 434 (emphasis added).

Similarly, the Arizona Supreme Court remanded this case with instructions to enter declaratory judgment in favor of Cave Creek and further proceedings consistent with their opinion. Cave Creek pled mandamus and injunctive relief in the Amended Complaint. While *Arkules* dealt with the rules for special actions, the reasoning regarding the scope of the trial court's authority on remand applies here. The trial court has jurisdiction to allow leave to amend, to hold hearings, to issue a form of order, and to conduct whatever proceedings are required to adjudicate this case consistent with the Supreme Court's decision.

The Arizona Supreme Court's opinion contemplated issues would be addressed on remand. Their mandate authorizing "further proceedings" consistent with the opinion is further evidence of this. Per *Cyprus Bagdad*, *Arkules* and *Harbel*, this Court has jurisdiction to address those issues.

Separation of Powers and Political Questions

These defenses are variations on the same theme: that the courts cannot tell the Legislature what to do with regard to funding. The State made and lost this argument on appeal.

As stated by Cave Creek, "The Arizona Supreme Court's decision established that the people's instructions with regard to funding were valid; that the Legislature must obey those instructions; and that the courts may enforce those instructions." (Cave Creek Memorandum No. 2, p. 11.) The Supreme Court stated that Prop 301/A.R.S. §15-901.01, a voter-approved law, qualifies the Legislature's otherwise plenary authority regarding funding decisions. It held that a failure to do what this law requires constitutes a violation of the Voter Protection Act Amendment to the Arizona Constitution. The Supreme Court has already considered and rejected the State's separation of powers argument.

The Court does agree with the State on certain points. This court cannot (and will not) tell the Legislature or Treasurer how to fund the adjustments, past or future. *Fogliano v. Brain*, 229 Ariz. 12, 270 P.3d 839 (App. 2011) (disbursement by the state treasury requires a valid appropriation). Nor can it direct the Governor's veto power. *Rios v. Symington*, 172 Ariz. 3, 5-6, 833 P.2d 20, 22-23 (1992) (executive branch has powers over the appropriations process). These are decisions for the legislative and executive branches, respectively.

The Court assumes that the Legislature will do what the law requires to enable the State to comply with the Supreme Court's decision. *Forest Grove School District v. T.A.*, 557 U.S. 230, 247 (2009) (courts should generally presume that officials are properly performing their obligations).

Uniform Declaratory Judgments Act

The State maintains that A.R.S. §12-1832 of the UDJA does not authorize the court to consider claims for relief other than a declaratory judgment regarding A.R.S. §15-901.01. A.R.S. §12-1832 states that the court may determine a parties' rights under statute, ordinance, contract, or other instrument.

The State's position ignores A.R.S. §12-1838, also part of the UDJA. Section 12-1838 states that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Relief may be by "complaint or appropriate pleading." The court shall give the opposing party an opportunity to be heard.

Interpreting §12-1838, our appellate courts have upheld monetary relief in a declaratory judgment action:

argument. Equitable relief in addition to the Supreme Court's decision on the declaratory judgment count falls squarely under the UDJA in Section 12-1838.

Cost

The State maintains that resetting the base level and/or paying past adjustments would cause extreme financial hardship and, therefore, bars any such order. The State's financial ability is disputed. Cave Creek contends that the State has the funds. Cave Creek also presents evidence of the financial loss to school districts and the students that they serve caused by the Legislature's failure to adjust the base level for inflation since 2009.

Cost does not defeat jurisdiction. The court finds no legal authority for that proposition. As a practical matter, if it did, the courts could never order anyone to do anything that costs money.

Granted the State faces many financial needs and challenges. However, it is not for this court to say how a judgment is satisfied, nor to question the practicality or wisdom of the law that the Legislature wrote and voters enacted. *League of Arizona Cities and Towns v. Brewer,* 213 Ariz. 557, 559, 146 P.3d 58, 60 (2006) (people's legislative acts deserve same deference as Legislature's acts).

SCOPE OF ORDER

Having determined that Cave Creek's relief is not barred and that the court has jurisdiction over Cave Creek's remaining claims, the court turns to Cave Creek's requests. In addition to declaratory judgment, Cave Creek requests that: 1) the base levels for fiscal years 2009 to present be reset, and 2) the State be ordered to disburse the funds necessary to correct for adjustments not made since 2009.

Mandumus

Mandamus and injunction are forms of equitable relief. Cave Creek pled both mandamus (an order compelling the State to make the adjustments) and injunction (precluding the State from disbursing education funds without the adjustment). Given the Supreme Court's ruling and Cave Creek's proposed Judgment, mandamus – an order compelling action – appears to be the form applicable here.

In Arizona, equitable remedies are available to prevent injustice and "compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it. "*Kilpatrick v. Superior Court In and For Maricopa County*, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970). In

issuing a mandamus order, consideration should be given to the rights of the public and of third persons. Am. Jur. Mandamus §20. Mandamus is appropriate when there is a clear right to relief; there is no other remedy available; and, in the court's discretion, the facts demonstrate that it is just and equitable. *Id.* at 45. It is a proper remedy to enforce a city's duty to pay a judgment and to compel an appropriation. *Garcia v. City of Tucson*, 135 Ariz. 604, 606, 663 P.2d 596, 598 (App. 1983) (citations omitted).

Impossibility of performance is a recognized defense to mandamus. *Id.* citing *Maricopa County v. State,* 126 Ariz. 362, 616 P.2d 37 (1980). Mere financial hardship is not. *Id*. citing *May v. Board of Directors of El Camino Irrigation District,* 34 Cal.2d 125, 131, 208 P.2d 661, 667 (1949). "Some courts, where the municipality is financially distressed, have balanced the equities and exercised discretion as to the manner in which the judgment should be paid. Thus, payment of judgments has been spread over a period of years." *Id.* (citations omitted).

As in any civil action where material facts are disputed, a claim for equitable relief may require an evidentiary hearing for the facts to be fully developed and the court to balance the equities). *Andrews v. Blake*, 205 Ariz. 236, 250-51, ¶¶ 50-53, 69 P.3d 7, 21-22 (2003) (hearing required on lessee's claim of financial hardship).

Time Period

Cave Creek's requested relief covers the time period from FY 2009-10 to the present. The State objects to any relief for any period other than FY 2010-11 because that is the fiscal year referenced in the Amended Complaint.

The court is not limited to FY 2010-11. The Supreme Court's decision is retroactive as well as prospective. "[U]nless otherwise stated, a court opinion operates retroactively as well as prospectively." *Chevron Chemical. Co. v. Superior Court*, 131 Ariz. 431, 436, 641 P.2d 1275, 1280 (1982). The Supreme Court decides whether its opinion shall be prospective only. *Jones*, 218 Ariz. at 372, 187 P.3d at 106. The Supreme Court did not limit its decision regarding §15-901.01 in this case. While Cave Creek filed in 2010, the Supreme Court's 2013 ruling applies retroactively and prospectively.

Base level reset

The court concludes that the base for future adjustments shall be reset starting with the first year the Legislature failed to make the appropriate adjustment – FY 2009-10.

First, the reset is necessary to comply with §15-901.01 and the Supreme Court's ruling. In construing a statute adopted by referendum, the court's "primary objective…is to give effect

to the intent of the electorate." *State v. Gomez*, 212 Ariz. 55, 57, 127 P.3d 873, 875 (2006). Generally, the best indication of intent is in the plain language of the statute. When the language is clear and unambiguous, the court does not look beyond it. *Matthews ex. rel. Matthews. v. Life Care Centers of America, Inc.*, 217 Ariz. 606, 608, 177 P.3d 867, 869 (App. 2009). If the plain meaning and intent conflict, the court will interpret the statute to accomplish the legislative intent and avoid an absurd conclusion. *State v. Estrada*, 201 Ariz. 247, 251, 34 P.3d 356, 360 (2001).

In upholding § 15-901.01, our appellate courts determined that voters intended that state funding for schools be protected against inflation. That protection disappears if the base level is not adjusted consistently and cumulatively. The goal is to ensure that school districts receive the full purchasing value of their funding to pay recurring overhead such as teacher salaries. If the base level is adjusted in Year 2 but not in Year 1, and inflation occurs both years, the inflation in Year 1 goes unaddressed. If not corrected, the increase for Year 2 is not sufficient to restore the value of the funds originally appropriated.

Second, case law supports correcting past errors in a cumulative formula to avoid future harm. Two cases cited by Cave Creek are instructive. In both cases, the courts held that past errors in applying cumulative formulas had to be corrected prospectively. In *Metropolitan School District Of Pike Township v. Department of Local Government Finance*, 962 N.E.2d 705 (Ind. Tax. Ct. 2011), a school district challenged an error in the district's property tax rate. The error would have reduced the district's capital projects fund (CPF) in the future. The court rejected the defendant tax agency's argument that the district challenged only one year, 2011, and therefore, was not entitled to have other years recalculated. The court stated that "logic dictates that previous CPF levy property tax rate calculations errors should not be allowed to corrupt the accuracy of current and future years' calculations." *Id.* at 709.

In *Cape Cod Hospital v. Sebelius*, 630 F.3d 203 (D.C. Cir. 2011), the Court reversed summary judgment for the Department of Health and Human Services. It held that the Department should recalculate the Medicare reimbursement payments due to hospitals. Otherwise, those errors "carried over from previous years" would be incorporated into current reimbursement rates. *Id.* at 207.

Third, there is precedent in Arizona for the issuance of mandamus relief to release funds wrongfully withheld from a school district due to an error in a statutory formula. In *Sanders v. Folsom*, 104 Ariz. 282, 451 P.2d 612 (1969), the Arizona Supreme Court granted a school district a writ of mandamus to compel the State Superintendent of Public Instruction to release funds allocated to the district. The Superintendent denied the funds because the County Board of Supervisors failed to administer a required property tax rate levy properly.

Calling the levy a "ministerial duty," the Court noted "innocent third parties – the children and taxpayers of the school district" would suffer "irreparable harm" unless the court granted equitable relief. The Court stated when the failure to perform a ministerial duty (like calculating the levy) hurts the public interest, the Court can remedy the situation by considering done "that which should have been done." *Id.* at 288, 451 P.2d at 617.

> "Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules of the absence of precedents. It looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality, And, once rightfully possessed of a case it will not relinquish it short of doing complete justice."

Id. at 289, 451 P.2d at 618 (citations omitted). Applying this principle, the *Sanders* Court held the Superintendent should treat the school district's application for funds as though the levy had actually been made. *Id.* at 290, 451 P.2d at 619.

Here, the Legislature had a non-discretionary duty to adjust the base level each year. It was (and is) a ministerial task similar to assessing a property tax rate based on property values. The Legislature made the adjustments for several years and then stopped. Their omissions will deprive school districts to which they are entitled if the base level is not reset. The law provides a remedy – resetting the current base level -- based on equitable principles. The base level must be re-calculated to what it would have been had the adjustments been made.

Finally, an evidentiary hearing is not necessary as the State contends. There are no facts in dispute material to what the inflation-adjusted base levels should have been. As stated, adjustments follow a mathematical formula set forth in §15-901.01. The court need only know the first year that the adjustments stopped and the inflation rate applicable for each year thereafter.

Cave Creek presents undisputed evidence of both. On page four of their Memorandum of Remaining Issues, Cave Creek sets forth a table applying the formula. It shows the percentage inflation adjustment and what the base level for each year should have been. This table is supported by the attached Declaration of Charles Essigs, Director of Government Relations for the Arizona Association of School Business Officials (AASBO). After making the calculation, Mr. Essig confirmed his results with the Joint Legislative Budget Committee (JLBC). The State submits the Declarations of John Arnold, Director of the Office of Strategic Planning and Budgeting (OSPB); D. Clark Partridge, State Comptroller; and Stephen A. Schimpp, Deputy Director of the JLBC. None dispute Essig's calculations. Accordingly, the record establishes the

facts necessary to determine what the base levels should have been had the proper adjustments been made.

Also, both the Court of Appeals and Supreme Court found, in fact, that there had been no adjustment between 2010 and 2013 specifically. (Court of Appeals Opinion, 231 Ariz. 342, 346, ¶4, 295 P.3d 440, 444 (2013); Supreme Court Opinion, 233 Ariz. 1, ¶4, 308 P.3d 1152.)

For these reasons, the court concludes that the base for future adjustments must be corrected to fulfill the mandate and intent of A.R.S. §15-901.01 and in the exercise of this court's equitable powers.

Disbursement of Funds

The same equitable considerations that warrant a reset weigh in favor of requiring disbursements. Cave Creek presents compelling evidence that the money, albeit late, is needed for capital improvements, curriculum, and other educational purposes. The State disputes that the needs of school districts are any greater than those of other state-assisted programs. The State asserts that paying for past adjustments will impose an extreme financial hardship. To mitigate the impact on the State's resources, Cave Creek proposes that the State make payments over a five-year period.

An evidentiary hearing is necessary on two issues regarding disbursements. First, the court must determine whether the facts support the disbursement of yesterday's funds today. It is the Court's understanding that, had the adjustments been made timely, the funds would have paid teacher salaries and other recurring costs for a given fiscal year. Obviously, funds released today will not be used to compensate teachers between 2009 and 2013. Cave Creek contends that the school districts will put the money to good use to purchase such things as books, computers, and building improvements. The court must determine whether equitable relief in the form of disbursements is warranted under these circumstances.

Second, a hearing is necessary on the State's "impossibility" defense. *Andrews*, *supra.* The State contends that it simply does not have the money. Cave Creek disputes this position regarding the State's budget situation. A factual dispute exists that requires a more fully-developed record.

Funds for 2009-10

The Amended Complaint does not state a claim for monetary relief for FY 2009-10. It is not clear to the court why given Cave Creek's position on remand that there was no adjustment made for 2009-10. While the Supreme Court's decision is retroactive, the Court did not address

Cave Creek's specific claims for relief. Those claims are before the trial court. Given Arizona's notice pleading requirements, the court must conclude that a claim for relief for FY 2009-10 is not pled. Nothing in this decision, however, bars Cave Creek from moving to amend its Amended Complaint.

State's Additional Objections

The court addresses more objections by the State as follows.

Regarding the Reset. The State contends that the Legislature is not bound to the base level amounts set forth in A.R.S. §15-901(B)(2). According to the State, the Legislature can set the base level at any amount any time provided it is not less than the base level for FY 2001-02.

This argument is contrary to the plain language of A.R.S. §§15-901.01 and 901(B)(2). When a statute is subject to only one reasonable interpretation, courts apply it as written without further analysis. *Brain, supra.; Matthews, supra*. A.R.S. §15-901.01 requires an adjustment to the base level. Every few years, the Legislature determines the base level for upcoming years. Their determination in enacted *into law* via amendments to §15-901(B)(2). The base level is that "statutorily-fixed dollar amount." (Supreme Court Opinion, ¶2, quoting the Court of Appeals, 231 Ariz. at 345, ¶4, 295 P.3d at 443.) It is not an arbitrary, discretionary number. It is a sum set down in a law. Had the Legislature intended to draft a law that made the base level changeable, they should have done so.

Second, the base level *as defined in §15-901(B)(2)* is critical to the inflation formula that the Supreme Court has held is voter-protected and mandatory. To match inflation, the base level must be adjusted properly each year so that it captures the increase for inflation of the previous years. The formula does not work if the Legislature does not make the adjustment or cuts the base level outside the formula. To comply with the Supreme Court's ruling, the Legislature must apply the statutorily-fixed base level amount codified in §15-901(B)(2).

Legislative history shows that the Legislature knew that a fluid base level would frustrate the formula. In 2000, when voters approved Prop 301, §15-901(B)(2) defined the base level for 2001-02 and each subsequent year as "the base level for the prior year adjusted by any growth rate prescribed by law, *subject to appropriation*." (Emphasis added.) The next year, 2001, the Legislature amended §901(B)(2) and removed the phrase "subject to appropriation." *See* 2001 Ariz. Legis. Serv. Ch. 233 (H.B. 2634); *Hayes v. Continental Ins. Co., 178 Ariz. 264, 268 69, n. 5, 872 P.2d 668 (1994)* (court may take judicial notice of legislative history). Since then, the Legislature has amended the definition of "base level" several times. None of these amendments restore the words "subject to appropriation."

In short, after voters approved §15-901.01, the Legislature removed language from § 15-901(B)(2) that arguably gave them the ability to change it later. This move benefitted everyone. The Legislature knew what to budget, school districts knew what to count on, voters got what they voted for, and the inflation adjustment could not be neutralized.

Third, the Court of Appeals rejected the State's argument that the "except that" clause at the end of A.R.S. §15-901.01 gives the Legislature discretion to reduce the base level. The Court of Appeals found this clause to be contrary to the "obvious purpose of the statute – to provide annual inflationary increases." (Court of Appeals Opinion, 231 Ariz. 342, 351 at n. 10, 295 P.3d 440, 449.)

Even if the Court of Appeals' statement is non-controlling dicta (as the State contends), at best, the "except that" clause sets a floor. It does not free the Legislature from the applying the base level amounts that *they approve and codify* in A.R.S. §15-901(B)(2). Nothing in the language of the clause supports their interpretation.

The inflation adjustments are just that – a mechanism to keep school districts' purchasing power from being eroded by inflation. That purpose is undermined if "except that" allows the Legislature to set the base level arbitrarily year to year. In a period of inflation, the Legislature could offset the adjustment by reducing the base level. In a deflationary period, it could reduce the base level by more than the GDP deflator. Both scenarios contradict the voters' intent that school funding be protected against inflation. The "except that" clause is either meaningless, as the Court of Appeals found, or it sets a floor below which the Legislature may not go.

Partial Adjustment Only. According to the State, inflation adjustments do not apply to "supplemental" funding to the base level, and the court should not consider "supplemental" funding in resetting the base level.

The argument is that the Legislature is only required to increase the base level by two percent. If they do that, they have complied with §15-901.01. Funding in excess of two percent over the prior year is "supplemental." Per the State, supplemental funding is never adjusted for inflation. In fact, it should serve as a credit against future inflation adjustments. In short, the Legislature complies with §15-901.01 as long as the base averages two percent increases each year. Any funding over that is not adjusted for inflation.

For example, n FY 2005-06, the Legislature increased the base level by 3.2%. It appropriated these additional funds to cover the cost of a longer school year (i.e., more days of education), including teacher salary increases. In 2006-07, 2007-08, etc., they continued to set the base level to cover these additional costs.

Once again, the language and intent of §15-901.01 fail to support the State's argument. Nothing in the statute suggests that, if the Legislature increases the base level by more than two percent, it can skip the inflation adjustment for that year. The statute does not say that, if there is an increase exceeding two percent, the inflation adjustment applies only to part of that appropriation. Finally, the statute does not provide for a credit to offset the inflation adjustment in a subsequent year.

Past funding levels do not change the operation of the inflation formula. The base level is the base level as set in §901(B)(2). The inflation formula is stated separately in §15-901.01. Whatever the base level is, the same formula applies. Neither §15-901(B)(2) nor §901.01 creates any exception to this calculation. Each year, the required adjustment applies to the dollar amount set by the Legislature for that year.

Again, legislative history demonstrates that the Legislature knew that so-called "supplemental" funding would be added to the base level and, as a result, adjusted annually for inflation. As part of Prop 301, in addition to inflation adjustments, voters approved a longer school year along with a tax increase to pay for it. (Arnold Declaration, para. 23-26.) The increase was to cover "the increased cost of basic state aid under section 15-971 due to added school days and associated teacher salary increases…" 2000 Ariz. Sess. Laws, ch. 1 at §38 (5th Spec. Sess.). Starting with FY 2005-06, the funds were to be transferred to the Department of Education. Instead, the Legislature placed these funds into the base level and has continued to do so since then.

Two points. First, the tax dollars placed in the base level were not added to adjust for inflation. Voters approved this money be raised and spent to provide more days of education for students. *Id.* It is disingenuous for the State to argue that, in correcting the current base level, money for additional fixed expenses should not be adjusted and/or should count toward the State's required inflation adjustment.

Second, more school days means increased recurring costs for school districts. These are the kind of costs that the base level is intended to address. When the Legislature chose to disburse additional funding via the base level, they presumably knew that §15-901.01 would require annual inflation adjustments to the total base level. The court must "presume that the legislature, when it passes a statute, knows the existing laws." *Daou v. Harris*, 139 Ariz. 353, 357, 678 P.2d 934, 938 (1984). They made this decision starting with FY 2005-06. They had been making the required adjustments since FY 2001-02. The court must conclude that the Legislature intended to protect this additional funding against inflation by adding it to the base level. Otherwise, school districts would have been burdened with cost of a longer school year with no mechanism to offset the effect of inflation. Such a result is contrary to the purpose of §15-901.01

CONCLUSION

The Supreme Court remanded this case with instructions to the trial court to enter declaratory judgment for Cave Creek and for further proceedings consistent with the Court's ruling. Pending are Cave Creek's claims for equitable relief for the failure to adjust for inflation the funds school districts receive in FYs 2009-10, 2010-11, 2011-12, 2012-13, and 2013-14. The trial court has jurisdiction to grant equitable relief in the exercise of the court's discretion.

The parties agree that Cave Creek is entitled to declaratory judgment based on the Supreme Court's decision that A.R.S. §15-901.01 requires the Legislature to annually adjust all components of the revenue control limit for inflation.

To effect the Supreme Court's decision, the base levels for FY 2009-10 through and including FY 2013-14 must be corrected. There are no disputed facts regarding the annual inflation rates for those years. The inflation formula set forth in §15-901.01 is a straight-forward mathematical calculation. The base for future adjustments must be corrected to fulfill the mandate and intent of §15-901.01.

Disbursements equal to past adjustments not made between FYs 2009 through 2014 may also be warranted. An evidentiary hearing is required for the court to determine whether and to what extent it is equitable for school districts to receive these funds today.

For the reasons stated above,

IT IS HEREBY ORDERED as follows:

1. Cave Creek is entitled to a declaratory order that all components of the revenue control limit, as defined in A.R.S. §15-947(A) must be adjusted each year pursuant to A.R.S. §15-901.01.

2. The base levels for fiscal years 2009 through 2014 shall be reset to what they would have been if adjusted for inflation. In making the inflation adjustment for FY 2014-15, the Legislature shall treat the base level for 2013-14 as having been $3,559.62.

3. The revenue control limit for school districts for fiscal years 2009-14 shall be corrected in accordance with the base levels properly adjusted for those years.

4. An evidentiary hearing is necessary regarding Cave Creek's request that school districts receive disbursements equal to the adjustments not made 2009 through 2014.

5. The request for disbursement to correct the adjustment for FY 2009-10 is not yet pled and, therefore, is not before the court at this time.

IT IS FURTHER ORDERED setting a telephonic conference on **July 18, 2014 at 10:00 a.m. (time allotted: 20 minutes)** to set a date for the evidentiary hearing. Before the conference, counsel shall confer regarding proposed dates for the hearing, the estimated number of witnesses for each side, and the amount of time that they anticipate the hearing will require.

IT IS FURTHER ORDERED that Counsel for the Plaintiff is to initiate the telephonic conference by first arranging the presence of all other counsel or self-represented parties on the conference call and by calling this division (602-506-8311) promptly at the scheduled time. All parties appearing telephonically must be joined in a single conference call and be prepared to hold until called to testify.

The call should be placed from a telephone in an area with no background noise as this will prevent the parties from hearing the proceedings in the courtroom. The call may not be placed from a vehicle. Also, the use of cellular telephones to call into the hearing is strongly discouraged.