

A PUBLIC ENTITY WAIVES A NOTICE OF CLAIM DEFENSE BY FAILING TO SEEK PROMPT JUDICIAL RESOLUTION; A PLAINTIFF MAY DEMONSTRATE BREACH OF THE STANDARD OF CARE BY SHOWING A DEFENDANT HAS DEPARTED FROM RULES OF ITS OWN MAKING

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Ponce v. Parker Fire Dist.

Arizona Ct. Appeals, Div. One, March 27, 2014

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On August 16, 2009, a fire began on the property next door to plaintiff and reached his house. Firefighters from the Parker Fire District (PFD) used a thermal imaging camera on the exterior of the plaintiff's house to check for hot spots, but did not use the camera on the house's interior. On August 21, the plaintiff's house was almost completely destroyed by fire.

The plaintiff submitted a notice of claim to PFD on March 5, 2010. In August 2010, the plaintiff sued PFD alleging negligence for failing to extinguish the fire and allowing it to rekindle. In answering the complaint, PFD asserted as an affirmative defense that the plaintiff had failed to file a timely notice of claim. In January 2012, PFD moved for summary judgment on the ground that the notice of claim was filed 196 days after the second fire and therefore was untimely under the 180-day limit imposed by A.R.S. § 12-821.01. PFD further argued that the plaintiff had not disclosed an expert witness on the standard of care for firefighters and therefore could not prove PFD was negligent.

On appeal from the trial court's grant of summary judgment, the court of appeals reversed. First, the court held that PFD waived the notice of claim defense by actively litigating the merits of the case for more than a year and failing to seek prompt judicial resolution of the defense.

Second, the court concluded that summary judgment was not appropriate based on the plaintiff's failure to identify a firefighting expert. The PFD Fire Chief, whose expertise PFD did not dispute, testified that standard operating procedure for thermal imaging cameras was to use it on everything possible. The court cited cases outside of Arizona for the proposition that a plaintiff may demonstrate breach of an appropriate standard of care by showing a defendant has departed from rules of its own making. Even though the Fire Chief also testified that PFD followed department procedures, his statements at least raised a question of fact precluding summary judgment.

The Ponce case has potentially far-reaching implications for businesses and entities that adopt policies and procedures to benefit their clients, patients, or the public. Plaintiffs may cite Ponce for the proposition that these policies and procedures can be evidence of the standard of care even in the absence of expert testimony establishing this.