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301 East Bethany Home Road
Suite B-100
Phoenix, Arizona 85012
Voice (602)285-0100
Fax (602) 265-0267

September 2, 2010

Michael Napier, Esq.
NAPIER, ABDO, CORY & BAILLIE, P.C.
2525 East Arizona Biltmore Circle
Suite 135
Phoenix, AZ 85016

Re: *City of Phoenix's recent invocation of "immunity" defense*

Dear Mike:

I wanted to alert you to a recent trend in police abuse of force cases against the City of Phoenix, a trend of which you may be aware, but wanted to advise you of in case you were not, in which the City is now maintaining that it has no obligation to indemnify its officers for claims of excessive use of force. This issue has arisen in two cases I have pending in federal court, [REDACTED] v. *City of Phoenix, et al.*, District Court No. CV-[REDACTED], and [REDACTED] v. *City of Phoenix, et al.*, District Court No. CV-[REDACTED]. Both cases are what I would fairly describe as "plain vanilla" use of force cases; while I firmly believe that the officers' use of force in both cases was unjustified, we have not alleged that the officers had any personal agenda or were in any way acting above and beyond the scope of their duties as police officers. Moreover, in both cases, the same attorney represented both the City of Phoenix and the individual officers (in each case, Lori Berke). However, the City, through the attorney purportedly representing the interests of both the City and the individual officers, argued that the City was statutorily immune for any liability -- and, as stated, any duty to indemnify -- under Arizona Revised Statutes section 12-820.05, and, therefore, any judgment against the individual officers would presumably be their sole responsibility to satisfy. Specifically, the City asserted:

Joel B. Robbins*
John M. Curtin
Anne E. Findling

*certified specialist in personal injury and wrongful death
evan@robbinsandcurtin.com

responsibility to satisfy. Specifically, the City asserted:

Count Two is a claim against the City of Phoenix ("COP") for false arrest and imprisonment. Count Four is a claim against COP for assault and battery. Both claims are premised on the alleged actions of the individual officers, and Schuette seeks to have COP held liable under the doctrine of *respondeat superior*. However, COP is statutorily immune from these state law claims under A.R.S. § 12-820.05(B) which provides as follows:

"A public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employees propensity for that action."

[¶] [I]n State v. Heinze, 196 Ariz. 126, 130, 993 P.2d 1090, 1094 (App. 1999), . . . [t]he Court of Appeals held that because the statute did not specify that the state employee must have been *convicted* of a felony, or exclude only losses arising from acts or omissions determined by a *criminal* court to be a felony, a civil court could make the determination that the actions by the employee were a felony. Id. at 130, 993 P.2d at 1094. The same reasoning applies here.

[REDACTED] v. *City of Phoenix*, Motion For Summary Judgment (Exhibit 1), at pp. 8-9.

As noted above, the City also raised this contention in **[REDACTED]** v. *City of Phoenix*, where, unfortunately, Judge Campbell adopted the City's reasoning. I have attached as **Exhibit 2** the City's motion for partial summary judgment, as well as our response (**Exhibit 3**), where we questioned the ability of the City to raise this immunity issue without providing separate representation to the individual officers. However, without addressing this seeming conflict of interest, Judge Campbell adopted the City's reasoning. See **Exhibit 4**. I have also attached a copy of a recent Court of Appeals memorandum decision in *Rand v. City of Glendale*, in which the appellate court also appears to have endorsed this reasoning. **Exhibit 5**.

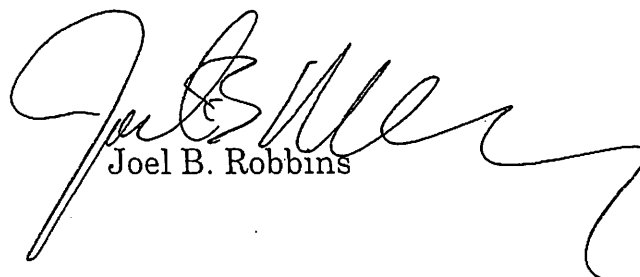
As I understand the City's contention (and Judge Campbell's ruling), each individual Phoenix police officer will be individually responsible for satisfying any judgment resulting from an excessive use of force, regardless of whether the use of force was done strictly within the officers' scope and course of employment. I find this contention troubling, and thought it might be of concern to you and your clients.

My preliminary thought was to seek reconsideration before Judge Campbell, asserting that the immunity provision, as applied, violates Article 18, Section 6, of the Arizona Constitution.

If you have any further insight into this issue, or would like to discuss it further, please give me a call. Thank you for your time.

Very truly yours,

Robbins and Curtin, p.l.l.c


Joel B. Robbins

JBR/elh
Attachments