No.

In The Supreme Court of the United States

Lisa M. Aubuchon and Rachel Alexander

Petitioners,

vs

County of Maricopa et al

Respondent.

On Petition For Writ Of Certiorari To The
United States Supreme Court

AMENDED
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Was the 9th Circuit Panel's Decision a Politically Charged Decision that Assumed the Role of a Fact Finder, as Asserted by the Dissent?

II. Was the existence of an employment contract or the terms of such a contract for these two government attorneys a question of fact for a jury?

III. Was Petitioner Alexander's Notice of Claim sufficient under the law?

IV. Are the Issues Presented by this Case of Exceptional Importance Due to the Precedent it Sets For Government Attorneys?

V. Did an Arizona Justice Now on the 9th Circuit Demonstrate Bias at Oral Argument and Ignore His Prior Involvement with the State Court Action?

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BASIS FOR JURISDICTION

This Court has jurisdiction over this matter as it is a request for review of the 9th Circuit Court of Appeals after a denial of a Petition for En Banc and for Rehearing entered on March 6, 2018, pursuant to 28 U.S.C. §1254. The Opinion below is cited Aubuchon v. County of Maricopa, No. 16-15484 (9th Cir. Jan. 3, 2018).

STATEMENT OF THE CASE

This case is about a terrible injustice that was done to two government attorneys, that would set a dangerous precedent for other government attorneys if allowed to stand. It would have a chilling effect on attorneys considering practicing government law. The lower courts ignored vast caselaw by the Supreme Court in order to uphold this travesty of justice.

Petitioners were part of what is called the "Largest Attorney Ethics Case in History" by hired bar prosecutors from Colorado. The highest court in Arizona disbarred Petitioner Aubuchon and suspended Petitioner Alexander for six months, destroying their careers and livelihood. As part of the sanctions imposed, bar costs in the astronomical amount of $101,292.75 were assessed. The newly appointed employer of the Petitioners, the Maricopa County Attorney, through the jural entity Maricopa County that was the subject of actions taken in Court by Petitioners, refused to pay for these costs and so Petitioners filed the lawsuit before this Court. Petitioners were caught up in a "county feud" between their boss, then-Maricopa County Attorney Andrew Thomas, and the Respondents, the Maricopa

County Supervisors. The county supervisors and their new Maricopa County Attorney refused to pay the disciplinary costs purely out of a vendetta against Thomas.

Instead of allowing a jury to decide the case as clear case law required, federally and by state law as to the state law claims, the Arizona District Court and then the 9th Circuit acted contrary to the law and decided the facts. These factual determinations were unsupported in the record and as the dissent made clear, were for a jury to decide. As to the legal matters, the courts also erred. In essence, Petitioners were treated differently than other litigants as demonstrated by one of the panel judges at oral argument. This judge, Andrew Hurwitz, had sat on the very case that Petitioner Aubuchon was disbarred for while he was on the Arizona State Supreme Court. This was a clear conflict of interest.

This decision was not made after a trial on the merits. The decision denied the Petitioners their right to a jury trial. The proceeding involves one or more questions of exceptional importance. Certainly there is a preference for decisions on the merits; Summary Judgment in employment matters as intent is a question of fact.

The Decision fails to follow the overwhelming majority of law in the 9th Circuit and the law in Arizona, and contradicts several U.S. Supreme Court decisions. Further, it failed to accurately state the uncontested facts and ignored contradictory facts that clearly create an issue of fact for the jury. This matter is of great important as Appellants have been disciplined and sanctioned over matters relating to conflicts with the

judiciary, and the Panel's decision is so contrary to the law and facts of the case as to create an appearance or actual bias. Judge Hurwitz brought into this matter the underlying bar discipline, characterizing it negatively with vehemence and passion. Judge Hurwitz also ignored his own review of Appellant Aubuchon's actions when he presided over the Special Action filed by Judge Gary Donahoe as set forth in detail below.

Petitioners are asking that this Court recognize the injustices to these former prosecutors who were deprived their contract and constitutional rights and have been stifled at every juncture with this Court being the last hope for them to finally get a fair day in Court.

ARGUMENT

The 9th Circuit Panel's Decision is a Politically Charged Decision and Unlawfully Assumes the Role of a Fact Finder, as Evidenced by the Dissent

1. The 9th Circuit has recognized, as the Dissent (Richard K. Eaton, Judge of the United States Court of International Trade) did, that issues of fact have to be decided by the trier of fact

The 9th Circuit Court and Arizona courts have made it clear that when an issue of fact exists, it is for the trier of fact and not appropriate for summary judgment. Arizona adopted and has maintained its position in *Orme School v. Reeves,* 802 P.2d 1000, ¶14 (1990), which held that "Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law."

In the *City of Phoenix v. Fields*, 201 P.3d 529 (2009), the court addressed a summary judgment issue related to the exact claim here, that the notice of claim was insufficient. The court held that "waiver" of the affirmative defense of a notice of claim is for a jury but there, the court found that, like here, "waiver by conduct is apparent from the extensive litigation record below."

In recent cases such as *Chatilla v. Scottsdale Healthcare Hospitals*, No. 16-15244 (9th Cir. July 17, 2017) (cited per 9th Circuit Rule 36-3), this Court stated that "viewed in the light most favorable to Chatila, the email and handwritten note raise a triable issue of fact regarding whether Chatila requested FMLA leave before her purported resignation." Likewise here, Appellants produced affidavits about promises and those affidavits were supported by Appellees' practice of paying the bar costs for all others. In addition, the policy in place, or expressed in the Trust Agreement, only precluded payment for trial attorneys, which did not include Appellants.

In their Affidavits, Appellants stated "As part of my employment, I was trained and specifically advised that if bar disciplinary proceedings were ever initiated, any costs associated with proceedings that alleged ethical violations while I was employed by the Maricopa County Attorney's Office would be paid for." Doc. 58, Pages 200-205 (Excerpts of Record). They further stated that their actions were approved by the County Attorney and that they were advised that any sanctions would be covered.

Also in *Kardell v. Lane County*, No. 14-35817 (9th Cir. June 20, 2017) (cited per 9th Circuit Rule 36-3), this

Court addressed a fact scenario very similar to Appellants. The claim in that case was that the plaintiff was retaliated against by his public employer in violation of his First Amendment rights. This Court stated "Kardell's declaration states that he was concerned that his superior was 'spending money to conduct outside investigations of meritless allegations' and that he 'brought this matter to HR.' Viewed in the light most favorable to *Kardell, see Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1056 (9th Cir. 2013), the declaration is evidence that *Kardell* spoke on a matter of public concern. . .[t]he district court therefore erred in granting summary judgment on this claim." Just like in *Kardell*, Appellants provided declarations about what happened to them and how they were assured that the bar costs would be paid, yet the Panel ignored this evidence. The dissent in the instant case correctly found that the issues in this case are matters for a jury. In fact, it is clear that Appellants' evidence in this case was simply disregarded, contrary to all case law on summary judgment and, particularly when corroborated by the other evidence which exists in this case.

In *Fuller v. Idaho Department of Corrections*, 865 F.3d 1154 (2017) this Court found that a "reasonable juror could credit Fuller's statements that Harvey's e-mail was 'completely insulting' to her, and that she felt the IDOC had given no 'assistance for [her] as a victim' of a rape which 'impaired [her] ability to live normal, sleep normal, or feel safe;' to find a hostile work environment. The Fuller court cited a recent 9th circuit case that stated "what is required to defeat summary judgment is simply evidence such that a reasonable juror drawing all inferences in favor of the respondent could return a

verdict in the respondent's favor." *Zetwick v. Cty. of Yolo,* 850 F.3d 436, 441 (9th Cir. 2017) (internal quotation marks omitted). Fuller made it clear that in "assessing whether a genuine issue of material fact exists for trial, we do not weigh the evidence, nor make factual or credibility determinations." The court further stated that the dissent criticized it for drawing inferences in the plaintiff's favor and explained that is what the court is supposed to do on a summary judgment analysis, citing to *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 252, 255 (1986).

2. The Arizona Courts held the Notice of Claim Requirement can be waived

The Panel simply stated that the:

> district court correctly granted summary judgment against Alexander because she did not comply with the Arizona governmental notice of claim statute, Ariz. Rev. Stat. §12-821.01(A). *See Simon v. Maricopa Med. Ctr.,* 234 P.3d 623, 630 (Ariz. Ct. App. 2010) (requiring "strict compliance" with the statute).

However, the following Arizona Supreme Court law shows error. The failure of the Notice of Claim is an affirmative defense where the Appellees have the burden of proof. *City of Phoenix v. Fields*, 219 Ariz. 568, 573, ¶¶ 31-33 (2009) held that despite the raising of the notice of claim deficiency in an Answer, the Defendant waived the defense by continuing to litigate before bringing the defense to the court. The Court stated that:

> If the City and Board had promptly sought judicial resolution of their § 12-821.01(A) defense, the plaintiffs would have been spared considerable expense and the judicial system a significant expenditure of its resources. Perhaps most importantly, the non-representative members of the class would have been alerted before class certification to the need to file their own separate notices of claim. *See Fields,* 219 Ariz. at 96 n. 9 ¶ 22, 193 P.3d at 790 n. 9. We therefore hold that, even assuming that the City and Board preserved the § 12-821.01(A) defense in their original joint answer, they waived this defense against the claims in the original complaint by their subsequent conduct.

Similarly, Defendants considered Alexander's Notice of Claim, denied it, and never brought up any deficiencies until months later, after litigation had begun. Additionally, the court noted, "Typically, waiver is "a question of fact." *Chaney Bldg. Co. v. Sunnyside Sch. Dist.* No. 12,147 Ariz. 270, 273, 709 P.2d 904, 907 (App.1985). A jury is necessary to determine whether such waiver occurred.

Thus, the Panel erred in remanding the waiver issue, which is clear, for the reason that the issue was not decided until there had been substantial litigation conducted and not until Summary Judgment after discovery was completed.

3 The Arizona Courts have found contrary to the Panel Opinion that Contracts can be established by policy and practice and can be orally modified.

The Panel made a finding that is incomprehensible. The Panel stated that "this legal conclusion about what Aubuchon's contract provided is not evidence that it actually did so. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 730, 738–39 (9th Cir. 1979)." Aubuchon did not make a legal conclusion - she stated factually what she was told by the Maricopa County Attorney. Ignoring the Affidavits in the record as was cited to by the dissenting judge during the oral argument, LINK, the majority of the Panel simply stated that "Aubuchon proffered no evidence that her original contract of employment provided for payment of costs imposed against Deputy County Attorneys in bar disciplinary proceedings."

As stated in the Dissent and below, there was compelling evidence to show that Aubuchon's contract was modified. Aubuchon provided an affidavit that showed what transpired when asked to take on additional responsibilities as a member of the anti-corruption task force. Alexander's affidavit corroborated it. The payment for all others who were assessed bar costs corroborated it was well. *See Lindsey v. University of Arizona,* 754 P.2d 1152, 157 Ariz. 48 (Ct. App. 1987) ("An employer's oral representations may modify the terms of a contract and create a question of fact for the jury as to the terms of the contract."). See also A. Corbin, Corbin on Contracts, § 585 at 481-87 (1960). The Respondents have not cited a single example of an attorney whose costs were not paid for by the county.

The Panel also ignored the following cases in concluding there was no evidence that the contract included payment of bar costs:

- Continued employment alone is sufficient

consideration to support a modification to an implied-in-fact contract. *Mattison v. Johnston,* 730 P.2d 286, 152 Ariz. 109, 157 Ariz. App. 109 (Ct. App. 1986); *Coup v. Scottsdale Plaza Resort, LLC,* 823 F. Supp. 2d 931 (D. Ariz. 2011).

- "[T]to effectively modify a contract, whether implied-in-fact or express, there must be: (1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration." *Demasse v. ITT Corp.,* 984 P.2d 1138, 194 Ariz. 501(1999).
- A written contract can be modified even without further writing. *Ariz. Feeds v. A & R Argo, Inc.,* 136 Ariz. 420, 423, 666 P.2d 520, 523 (App. 1983); *Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139, 629 P.2d 553, 555 (App.1981) ("A written contract may be modified by subsequent oral changes that are supported by consideration").
- Government employees can have contract terms other than specifically set out in a signed written contract. *Wagner v. City of Globe*, 722 P. 2d 250, 254 150 Ariz. 82, 86 (1986).
- Verbal promises can become part of the contract, and whether in a particular case a promise should be implied in fact is a question of fact. *Wagenseller v. Scottsdale Mem'l Hosp.,* 710 P.2d 1025, 147 Ariz. 370 (Ariz. 1985) superseded by statute on other grounds, A.R.S. superseded by statute §§ 23-1501,-1502; *see also Leikvold, v. Valley View Community Hospital*, 141 Ariz. 544, 547, 688 P.2d 170, 173 (1984).

4. A majority of the Panel stretched the truth when it found that "a supervisor" advised of a contract benefit – it was the County Attorney, an elected official and Appellants' employer who entered into the contract and

had the authority to modify it thus, as stated by the Dissent, an issue of fact exists for the jury. In fact, Alexander's actual "supervisor" was treated as having an employment contract since his bar disciplinary costs arising from the same proceeding were paid for by the county.

The Panel's conclusion that Aubuchon provided no evidence creating a material issue of fact as to whether her original employment contract obligated the County to cover bar costs, or that there was a subsequent relevant modification of the contract is completely unsupported by the record, as pointed out by Judge Eaton at oral argument.

Contrary to the Panel's conclusion, Appellants proffered absolute evidence that their original contract, as well as modified contract of employment, provided for the payment of costs imposed against Deputy County Attorneys in bar disciplinary proceedings in their Affidavits. It is undisputed that Maricopa County Attorney Thomas asked them to take on additional responsibilities for the corruption investigation. Thus, the Panel's contention that "a supervisor" telling Aubuchon that bar costs would be covered is insufficient evidence to show a contract modification, is a mischaracterization of what took place. As recognized by the Dissent, a contract can be modified verbally. Here, the unrefuted evidence is that it was the County Attorney, Appellants' employer, an elected official with the power to modify the contract who, with Appellants' consent, did modify the contract. The Affidavits were corroborated by the payment of bar costs to Alexander's supervisor and to all other employees similarly situated.

The court in *Romley v. Daughton*, 241 P.3d 518, 225 Ariz. 521 (Ct. App. 2010) made it clear that the County cannot usurp the County Attorney's authority over his or her personnel, absent some conflict of interest. The County Attorney has the authority to negotiate the terms of a contract, as the County acknowledged. The Office has policies and procedures in place that are modified as necessary by the County Attorney. Doc. 58, Page 189.

In addition, the policy in place specifically stated that bar costs would not be paid as to "trial attorneys," thus corroborating Appellants' belief, and creating a question of fact for the jury. In 2014, a memorandum was issued by the new County Attorney discussing bar costs, long after the events in the instant case took place that curiously related back to the Thomas administration. Doc. 58, Page 190. It tried to adopt a brand new policy that combined the Trial Attorney Policy with the basic Employee policy, yet incredibly claiming the policies were not substantively modified. Doc. 56, Page 445. Appellees failed to produce the original Employee Policy and instead only produced the former Trial Attorney policy. As pointed out above, this "Trial Attorney" policy was inapplicable to Appellants at the time of the events at issue or afterwards.

Further, the County admitted that all other deputy county attorneys' bar costs had been paid. Justice Hurwitz noted at the oral argument that Peter Spaw's (Alexander's supervisor) costs were paid and that his actions were "worse" than Alexander's. While both Appellants were employed by the Maricopa County

Attorney's Office, at least two attorneys, Peter Spaw and Ted Duffy, were assessed bar disciplinary costs which the County paid. Doc. 58, Page 188.

Where reasonable minds may draw different conclusions, or inferences, from undisputed evidentiary facts, a question of fact is presented. *Dietz v. Waller,* 141 Ariz. 107, 110-111, 685 P.2d 744, 747-48 (1984). "[T]he very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Apache Railway Co. v. Shumway*, 62 Ariz. 359, 378, 158 P.2d 142, 150 (1945).

The Arizona Supreme Court has stated that due to the lower pay rate of public employment, the fringe benefits public employees receive, such as pensions, should be given more weight in breach of contract claims. *Yeazell v. Copins*, 402 P. 2d 541, 98 Ariz. 109, 114 (1965).

When contract terms are ambiguous and "it is necessary to turn to extrinsic and conflicting evidence to determine the true meaning, "the question should be submitted to the jury." *Miller Cattle Co. v. Francis*, 298 P. 631, 633 (Ariz. 1931) (quoting *Carrick v. Sturtevant*, 28 Ariz. 5, 7, 234 P. 1080, 1082 (Ariz. 1925)). In such a case, "oral testimony is admissible to show the meaning of the language in the contract and the true intention of the parties." *Temp-Rite Eng'g Co. v. Chesin Constr. Co.*, 91 Ariz. 360, 362, 372 P.2d 701, 702 (1962). *See also, Vaughey v. Thompson,* 95 Ariz. 139, 143, 387 P.2d 1019, 1021-22 (1963).

Recently decided *Keg Restaurants Arizona, Inc. v.*

Jones, 375 P.3d 1173, 240 Ariz. 64 (2016), makes it clear that a contract includes a covenant of good faith and fair dealing, and a party breaches the covenant: "by exercising express discretion in a way inconsistent with a party's reasonable expectations, and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain." *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 424, 46 P.3d 431, 435 (App. 2002).

Whether a breach occurred in the case at hand is a question of fact for the jury. *County of La Paz v. Yakima Compost Co., In c.,* 224 Ariz. 590, 604, 233 P.3d 1169, 1183 (App. 2010). The majority of the Panel wrongfully ignored the evidence by concluding that "a supervisor" telling Aubuchon that her bar costs would be covered was the only evidence. It ignored the authority of the one who told her and ignored the practice of the office. Other evidence was that the Trust covers costs or expenses "arising out of a disciplinary or licensure proceeding before a professional regulatory body." It simply requires prior written approval from the Trustees before payment. Thus, at a minimum this is a fact for the jury.

The Trustees' and Appellees' decision to approve the payment of costs for Peter Spaw, Alexander's supervisor on the same case that Alexander was involved in, is evidence of the intent of the parties to the contract, to pay the bar costs. This undisputed fact is additional evidence of the contract benefit that was promised.

5. The statements about corruption were made after the denial of the State Bar Costs

The Panel erred when it found that the District Court did not err in granting summary judgment on Appellants' 42 U.S.C. § 1983 claims. The Panel found, despite no evidence presented by either side, that the First Amendment retaliation claim failed because the decision not to pay bar costs was made before there was testimony about alleged corruption in the County. This finding was error. The record is clear from both sides that the bar costs were not denied until after the disciplinary hearing. The testimony was in part at the disciplinary hearing. On December 16, 2013, an Order granted judgment against Appellants, jointly and severally, for $101,293.75. Doc. 58, Page 187. On January 29, 2014, a representative of the County accepted the Notice of Claim and "denied" the claim, "We respectfully deny your claim." Doc. 58, Page 216. Aubuchon's Notice of Claim was filed on March 14, 2014. Doc 58, Page 206. Both were denied, January 19 and February 14, 2014, after the costs were ordered, December 13, 2013, following the disciplinary hearing.

The Appellants have set forth sufficient evidence to show that denying the payment of bar costs after the testimony about corruption is evidence for a jury on the retaliation issue especially in light of the fact that Alexander's supervisor in the same disciplinary matter and all other County attorneys, similarly situated, have had their bar costs paid by the Appellees.

This matter does not hinge on a merit or disciplinary process but a contract dispute and the Appellants were

not employed when their claims for bar costs were denied thus the Panel's finding that the equal protection claim fails because "the class-of-one theory of equal protection does not apply in the public employment context," per *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 598 (2008) fails.

As to the Panel's finding that the Monell claim fails because "she has not established that the County had a policy that 'amounts to deliberate indifference to [her] constitutional right,'" the Panel completely ignored the Facts presented by Appellants; that the County adopted a policy not to pay Appellants' bar costs, contrary to what they have done in all other cases, made it retroactive, could not produce it, and claimed there were no changes. Appellees were the adversaries in the actions for which the bar costs were assessed. A jury could conclude that the County adopted such policy in retaliation for Appellants trying to expose corruption or simply testifying against them.

The Issues Presented by this Case Are of Exceptional Importance.

1. Petitioners have never been given a fair trial in front of a jury.

The Appellants have been denied juries in multiple settings. In a federal lawsuit against Aubuchon, the County settled the matters to avoid a trial. Appellants were denied a panel as required by the old and new rules during their disciplinary proceedings. Instead, when the Court allowed the State Bar to file a complaint and obtain a probable cause finding under the old

system by one judge, the Bar then waited months for the new system to take effect so the matter went before a three member panel. In the state case now pending appeal, the trial court has refused to permit the case to go to a jury. Here, as stated by the Dissent, the contract and unjust enrichment claims are for a jury to decide.

Also as pointed out by Judge Eaton, the attorneys for the Appellees made false allegations, presented untrue facts and took positions contrary to their clients' established policies, which reflects directly on Appellees' credibility - which is also for the jury to weigh. The lack of credibility about what transpired shows that retaliation was a far more likely explanation for Appellees' conduct. A jury would be able to weigh such evidence, especially in light of Justice Hurwitz's comment during oral argument, that the conduct of Alexander was not as bad as Peter Spaw is a matter of concern. Here, two women (Appellants) engaged in the same conduct as Spaw and "defended themselves" against the bar accusations, yet Alexander's male supervisor's costs were paid and Appellants' were not.

2. The decision was not based on accurate facts as shown in the record

It is undisputed that Appellants incurred bar costs based on their underlying actions against the judicial officers, county actors and their attorneys. Judge Hurwitz alluded to these concerns in the oral argument, thus calling into question whether the court's conclusions are based on unfair treatment of Appellants due to their past actions in other cases. Particularly in a

matter involving the courts, all facts should be accurately alleged when relied on.

Judge Hurwitz Demonstrated Bias at Oral Argument and Ignored His Prior Involvement with the Special Action of Judge Donahoe

1. Bias Apparent by Panel Judge

At oral argument, Justice Hurwitz criticized Appellant Aubuchon for her misdeeds and referred to her disbarment. One of the main reasons for Aubuchon's disbarment involved Arizona's disciplinary system ignoring principles of prosecutorial discretion in charging and finding that Aubuchon filed a case against a judge without probable cause.

However, in 2009, CV2009-00372SA, then Arizona Supreme Court Justice Hurwitz heard an oral argument for a stay filed by defendant Judge Donahoe claiming there was no probable cause and bias. Justice Hurwitz was on the Arizona Supreme Court when this Special Action was heard. The court was briefed and all of the evidence set out to support the criminal charges against Judge Donahoe. The Court declined to hear the Special Action. Arizona Supreme Court CV-09-00372SA. As this court knows, there is an ethical requirement that a judge seeing unethical conduct has a duty to report it. Arizona Rules of Professional Conduct, ER 8.3. Neither Justice Hurwitz nor any other judge reported Aubuchon or anyone else as filing criminal charges with no probable cause after this Special Action. The Arizona Supreme Court had all of the evidence in front of them at that time.

This criminal complaint was the exact complaint that later resulted in the bar proceedings. Months later in 2010, Arizona Supreme Court Justice Rebecca Berch, at the bequest of the State Bar, requested "charges" against Aubuchon for filing cases without probable cause. The Arizona Supreme Court thus ignored its prior evidence and decision when it supported her disbarment. Justice Hurwitz's statements at oral argument and, in concurring in a decision that contains erroneous facts and conflicting case law, supports a rehearing in this matter.

This Court should accept this Petition and reverse the decision and remand for a fair and just assessment of the facts in this case.