IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BANNER UNIVERSITY MEDICAL CENTER TUCSON CAMPUS, LLC,
AN ARIZONA CORPORATION DBA
BANNER UNIVERSITY MEDICAL CENTER TUCSON;
GEETHA GOPALAKRISHNAN, M.D.; MARIE L. OLSON, M.D.;
EMILY NICOLE LAWSON, D.O.; DEMETRIO J. CAMARENA, M.D.;
PRAKASH JOEL MATHEW, M.D.; SARAH MOHAMED DESOKY, M.D.;
SEUNG HUR, M.D.; BANNER HEALTH; BANNER UNIVERSITY MEDICAL GROUP;
Petitioners,

v.

HON. RICHARD E. GORDON, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

JEREMY AND KIMBERLY HARRIS,
Real Parties in Interest.

No. 2 CA-SA 2019-0051
Filed May 29, 2020

Special Action Proceeding
Pima County Cause No. C20174589

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Eppich concurred and Judge Brearcliffe dissented.

E S P I N O S A, Judge:

¶1 In this special action, we are asked to decide whether a vicarious liability claim against a private employer must be dismissed when the claims against its employees were dismissed with prejudice due to the plaintiff's failure to timely serve those employees with a notice of claim as required by A.R.S. § 12-821.01 due to their joint employment by a public entity. We conclude that under the circumstances here, the claim of vicarious liability against the private employer survives the dismissal of claims against the employees.

Background

¶2 When reviewing a grant of summary judgment, we view the facts in the non-moving party's favor. *Normandin v. Encanto Adventures, LLC*, 246 Ariz. 458, ¶ 9 (2019). In October 2015, Connor Harris, a fourteen-month-old child, died from complications caused by an improperly treated bowel obstruction while in the care of doctors employed by Banner University Medical Center Tucson Campus LLC (and various other companies under the umbrella of Banner Health) and by the University of Arizona. His parents, Jeremy and Kimberly, sued the individual doctors, alleging medical malpractice, and Banner, alleging it is vicariously liable for that malpractice, among other claims. Under A.R.S. § 12-821.01, a person is required to first provide a timely notice of claim before they may sue a "public employee." The Harrises did not serve such claim notices on any defendant.

¶3 The respondent judge granted summary judgment in favor of the individual doctor-defendants due to the Harrises' failure to serve them with notices of claim pursuant to § 12-821.01, required because of their employment by the University. The respondent concluded it would be

> impossible for the jury to reasonably find that the doctors in this case (who were both attending physicians as well as residents in this case) were providing (1) care and (2) supervision of that care as well as (3) learning to have conducted those services on behalf of [their] employer, the University, to be outside the course and scope of their employment for the University.

Thus, the doctor-defendants were dismissed "with prejudice."[1]

¶4 The respondent judge, however, denied Banner's motion for summary judgment on the vicarious liability claim against it grounded in the negligence claims against the individual doctor-defendants. Banner

[1] The respondent judge did not certify the judgment as a final, appealable order pursuant to Rule 54(b), Ariz. R. Civ. P. In response to Banner's petition for special action, the Harrises filed a cross-petition asking us to review the trial court's dismissal of the doctor-defendants in the event that we grant Banner relief. We have issued a separate order declining jurisdiction over the cross-petition simultaneously with this opinion.

seeks special-action relief from that ruling, arguing as it did below that because dismissal with prejudice constitutes an adjudication on the merits, dismissal of the claims against the doctors requires dismissal of the vicarious liability claim against it grounded in the doctors' alleged malpractice. Because the issue presented is purely a matter of law, could affect the course of the ongoing litigation, and presents an important question that may arise in future cases, we accept special-action jurisdiction. *See Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶¶ 8-9 (App. 2006) (special-action jurisdiction appropriate to address issue of statewide importance that could readily recur in other cases); *see also* Ariz. R. P. Spec. Act. 1(a).

Discussion

¶5 At the heart of Banner's argument is the principle that a dismissal with prejudice constitutes an adjudication on the merits. It relies primarily on *De Graff v. Smith*, 62 Ariz. 261 (1945), and *Law v. Verde Valley*, 217 Ariz. 92 (App. 2007). In *De Graff*, our supreme court determined that an employer could not be vicariously liable when a judgment stemming from a voluntary dismissal of the employee "reliev[ed] [the employee] of all liability," which the supreme court stated thus "adjudged" that employee "as not guilty of any negligence because of the dismissal with prejudice." 62 Ariz. at 264, 269-70. The court noted that dismissal with prejudice is an adjudication on the merits. *Id.* at 269; *see also Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272 (1971) (voluntary dismissal of claim against employee ends derivative claim against employer). Similarly, in *Law*, the employee-doctors were dismissed with prejudice—one by stipulation in conjunction with a settlement agreement and the other upon motion by the plaintiffs. 217 Ariz. 92, ¶ 5. Applying *De Graff*, we concluded that the dismissals necessarily barred a vicarious liability claim against the employer. *Id.* ¶¶ 12-13.

¶6 *De Graff* and *Law* are facially distinguishable from the instant case because they addressed voluntary dismissals with prejudice. But the underlying notion—that the employee's liability is a necessary element of a claim of vicarious liability—has been applied to some involuntary dismissals as well. *See, e.g.*, *Wiper v. Downtown Dev. Corp. of Tucson*, 152 Ariz. 309, 310, 311-12 (1987) (jury awarded punitive damages against principal but not agent; "[i]f an employee's conduct does not warrant recovery of punitive damages against himself, it can not serve as a basis for such recovery against his employer"); *Hansen v. Garcia, Fletcher, Lund & McVean*, 148 Ariz. 205, 207-08 (1985) (summary judgment against agent requires summary judgment against principal on vicarious liability claim);

Kennecott Copper Corp. v. McDowell, 100 Ariz. 276, 281-82 (1966) (directed verdict for agent releases principal). None of these cases, however, including *De Graff* and *Law*, address the precise issue before us—whether an employer should be permitted to avoid liability by way of a defense available only to its employee.

¶7 In *Kopp v. Physician Group of Arizona, Inc.*, our supreme court expressly disavowed *De Graff* "insofar as that case and its progeny conclude that a stipulated dismissal with prejudice" adjudicates the question whether the dismissed party was negligent. 244 Ariz. 439, ¶ 1 (2018). There, a negligence claim against an individual doctor had been dismissed with prejudice following settlement. *Id.* ¶¶ 2, 3. The remaining claim against the doctor's employer, however, was dependent on proof of the doctor's negligence. *Id.* ¶ 10. The court determined the dismissal did not operate as an adjudication on the merits because "a dismissal with prejudice does not, on its own, trigger issue preclusion." *Id.* ¶ 14.

¶8 Banner seeks to distinguish *Kopp*, contending that case is limited to the application of issue preclusion to an independent negligence claim. Banner argues, then, that *De Graff* and *Law* are instead grounded in claim preclusion.[2] Although the court in neither case expressly addressed claim or issue preclusion, those principles are necessarily implicated here given the general rule that a dismissal with prejudice operates as an adjudication on the merits. *See* Ariz. R. Civ. P. 41(b); *see also Phillips v. Ariz. Bd. of Regents*, 123 Ariz. 596, 598 (1979) ("Rule 41(b) assumes that some dismissals for reasons other than the merits will result in a bar to future litigation as if the suit had been decided on the merits.").

¶9 Under the doctrine of claim preclusion, when "a final, valid judgment is entered after adjudication or default," a party "is foreclosed from further litigation on the claim." *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425 (App. 1993). "The defense of claim preclusion has three elements: (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the

[2] Our dissenting colleague, while otherwise adopting Banner's arguments, avoids characterizing the issue as one of claim preclusion. But we have found no case suggesting that a dismissal under Rule 41(b), Ariz. R. Civ. P., operates independently of the doctrines of claim or issue preclusion to bar future claims. In any event, the operative issue here is whether an employer can take advantage of a defense available only to its employee.

previous litigation, and (3) identity or privity between parties in the two suits." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 14 (2006). Actual litigation of the claim is not required. *Circle K Corp.*, 179 Ariz. at 425.

¶10 To the extent Banner asserts in its petition that claim preclusion applies here, it develops no argument that the third element—privity—is met.[3] As the party asserting the defense, Banner has the burden of proving it applies.[4] *Hanrahan v. Sims*, 20 Ariz. App. 313, 316 (1973) ("res judicata is an affirmative defense and must be pleaded and proved"; the failure to do so constitutes waiver). And even assuming that Banner is in sufficient privity with the individual doctor-defendants to meet this element, claim preclusion nonetheless does not apply here.

¶11 Claim preclusion applies "only when the policies justifying preclusion are furthered," namely, finality, the prevention of harassment, efficiency, and "enhancement of the prestige of the courts." *Circle K Corp.*, 179 Ariz. at 425-26; *see also In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 12 (App. 2011) ("[T]he doctrine of res judicata enforces important principles of

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[3] We note that the order dismissing the doctor-defendants with prejudice has not been certified for appeal under Rule 54(b), Ariz. R. Civ. P. As such, it is not clear that Banner may invoke claim preclusion at all—another issue Banner has left unaddressed. *See Tarnoff v. Jones*, 17 Ariz. App. 240, 243 (1972) (doctrine of res judicata held inapplicable to interlocutory judgment).

[4] Courts have concluded that the employer-employee relationship is usually sufficient to establish privity when evaluating claim preclusion. *See Corbett v. ManorCare of Amer., Inc.*, 213 Ariz. 618, ¶ 40 (App. 2006) ("Examples of persons in privity include employers and employees, principals and agents, and indemnitors and indemnitees."). But Banner has not attempted to show that result is appropriate here, and the dissent's privity analysis misses the point: whether preclusion should apply when the employees were simultaneously employed by another entity at the time of the relevant acts and the basis for their nonliability is unrelated to their employment by the entity seeking to raise a claim preclusion defense. Additionally, we must take exception to the dissent's assertion that "Under any measure, Banner's interests are the interest of the state." Of course, the interests of a private, for-profit hospital diverge from those of a public educational institution, but more importantly, the privity at issue here is between the hospital and the doctors, not the state.

judicial economy and finality."). Banner has not explained how any of these policies weigh in its favor. The litigation has not yet ended, and it appears the negligence of at least some of the individual doctor-defendants will be further litigated irrespective of whether claim preclusion were applied to bar the vicarious liability claim against Banner.[5]

¶12 Further, we will not apply claim preclusion when it would contravene public policy or result in manifest injustice. *Marriage of Gibbs*, 227 Ariz. 403, ¶ 8. The policies underlying the notice-of-claim requirement are not served by applying claim preclusion here. The chief purpose of § 12-821.01 is "to give the government notice of potential liability, an opportunity to investigate claims, the chance to avoid costly litigation through settlement, and assistance in budgeting." *Lee v. State*, 218 Ariz. 235, ¶ 17 (2008).[6] As the respondent noted, "the uncontested record shows that the State would not suffer financially from an adverse judgment."

¶13 Moreover, the notice-of-claim statute is, fundamentally, a codification of sovereign immunity. *See Swenson v. Cty. of Pinal*, 243 Ariz. 122, ¶ 6 (App. 2017). Arizona has adopted the Restatement (Second) of Agency § 217(b), which provides that an employer cannot assert immunities personal to its employee. *Brumbaugh v. Pet Inc.*, 129 Ariz. 12, 13 (App. 1981). Consistent with that provision, the Restatement (Second) of Judgments § 51(1)(b) states that claim preclusion does not apply to a

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[5]For example, as the respondent judge noted, the Harrises' fraud claim against Banner depends in part on the "malpractice by the treating residents" and its breach of contract claim is premised, in part, on the decision of a resident radiologist to "interpret . . . film with no guidance from an available attending physician." And at oral argument before this court, both parties agreed the litigation would be far from over.

[6] Petitioners argue that an adverse judgment against Banner predicated on the negligence of the doctor-defendants would require mandatory reporting to the National Practitioner Data Bank, *see* 42 U.S.C. § 11131, potentially resulting in serious consequences to the doctors in terms of licensure, credentialing, and employment, notwithstanding their dismissal as parties. They contend that the effect of such judgment would "eviscerate the notice of claim requirement for the individuals." But, assuming such reporting is required, nothing in the text of § 12-821.01 suggests the legislature intended it to act as a bar to such collateral consequences to public employees, much less to those arising from dual employment by a private entity.

vicarious claim when, as here, the judgment in the first claim was based on a defense personal to the defendant. Applying claim preclusion here would violate these principles without furthering its underlying policies or the purpose of the notice-of-claim statute.

¶14 We note that Banner has cited no case in which an employer was allowed to benefit from its employee's separate statutory or sovereign immunity, and we are aware of none in Arizona. Our research, however, indicates that other jurisdictions addressing the issue have concluded that vicarious claims against the employer can proceed in such circumstances. *See Blackwell Motors, Inc. v. Manheim Servs. Corp.*, 529 S.W.3d 367, 380 (Mo. Ct. App. 2017) (no immunity for private employer from liability for employee's negligent acts "simply because that employee has an official status as a police officer"); *Fuentes v. Brookhaven Mem. Hosp.*, 780 N.Y.S.2d 777, 778 (App. Div. 2004) (dismissal of complaint against one party "need not be given res judicata effect as against another vicariously liable for the same conduct when the dismissal was based upon a defense that was personal to that party"; dismissal for failure to serve notice of claim "did not determine the merits of the underlying allegations of medical malpractice"); *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas*, 931 N.E.2d 1082, ¶¶ 22, 28 (Oh. 2010) (noting majority of jurisdictions have rejected vicarious immunity; employee's immunity from liability "no shield to the employer's liability for acts under the doctrine of respondeat superior"); *Johnson v. LeBonheur Children's Med. Ctr.*, 74 S.W.3d 338, 347 (Tenn. 2002) ("[F]airness to the parties requires that a private hospital may be held vicariously liable under the doctrine of respondeat superior solely for the acts of a state-employed physician resident when that resident is found to be the agent or servant of the hospital."). And in an analogous setting, South Dakota's Supreme Court, after exhaustively examining the question, has determined that procedural dismissals do not bar a vicarious liability claim, noting "[i]t is the negligence of the servant that is imputed to the master, not the *liability*." *Cameron v. Osler*, 930 N.W.2d 661, ¶ 16 (S.D. 2019) (alteration and emphasis in *Cameron*) (quoting *Cohen v. Alliant Enters., Inc.*, 60 S.W.2d 536, 538 (Ky. 2001)).

¶15 Finally, a few comments on the dissent are in order. First, our colleague relies on an unpublished memorandum decision of this court as "sufficiently similar," to the situation here. In that case we rejected a claim of vicarious liability against the City of Phoenix, premised on the negligence of a city employee who was not provided notice under § 12-821.01. *Angulo v. City of Phoenix*, No. 1 CA-CV 12-0603, ¶¶ 3, 8 (Ariz. App. July 16, 2013) (mem. decision). But *Angulo* is not only unpersuasive in the present context, *see* Ariz. R. Sup. Ct. 111(c)(1)(C) (limited authorization to cite

memorandum decisions for persuasive value), it is inapposite because it dealt only with the straightforward situation of a public entity and its employee, rather than a private employer as is the case here. It does not address the question with which we are confronted: whether a private employer is shielded by a statute intended to protect state actors.

¶16 The dissent also engages in a technical discussion of immunity but misses the broader point that § 12-821.01 is a reflection of sovereign immunity. As our supreme court has explained, the notice-of-claim statute was a legislative response to the decision to abolish the common-law defense of governmental immunity, by providing for absolute immunity, qualified immunity, and affirmative defenses. *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, ¶ 13 (2001). The affirmative defense Banner seeks to invoke here is closely related to notions of governmental immunity—a protection from liability to which it has no right and cannot borrow from its employees. Lastly, our colleague charges that we have abandoned our role "merely to apply the law" in favor of "declar[ing] public policy," which we decidedly have not. We only observe that the public policy of § 12-821.01, as described by our supreme court, is not aided by making Banner immune.

Disposition

¶17 For the foregoing reasons, we conclude the respondent judge did not err by ruling that dismissal of the doctor-defendants does not require dismissal of the vicarious liability claims against Banner. Accordingly, although we accept special-action jurisdiction, relief is denied.

B R E A R C L I F F E, Judge, dissenting:

¶18 As long as the Harrises' direct claims against the Banner Physicians[7] are barred, I would bar pursuit of those claims vicariously against Banner. I therefore respectfully dissent.

[7]"Banner Physicians" are Drs. Geetha Gopalakrishnan, Marie Olson, Emily Lawson, Demetrio Camarena, Prakash Mathew, Sarah Desoky, and Seung Hur, and the claims against each were dismissed with prejudice in an, as yet, non-final, non-appealable order.

The Dismissal of the Claims Against the Banner Physicians Bars the Vicarious Claims Against Banner

¶19 The Harrises allege that Banner is vicariously liable for the Banner Physicians' negligence. Vicarious liability can only exist because of Banner's principal-agent relationship with the Banner Physicians. *See Kopp v. Physician Grp. of Ariz., Inc.*, 244 Ariz. 439, ¶ 9 (2018). Here, however, the trial court dismissed the Harrises' complaint against the Banner Physicians with prejudice, thus entering a judgment on the merits in their favor. *See* Ariz. R. Civ. P. 41(b) (with limited exceptions, involuntary dismissal "operates as an adjudication on the merits"). Without any liability on the part of the Banner Physicians, there is no liability or fault to impute to Banner; thus, Banner may not be held vicariously liable. *See Law v. Verde Valley*, 217 Ariz. 92, ¶ 13 (App. 2007). The trial court erred in not dismissing these claims against Banner.

The Claims Against The Banner Physicians Were Dismissed With Prejudice And On The Merits

¶20 The failure of a plaintiff to timely submit a notice of claim under A.R.S. § 12-821.01 as to any cause of action against the state or a state employee (acting within the course and scope of his state employment) bars any later suit against the state or such state employee. *See Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, ¶ 30 (App. 2008) ("If a notice of claim is not properly served, the claim is barred."); *McCloud v. State*, 217 Ariz. 82, ¶ 27 (App. 2007) (A.R.S. § 12-821 applies to state employee's acts within scope of state employment). If a suit is nonetheless filed against the state or the state employee without a timely notice of claim, the suit may be challenged and, ultimately, be dismissed. *See Salerno v. Espinoza*, 210 Ariz. 586, ¶¶ 11-12 (App. 2005) (affirming dismissal of complaint against state employee after complainant failed to provide notice within the applicable time limit).

¶21 When the adjudication of a civil claim on the merits results in the finding of no liability, the resulting order of dismissal in the case typically, but not necessarily, is entered expressly "with prejudice." *See, e.g.*, *Law*, 217 Ariz. 92, ¶ 8. Whether the final order is expressly "with prejudice" or not, a claim adjudicated on the merits and dismissed may not be brought again. *See 4501 Northpoint LP v. Maricopa County*, 212 Ariz. 98, ¶¶ 15-17 (2006). A court reaches the merits of a claim when it resolves the claim on its *substance*. *Id.* ¶¶ 16-17. As stated in Black's Law Dictionary, a judgment on the merits is

> [o]ne rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or formal or merely technical or procedural point, or by default and without trial. A decision that was rendered on the basis of the evidence and facts introduced.

Merits, judgment on, Black's Law Dictionary, at 843 (6th ed. 1990). And further,

> [n]ormally, a judgment based solely on some procedural error is not a judgment on the merits. The latter kind of judgment is often referred to as a "dismissal without prejudice." A party who has received a judgment on the merits cannot bring the same suit again. A party whose case has been dismissed without prejudice can bring the same suit again so long as the procedural errors are corrected (*i.e.*, cured) in the later action.

Id. at 843-44; *see also Judgment on the Merits*, Black's Law Dictionary (11th ed. 2019) ("A judgment based on the evidence rather than on technical or procedural grounds.").

¶22 Under some circumstances, even if the issue of liability has not actually been resolved "on the basis of the evidence and facts introduced," but rather on some procedural defect, we must nonetheless treat it as if it *were* on the merits. Under Rule 41(b), Ariz. R. Civ. P., unless the order dismissing a claim states otherwise, an involuntary dismissal of a claim (on grounds other than jurisdiction, failure to join a necessary party, or for improper venue) "operates as an adjudication on the merits." Here, the trial court expressly dismissed the claims against the Banner Physicians "with prejudice" and made no statement as to whether it was being dismissed on the merits or otherwise; consequently, it was also on the merits. Thus, even though the claims were in fact dismissed on a matter of procedure—for failure to comply with § 12-821.01—the dismissal was on the merits, and the claims may not be brought again. As a result, our courts must treat the claims as if, after a full and complete examination, on the basis of the evidence and facts introduced, the Banner Physicians were found not liable.

Derivative Claims Dismissed Against The Servant Must Be Dismissed Against The Master

¶23 Because the claims against the Banner Physicians were adjudicated on the merits and dismissed for lack of liability, those same claims, brought vicariously against Banner, must also be dismissed. "Under the doctrine of respondeat superior, an employer is vicariously liable for 'the negligent work-related actions of its employees.'" *Kopp*, 244 Ariz. 439, ¶ 9 (quoting *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, ¶ 9 (2012)). "[A] party is responsible for the fault of another person, or for payment of the proportionate share of another person, if . . . [t]he other person was acting as an agent or servant of the party." *Law*, 217 Ariz. 92, ¶ 11 (emphasis omitted) (quoting A.R.S. § 12-2506(D)). "Vicarious liability results solely from the principal-agent relationship . . . ." *Id.* It is well-settled that "[w]hen a plaintiff sues both the agent and the principal for the negligence of the agent, a judgment in favor of the agent bars the plaintiff's vicarious liability claim against the principal, even when the judgment is the product of a settlement." *Jamerson v. Quintero*, 233 Ariz. 389, ¶ 6 (App. 2013); *see also Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 574 (1986) ("In cases of derivative liability, a judgment or dismissal in favor of the servant relieves the master of liability."). Further, "[w]hen a judgment on the merits—including a dismissal with prejudice—is entered in favor of the 'other person' in [Arizona's vicarious liability statute] . . . there is no fault to impute and the party potentially vicariously liable . . . is not 'responsible for the fault' of the other person." *Law*, 217 Ariz. 92, ¶ 13.

¶24 As early as 1937, in *Rosenzweig & Sons, Jewelers, Inc. v. Jones*, Arizona has barred judgment against an employer grounded in vicarious liability when the employee is found free of liability. 50 Ariz. 302, 311 (1937). In *Rosenzweig & Sons, Jewelers*, a libel action in which the jury found the company responsible, but not the individual employee defendants, our supreme court concluded:

> [I]f the employee who causes the injury is free from liability therefor, his employer must also be free from liability. . . .
>
> We think that all justice and reason upholds this view of the law. When the only reason why a judgment may be returned in favor of a plaintiff is that A has committed a tort, and the liability of B, if any, is an imputed one only, it would be a denial of all justice to say

> that the one who actually did the wrong may go free, while the one who can only be liable because of the former's wrongdoing is mulcted in damages.

Id. at 310-11.

¶25 Then, a few years later in *De Graff v. Smith*, the court similarly held that the employer could not be held liable solely for the conduct of his employee, as to which the employee has "been adjudged as not guilty of any negligence because of the dismissal with prejudice." 62 Ariz. 261, 270 (1945). The court quoted favorably 35 Am. Jur. § 534,

> [A]ccording to the weight of authority, where employer and employee are joined as parties defendant in an action for injuries inflicted by the employee, a verdict which exonerates the employee from liability for injuries caused solely by the alleged negligence or misfeasance of the employee requires also the exoneration of the employer . . . . This is not upon the theory that the employer is denied the right to recover over against the employee, but upon the ground that the sole basis of liability is the negligence or wrongdoing of the employee imputed to the employer under the doctrine respondeat superior; the acquittal of the employee of wrongdoing conclusively negatives liability of the employer. The verdict in favor of the employee, determining in effect that he was not guilty of negligence, necessarily amounts to a finding that the employer was free from negligence, and a verdict against the employer after finding in favor of the employee would be inconsistent and illogical. Also, as a general rule, a judgment in an action against the employee which exonerates the employee from personal liability for an act which he committed while acting for his employer, and establishes that the act was not wrongful or that it was excusable, is necessarily a like determination in favor of the employer, and is conclusive in a

> subsequent action against the employer based upon the same injury.

De Graff, 62 Ariz. at 268-69 (quoting 35 Am. Jur. § 534). Similarly, in *Wiper v. Downtown Dev. Corp. of Tucson*, as to an award of punitive damages against the employer only as to a derivative claim, our supreme court recognized that "punitive damages cannot be imputed to an employer for an employee's acts . . . where the individual employee has been discharged from personal liability. In such cases, a judgment in favor of the employee will relieve the employer of any liability." 152 Ariz. 309, 310-11 (1987).

¶26 In a case sufficiently similar to this one, our court held that the dismissal of claims against the employee for failure to serve a notice of claim under § 12-821.01, required a dismissal of the vicarious claims against the employer. *Angulo v. City of Phoenix*, No. 1 CA-CV 12-0603 (Ariz. App. July 16, 2013) (mem. decision). In *Angulo*, the plaintiff was struck while in a crosswalk by a City of Phoenix vehicle. *Id.* ¶ 2. The plaintiff sued the city-employee driver in negligence and the City itself asserting vicarious liability. *Id.* The driver filed a successful motion to dismiss and motion for summary judgment on the grounds that the plaintiff had failed to serve him with a notice of claim. *Id.* ¶ 3. After the employee was dismissed, the City filed a motion for summary judgment asserting that the employee's "dismissal extinguished its potential vicarious liability." *Id.* This court, relying on *De Graff*, upheld the dismissal of the vicarious claims against the City. *Id.* ¶ 8. In our decision, we determined that it would be up to the Arizona Supreme Court to limit or depart from *De Graff*. *Id.*

¶27 Contrary to the majority's assertion, it makes no difference whether the employer benefitting from the dismissal of the employee is a private or state employer. It is rather the vicarious nature of the claims themselves, not the relationship of the parties, that is fundamental to this analysis. Indeed, it does not even matter how the claims are dismissed against the employee. The import of *Angulo* is that even claims dismissed against an employee under § 12-821.01 will relieve a vicariously sued employer of liability.

Kopp ***Does Not Save These Vicarious Claims***

¶28 Despite that invitation in *Angulo*, our supreme court did not revisit *De Graff* in the context of that case, but did address it and limit its application five years later in *Kopp*, 244 Ariz. 439. The majority concludes that *Kopp*'s partial disapproval of *De Graff* allows these vicarious claims to survive. It does not.

¶29 In *Kopp*, three patients suffered post-operative complications after bariatric surgery. *Id.* ¶ 2. They sued the surgeon in negligence and the hospital where the surgery was performed. *Id.* The claims against the hospital were based on vicarious liability and related to its alleged independent negligent administration of its surgical program, including as to its "hiring, selection, and credentialing." *Id.* The plaintiffs settled with the surgeon under an agreement that required them to dismiss the claims against him with prejudice and precluding the plaintiffs from "pursuing claims against the [H]ospital . . . based on a theory of vicarious liability or respondeat superior." *Id.* ¶ 3 (alterations in *Kopp*). The agreement did not, however, preclude "independent claims" against the hospital. *Id.*

¶30 After the claims against the surgeon were dismissed, the hospital moved for summary judgment to dismiss most of the remaining claims against it claiming they were "derivative" of the claims against the surgeon and therefore barred as a result of the dismissal. *Id.* ¶ 4. The trial court granted the motion, dismissing the claims of negligent hiring, selection, and credentialing. *Id.* Our court affirmed the ruling, concluding that the dismissal of the claims against the surgeon "preclude[d] Plaintiffs from litigating [the Hospital's] alleged liability as vicariously derived from any alleged negligence" of the surgeon. *Id.* ¶ 5 (first alteration added, second alternation in *Kopp*). On review, our supreme court reversed the trial court, holding that the claims against the hospital for negligent supervision, credentialing, or hiring rest on the hospital's breach of its independent "duty to monitor the 'quality of medical care furnished to patients within its walls,'" not derivatively on the claims against the surgeon. *Id.* ¶¶ 10-11, 16 (quoting *Fridena v. Evans*, 127 Ariz. 516, 519 (1980)).

¶31 The hospital had argued, however, that even if the claims were independent claims, the dismissal of the claims against the surgeon barred the plaintiff from asserting that the surgeon had been negligent, a necessary element of proof for those claims. *Id.* ¶ 13. Our supreme court disagreed, holding that the effect of the dismissal of the surgeon did not bar assertion of the fact of his negligence for the independent claims. *Id.* ¶ 15. It determined that the hospital was asserting collateral estoppel, or issue preclusion, and that the court's issue preclusion jurisprudence required that the issue or fact—such as the surgeon's negligence—must have been *actually* litigated to prevent it being raised again as to a future claim. *Id.* ¶¶ 14-15. It was constrained then to abrogate *De Graff* and other cases "to the extent [they] suggest that a stipulated dismissal with prejudice is a judgment on the merits for the purposes of issue preclusion." *Id.* ¶ 14.

¶32 However, in its limited abrogation of *De Graff*, our supreme court left alone *De Graff*'s application to matters of claim preclusion; it expressly affirmed that "a judgment can be 'on the merits' for purposes of *claim* preclusion even if it results from the parties' stipulation or certain pretrial rulings by the court." *Id.* (quoting *4501 Northpoint LP*, 212 Ariz. 98, ¶¶ 15-18).[8] The barring of claims against an employer after the dismissal of claims against the employee, if not strictly a matter of application of claim preclusion, is akin to it, and not akin to issue preclusion.

¶33 The claims against Banner at issue here are wholly derivative and not the type of direct claims based on Banner's own fault at issue in *Kopp*. Notwithstanding *Kopp*, the adjudication of the claims against the Banner Physicians on the merits with a finding of no liability "conclusively negatives liability of" Banner as to such solely derivative claims. These claims should have been dismissed.

If Privity Does Not Exist to Benefit Banner, It Does Not Exist to Render It Liable

¶34 The majority's conclusion that Banner has failed to show its privity with the state sufficient for claim preclusion—even while concluding it may be held vicariously liable for the conduct of the state's employees—is curious. Even assuming that Banner were required to show its privity with the state, privity exists.

¶35 "The question of who is a privy is a factual one requiring a case-by-case examination." *Aldrich & Steinberger v. Martin*, 172 Ariz. 445, 448 (App. 1992). To find "[p]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship' . . . in which the interests of the non-party are

[8]As stated in footnote one, above, it is not entirely clear that claim preclusion may be applied here in the absence of a final, appealable judgment dismissing the Banner Physicians. *See Tarnoff v. Jones*, 17 Ariz. App. 240, 243 (1972) (interlocutory judgment from an earlier filed case could not support a claim for claim preclusion because not "final"). However, in *Kopp*, the order of dismissal of the physician defendant on which the later motion for dismissal of the employer defendant was based was interlocutory and not itself, apparently, a final, appealable order of dismissal. *See Kopp v. Schlesinger,* No. CV2012-092733, 2015 WL 13560120, at *1 (Ariz. Super. Jan. 6, 2015). Nonetheless, it is less clear that we must apply traditional claim preclusion—which typically arises in the context of two separate lawsuits—in this context.

presented and protected by the party in the litigation." *Hall v. Lalli*, 194 Ariz. 54, ¶ 8 (1999) (alteration in *Hall*) (quoting *Phinisee v. Rogers*, 582 N.W.2d 852, 854 (Mich. 1998)). Privity is not the result of the parties having common objectives in the action, but is the result of the relationship of the parties and the commonality of their interests. *Id.* ¶ 12. As the majority concedes, "[e]xamples of persons in privity include employers and employees, principals and agents, and indemnitors and indemnitees." *Corbett v. ManorCare of Amer., Inc.*, 213 Ariz. 618, ¶ 40 (App. 2006).

¶36 Banner is the direct employer of the Banner Physicians and the entity—as admitted by the Harrises—"controlling" those same physicians pursuant to Banner's Affiliation Agreement with the University, under which Banner is also the indemnitor of the state. Under any measure, Banner's interests are the interest of the state, and privity exists.

Dismissal of the Derivative Claims Fulfills Public Policy

¶37 The majority, citing *Lee v. State*, 218 Ariz. 235 (2008) as to some purposes of § 12-821.01, argues that public policy is not satisfied by dismissing the claims against Banner here. Our role, of course, is not to declare public policy, but merely to apply the law. Public policy is established by the legislature, *Ray v. Tucson Med. Ctr.*, 72 Ariz. 22, 35-36 (1951), and, to the extent public policy is established by case law, by the Arizona Supreme Court in its opinions, *Alcombrack v. Ciccarelli*, 238 Ariz. 538, ¶ 14 (App. 2015). It is not established by intermediate appellate courts. Our job is to faithfully apply the law and precedent. A faithful application of the law and precedent compels the dismissal of these vicarious claims against Banner.

A.R.S. § 12-821.01 Does Not Confer "Immunity" On State Employees And Therefore Banner Is Not Benefitting From Its Servants' Immunity

¶38 The majority also incorrectly concludes that Banner is seeking to benefit from the "sovereign immunity" enjoyed by the Banner Physicians. This is not so. The Banner Physicians did not claim immunity below, and Banner does not claim it vicariously here. The dismissal of the vicarious claims against Banner is not mandated by sovereign immunity or immunity of any kind, but is a statutory consequence of the failure of the Harrises to fulfill a condition precedent to their claim—namely the timely service of a sufficient notice of claim.

¶39 It is "the common law rule that the government is liable for its tortious conduct" unless an exception is granted by statute or case law. *Diaz v. Magma Copper Co.*, 190 Ariz. 544, 553 (App. 1997); *see also Warrington*

v. Tempe Elementary Sch. Dist. No. 3, 187 Ariz. 249, 251 (App. 1996). The Actions Against Public Entities or Public Employees Act, A.R.S. §§ 12-820 to 12-826, as a whole, recognizes the *absence* of sovereign immunity except in the two very specific cases of absolute and qualified immunity defined in §§ 12-820.01 and 12-820.02, respectively. As to matters of simple negligence raised here, neither the state nor its employees are either absolutely or qualifiedly immune. *See* §§ 12-820.01 (absolute immunity), 12-820.02 (qualified immunity); *Glazer v. State*, 237 Ariz. 160, ¶ 11 (2015) ("The Act leaves intact the common-law rule that the government is liable for its tortious conduct unless immunity applies."). Indeed, both § 12-821, which establishes the applicable one-year statute of limitations for claims against the state, and § 12-821.01, which requires the service of a notice of claim before filing suit, would be superfluous if absolute sovereign immunity applied.

¶40 The requirements to timely file suit within the one-year statute of limitations and to timely serve a sufficient notice of claim found in §§ 12-821 and 12-821.01, respectively, are simply no more than procedural steps akin to statutes of limitations generally. *See Pritchard v. State*, 163 Ariz. 427, 433 (1990) (§ 12-821 analogous to statute of limitations). In no other context have we deemed the failure of a plaintiff to meet a statute of limitations as having conferred immunity. The Banner Physicians did not claim or possess immunity and therefore Banner is not attempting to benefit from any immunity enjoyed by them.

¶41 For the foregoing reasons, I would accept jurisdiction and grant the relief sought by Banner. And, given the majority's departure from reasoning of prior cases, including *Angulo*, and the apparent uncertainty as to the applicability of *Kopp* and the continued applicability of *De Graff* in this context, if relief is sought from our supreme court, I urge that court to resolve this question.[9]

[9]The Harrises assert that they could have brought the suit in the first instance against Banner without naming the individual tortfeasor physicians and thus they should not lose their claim by virtue of the mechanics of their suit. Whether the first proposition is true is immaterial because that is not before us. Nonetheless, as to the second proposition, the Harrises are certainly bound by the tactical and strategic choices they made in bringing the suit they brought. *See Flynn v. Campbell*, 243 Ariz. 76, ¶ 22 (2017); *e.g.*, *Angulo*, No. 1 CA-CV 12-0603. Those choices, providently made or not, resulted in the findings that bar their claims.