DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VIVIAN and THOMAS KENNEY, surviving parents of MICHELLE ANN PAGANA, deceased, Plaintiffs/Appellants, v. CITY OF MESA, a political subdivision of the State of Arizona, Defendant/Appellee.	1 CA-CV 12-0377 A DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-018604

The Honorable George H. Foster Jr., Judge

AFFIRMED

Law Offices of Vernon L. Nicholas — Mesa
By Vernon L. Nicholas
Attorneys for Appellant

Deborah Spinner, Mesa City Attorney — Mesa
By Marc T. Steadman, Deputy City Attorney
Jason K. Reed, Assistant City Attorney
Attorneys for Appellee

K E S S L E R, Judge

¶1 Appellants Vivian and Thomas Kenney ("the Kenneys") appeal the superior court's order granting Appellee City of Mesa's (the "City") motion for summary judgment and finding that the Kenneys failed to properly serve a notice of claim pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 (Supp. 2012).[1] For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 This appeal arises out of the Kenneys' wrongful death action against the City for the death of their daughter, which occurred during a police pursuit of a suspect on October 28, 2010. On April 19, 2011, the Kenneys timely mailed a notice of claim letter addressed to the Mesa City Attorney. The city attorney received the claim letter and forwarded it to the City's risk manager. Approximately five weeks later, the risk manager informed the Kenneys' attorney via email that the city attorney was not the "designated agent for the City of Mesa for receiving [n]otices of [c]laim in accordance with [A.R.S. §] 12-821.01" and that the notice must be served upon the city clerk. The email also informed the Kenneys' attorney that once the city clerk receives a notice of claim, he sends it to "Risk

[1] We cite to the most recent version of the statute when there are no relevant changes.

Management for evaluation."[2] Both parties agree that aside from writing the email to the Kenneys' attorney, the risk manager took no action after receiving the Kenneys' notice of claim.

¶3 In October 2011, the Kenneys filed a complaint in superior court naming the City and other parties as defendants in the wrongful death action.[3] In response, the City filed a motion for summary judgment, arguing the Kenneys failed to comply with the statutory notice of claim requirements, and as such, their claims were barred. The City argued that pursuant to A.R.S. § 12-821.01 and Arizona Rule of Civil Procedure 4.1(i), the notice of claim should have been sent to the City's chief executive officer or the city clerk. The Kenneys argued in response that the notice of claim was properly mailed to the city attorney, and even if it was defective, the City waived this affirmative defense by its conduct.

¶4 The superior court granted the City's motion, finding that the city attorney was not authorized to accept service of the notice of claim pursuant to Rule 4.1(i). The Kenneys timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

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[2] The Kenneys' attorney argues for the first time on appeal that he never received this email because it was sent to an incorrect email address.

[3] The complaint includes a co-plaintiff who is not a party to this appeal.

DISCUSSION

¶5 We review a grant of summary judgment *de novo*, construing "all facts in favor of the nonmoving party and affirm[ing] only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 59, ¶ 9, 234 P.3d 623, 627 (App. 2010).

¶6 Pursuant to A.R.S. § 12-821.01(A), "[p]ersons who have claims against a public entity . . . shall file claims with the person or persons authorized to accept service for the public entity . . . as set forth in the Arizona [R]ules of [C]ivil [P]rocedure." Any claim that is not filed with a person authorized to accept service "within one hundred eighty days after the cause of action accrues is barred." A.R.S. § 12-821.01(A). Rule 4.1(i), which governs service upon a city, authorizes only the "chief executive officer, the secretary, clerk, or recording officer" to accept service. Pursuant to A.R.S. §§ 9-236 (2008) and -273(B) (2008), the mayor is statutorily determined to be the City's chief executive officer. *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527,

¶ 13, 144 P.3d 1254, 1256 (2006).[4] The Mesa City Charter provides for a city clerk, but does not provide for a secretary or recording officer. Mesa City Charter, Art. IV, § 401 (2009), *available at* http://www.mesaaz.gov/clerk/pdf/Mesa_Charter.pdf. The City's website also identifies the city clerk as the "agent for claims against the City of Mesa." *City Clerk*, The Official Website of the City of Mesa, Arizona, http://www.mesaaz.gov/clerk/ (last visited Nov. 1, 2012). Thus, to satisfy A.R.S. § 12-821.01, the Kenneys were required to serve the notice of claim on either the mayor or the city clerk.

¶7 The Kenneys concede that they did not file the notice of claim with either the mayor or the city clerk; however, they claim the superior court erred in granting the City's motion for summary judgment because: (1) Arizona case law does not support a strict application of Rule 4.1(i) to filing notices of claim; (2) service on the city attorney was in compliance with A.R.S. § 12-821.01 because Arizona Rule of Civil Procedure 5(c)(1) requires service on attorneys of represented parties; and (3) the City waived by its conduct any defense of deficiency of

[4] The City's website identifies the city manager as the City's chief executive officer. *City Manager Christopher J. Brady*, The Official Website of the City of Mesa, Arizona, http://www.mesaaz.gov/citymgt/brady.aspx (last visited Nov. 1, 2012). The Mesa City Charter identifies the city manager as the City's chief administrative officer. Mesa City Charter, Art. III, § 303 (2009), *available at* http://www.mesaaz.gov/clerk/pdf/Mesa_Charter.pdf. The Kenneys, however, did not file the notice of claim with the city manager.

notice of claim. For the following reasons, we hold the superior court did not err in granting the City's motion for summary judgment.

I. Rule 4.1(i) Must Be Applied to Notices of Claim

¶8 The Kenneys cite *Lee v. State*, 218 Ariz. 235, 182 P.3d 1169 (2008), to argue that strict application of Rule 4.1(i) to notices of claim is not required under A.R.S. § 12-821.01. In *Lee*, the Arizona Supreme Court interpreted the word "file" in A.R.S. § 12-821.01 to include regular mail delivery subject to the "mail delivery rule."[5] 218 Ariz. at 237, 239, ¶¶ 7-8, 19, 182 P.3d at 1171, 1173. *Lee* rejected the argument that the statutory language, "file . . . as set forth in the Arizona [R]ules of [C]ivil [P]rocedure," requires formal service of a notice of claim as one would file with a court. *Id.* at 238-39, ¶¶ 13-17, 182 P.3d at 1172-73. The Kenneys argue that because *Lee* did not strictly apply the Arizona Rules of Civil Procedure to its interpretation of the word "file," this Court should not strictly apply Rule 4.1(i) to the phrase "persons authorized to receive service." In addition, the Kenneys assert that Rule 4.1 governs the service of documents that commence an action, i.e. summons and complaint, not necessarily notices of claim, and

[5] Under the "mail delivery rule," when a letter is properly addressed and mailed with the correct postage, a rebuttable presumption is created that it reached its destination and that the addressee received the letter. *Andrews v. Blake*, 205 Ariz. 236, 242 n.3, ¶ 22, 69 P.3d 7, 13 n.3 (2003).

that Rule 4.1 does not include all persons who are authorized to accept service of notices of claim under the Arizona Rules of Civil Procedure.

¶9 The Kenneys' reliance on *Lee* is misplaced. *Lee's* interpretation of the word "file" in A.R.S. § 12-821.01 did not deal with whom the notice was filed. *Lee's* interpretation is not inconsistent with the Arizona Rules of Civil Procedure because "nothing in the rules defines how filing must occur. The rules do not prohibit mail as a form of filing [notices of claim]." *Id.* at 238, ¶ 13, 182 P.3d at 1172. In contrast, *Lee* noted that Rules "4.1(h)-(j) clearly 'set forth' the 'person or persons authorized to accept service' for various public entities." *Id.* (quoting A.R.S. § 12-821.01).

¶10 It is well-established that strict application of Rule 4.1 to notices of claim is required, and filing only with the persons authorized by Rule 4.1(i) is mandatory. *See Falcon*, 213 Ariz. at 529-31, ¶¶ 23-24, 34, 144 P.3d at 1258-60 (holding the court's general duty to liberally construe procedural rules to avoid creating a trap for the unwary did not apply "because Rule 4.1(i) plainly lists the entities or persons who are authorized to accept service"; filing with one member of the Board of Supervisors ineffective because the entire Board acted as chief executive officer of the county); *Slaughter v. Maricopa County*, 227 Ariz. 323, 325-26, ¶¶ 10-11, 258 P.3d 141, 143-44 (App.

2011) (holding the plaintiff's failure to serve the Arizona Attorney General with her notice of claim in compliance with Rule 4.1 barred her claims against the State, even though she mistakenly believed she was employed by the county, not the State). Indeed, as we held in *Young v. City of Scottsdale*, 193 Ariz. 110, 114, ¶ 15, 970 P.2d 942, 946 (App. 1998), *disapproved of on other grounds by Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), filing of a notice of claim is defective when the claimant sends the notice to the city attorney instead of sending it to an authorized person listed in Rule 4.1(i).

¶11 The underlying purpose of the notice of claim statute is to ensure that public entities have sufficient notice of a claim in order to investigate and assess liability. *Falcon*, 213 Ariz. at 527, ¶ 9, 144 P.3d at 1256. Thus, the Arizona Supreme Court clearly favored a black-letter literal application of Rule 4.1 so that filing is limited to just those persons identified in the rule. *See id.* at 529, ¶¶ 23-26, 144 P.3d at 1258. Such a literal interpretation protects both claimants in knowing who to file the claim with and defendants in knowing whether the claim was properly filed.

¶12 The Kenneys next argue that subsections (h) and (j) of Rule 4.1 support filing with a city attorney. The Kenneys assert that because subsection (h) allows service on the

attorney general for the State of Arizona, and subsection (j) allows service on the "appropriate legal officer" representing a government entity not listed in the preceding subsections, filing with the City's chief legal officer is appropriate. The Kenneys claim that the omission of the city attorney from Rule 4.1(i) was likely an "oversight of the drafters." We disagree. The language of the rule is clear: subsection (h) governs service upon the State, and subsection (j) governs service upon other government entities not listed in the preceding subsections. Neither subsection (h) nor (j) governs service upon a city. Moreover, *Falcon* specifically prohibits the reliance on other subsections of Rule 4.1 to interpret Rule 4.1(i) because the plain language of Rule 4.1(i) is unambiguous. 213 Ariz. at 529, ¶¶ 22-24, 144 P.3d at 1258; *see State v. Superior Court (Stewart)*, 168 Ariz. 167, 169, 812 P.2d 985, 987 (1991) ("[W]hen the rule's language is not subject to different interpretations, we need look no further than that language to determine the drafters' intent."). Moreover, this Court has already confirmed in *Young* that a notice of claim is not properly served upon a city attorney. 193 Ariz. at 114, ¶ 15, 970 P.2d at 946.

II. Actual Notice Does Not Excuse Non-Compliance

¶13 The Kenneys' assert that the City's general protocol for processing notices of claim includes forwarding the claim

letters to the risk manager who then begins the evaluation process. Thus, the Kenneys argue that had the city clerk received the notice of claim, as is required by the statute, he, too, would have forwarded it to the risk manager, per the City's procedure in processing notices of claim. The Kenneys note this fact first in the context of their waiver argument and then in their reply. The Kenneys cite *Liberty Mut. Ins. Co. v. Rapton*, 140 Ariz. 60, 680 P.2d 196 (App. 1984), to argue that when a defendant receives actual notice of an action, the court should liberally construe the rules governing service.[6] The Kenneys also cite *Kline v. Kline*, 221 Ariz. 564, 571, ¶ 22, 212 P.3d 902, 909 (App. 2009), to argue that the City was apprised of the claim, was afforded an opportunity to respond, and thus, was not prejudiced by the defective service. The Kenneys argue that strict adherence to this rule values procedure over substance and that claiming protection by "procedural rules of service for such a technical violation, offends the very purpose of the rules."

[6] The Kenneys also cite *Liberty* to argue that substituted service should have been allowed in these circumstances. 140 Ariz. 60, 62-62, 680 P.2d 196, 198-99. Rule 4.1(m) allows substituted service when one of the means set forth in the preceding subsections of Rule 4.1 proves impracticable. Rule 4.1(m) is inapplicable in this case because there is no evidence in the record that service upon a person authorized to accept service under Rule 4.1(i) was impracticable.

¶14 We disagree with the Kenneys. If a claimant does not properly file a notice of claim pursuant to A.R.S. § 12-821.01, the claim is barred, and neither actual notice nor substantial compliance excuses a failure to comply with the statutory filing requirements. *Falcon*, 213 Ariz. at 527, ¶ 10, 144 P.3d at 1256; *see also Martineau v. Maricopa County*, 207 Ariz. 332, 334-35, ¶¶ 13, 17, 86 P.3d 912, 914-15 (App. 2004) (rejecting claimant's argument that although he served his notice of claim upon an unauthorized person, he substantially complied with A.R.S. § 12-821.01 because he voiced his claims to the county board at a public hearing). The purpose of the statutory requirements is to ensure that the government entity has an opportunity to investigate, assess potential liability, and consider settlement options. *Falcon*, 213 Ariz. at 527, ¶ 9, 144 P.3d at 1256. *Falcon* recognized that allowing a claimant to file a notice of claim with an unauthorized person might result in a situation in which the individual who receives the notice may not appreciate its significance or recognize that action is required. *Id.* at 529, ¶ 26, 144 P.3d at 1258. *Falcon* opted for a strict compliance with Rule 4.1(i) so that anyone filing a claim knew exactly who to serve and both parties' rights would be protected. *See id.* "[T]he rule requires service on the [authorized persons], not on someone whose usual practice is to

forward the claim to the [authorized persons]." *Id.* at 530, ¶ 27, 144 P.3d at 1259.

¶15 In accordance with *Falcon*, this Court strictly applied Rule 4.1 to notices of claim in *Simon*, finding actual notice did not excuse the plaintiff from failing to meet the statutory requirements. 225 Ariz. at 62, ¶¶ 23-24, 234 P.3d at 630. In *Simon*, we reversed the dismissal of the plaintiff's claims against the City of Phoenix and Maricopa County Special Healthcare District because the plaintiff properly served his claim letter upon the city clerk and the assistant district clerk; however, we affirmed the dismissal of plaintiff's claims against two individual police officers because he failed to properly serve the notice of claim to the individual or to an authorized agent pursuant to Rule 4.1(d), even though the plaintiff alleged the individual officers had actual notice of the claims. *Id.* at 61-62, ¶¶ 14, 17, 20, 23, 234 P.3d at 628-30. Thus, even if the City's risk manager, who ultimately received the Kenneys' claim letter, would have received the letter if it had been properly filed with the city clerk or the mayor, the Kenneys still failed to comply with the statutory requirements, and as such, their claims are barred. Contrary to the Kenneys' assertion, neither *Liberty* nor *Kline* is instructive because neither case involved service of a notice of claim or

the application of Rule 4.1(i).[7]

III. Rule 5(c) Does Not Apply to Notices of Claim

¶16 The Kenneys next argue that the application of Rule 5 to notices of claim is more appropriate because Rule 5 explicitly governs service of pleadings and other papers, in contrast to Rule 4.1, which only governs service of documents commencing an action. Specifically, the Kenneys argue that Rule 5(c)(1) requires service to be made on an attorney if a party is represented by one, and therefore, the Kenneys' service upon the city attorney was appropriate.

¶17 Based on the plain language of Rule 5, we reject this argument. First, Rule 5(c) applies to service of documents only after an appearance has been made. Ariz. R. Civ. P. 5(c) (bearing title of "Service After Appearance; Service After Judgment; How Made"); *see also Kline*, 221 Ariz. at 569, ¶¶ 18-19, 212 P.3d at 907 (distinguishing Rule 5(c) from Rule 4.1 because, "[t]he rules governing service differ significantly depending on whether a party to be served has made an

[7] *Liberty* held that service of a complaint was proper when it was served on the business owner's fiancé at the business office, which was in close proximity to the business owner's residence. 140 Ariz. at 62-63, 680 P.2d at 198-99. *Kline* held that wife's service of a petition for dissolution of marriage on husband was improper when it was served on an attorney who had represented husband in a previous action but was not husband's current counsel at the time of service and was not otherwise authorized as husband's agent for acceptance of service. 221 Ariz. at 570, ¶ 20, 212 P.3d at 908.

'appearance.' . . . A party has made a general appearance when he has taken any action . . . that recognizes the case is pending in court. . . . [S]ervice on a party who has not made a general appearance is governed by [Rule] 4.1"); *Morgan v. Foreman*, 193 Ariz. 405, 407, ¶¶ 17-18, 973 P.2d 616, 618 (App. 1999) (holding that Rule 4.1, not Rule 5(c), governs service of a complaint because Rule 5(c) is limited to the service of pleadings and other papers filed subsequent to the complaint). At the time the Kenneys mailed the notice of claim to the City, the Kenneys had not filed a complaint, and neither the Kenneys nor the City had made an appearance before the superior court.

¶18 Furthermore, the city attorney cannot be presumed to be authorized to accept service on behalf of the City. An attorney only qualifies as an agent authorized to accept service when it appears that the attorney was either expressly or impliedly authorized to do so, and if the attorney was impliedly authorized, all of the circumstances must support a finding that the client intended to appoint the attorney as an agent. *Rotary Club of Tucson v. Chaprales Ramos de Pena*, 160 Ariz. 362, 365, 773 P.2d 467, 470 (App. 1989). Here, authorization to accept service cannot be implied solely from the city attorney's general duty to provide legal advice and represent the offices

of the City.[8] *See* Mesa City Charter, Art. IV, § 401(B) (2009), *available at* http://www.mesaaz.gov/clerk/pdf/Mesa_Charter.pdf; Mesa City Code, Chapter 19, § 1-19-2, *available at* http://mesaaz.gov/clerk/CodeBook/CodeinPDF/T1/T1Ch19.pdf. At the time the Kennys mailed the notice of claim, the city attorney was not representing any office of the City in an action with the Kenneys. We cannot conclude on this record that any of the City's offices either expressly or impliedly authorized the city attorney to accept service on its behalf. *See Kline*, 221 Ariz. at 570, ¶ 20, 212 P.3d at 908 (finding that no evidence in the record established an attorney was authorized to accept service for the respondent when the attorney was not representing the respondent in a pending action at the time of the service, even though he had represented respondent in prior actions).

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[8] Both Art. IV, § 401(B) and Mesa City Code, Chapter 19, § 1-19-2 provide:

> The Council shall appoint a City Attorney and fix his compensation. He shall serve as the chief legal advisor to the Council, the Manager, and all City departments, offices, and agencies. He shall represent the City in all legal proceedings and shall perform any other duties prescribed by this Charter, law, or ordinance. The City Attorney shall serve at the pleasure of the Council.

Contrary to the Kenneys' assertion, nothing in this language either expressly or impliedly authorizes the city attorney to accept notices of claim on behalf of the city.

¶19 The Kenneys cannot successfully rely on *Creasy v. Coxon*, 156 Ariz. 145, 148, 750 P.2d 903, 906 (App. 1987), to argue that because the city attorney represents all of the City's offices, service upon the city attorney is the same as service upon the office of one who is authorized to accept service under Rule 4.1(i). *Creasy* held that service upon a public entity could be accomplished by serving documents to the office of an individual authorized to accept service and not necessarily to the individual personally; it did not hold that service to the office of an attorney was permitted. 156 Ariz. at 148, 750 P.2d at 906. Because the Kenneys did not serve the notice of claim to either the office of the city clerk or the office of the mayor, *Creasy* is inapplicable.

¶20 The Kenneys also argue that because Rule 5, which allows for filing by regular mail, is contrary to the language of Rule 4.1(d), which does not contemplate filing by regular mail, application of Rule 5 to notices of claim is more appropriate. We do not agree. Rule 4.1(d), which requires personal delivery to an "individual's dwelling house," does not apply to service upon a city. In contrast, the language of Rule 4.1(i), which does govern service upon a city, only requires "delivery," not personal delivery. The court in *Lee* has interpreted "deliver[y]" in the context of notices of claim to

include regular mail delivery. 218 Ariz. at 237, 239, ¶¶ 7-8, 19, 182 P.3d at 1171, 1173.[9]

IV. The City's Actions Do Not Constitute Waiver

¶21 The Kenneys argue that even if the notice of claim failed to meet the requirements of A.R.S. § 12-821.01, the City waived that affirmative defense by its conduct. The Kenneys argue that when the city attorney forwarded the notice of claim letter to the City's risk manager, as is evidenced by the risk manager's email to the Kenneys' attorney, the City took steps to process the claim, thereby waiving the defense of defective service. The Kenneys' waiver argument is without merit.

¶22 The notice of claim statute, like a statute of limitations, is subject to waiver. *Pritchard v. State*, 163

[9] To further argue that Rule 5 is more appropriately applied to notices of claim because Rule 4.1 does not contemplate filing by regular mail, the Kenneys interpret subsection (d) as modifying subsection (i), requiring personal delivery to those listed in subsection (i). This interpretation is not supported by Arizona law. *See Falcon*, 213 Ariz. at 529, ¶ 22, 144 P.3d at 1258 (holding that one may not rely on other subsections of Rule 4.1 to interpret subsection (i)). Furthermore, the plain language of the rule is unambiguous: Rule 4.1(d) applies to service upon individuals, not governmental subdivisions. *See* Ariz. R. Civ. P. 4.1(h)-(l); *Romley*, 168 Ariz. at 169, 812 P.2d at 987 (noting that when the plain language of the rule is not subject to different interpretations, the court need not look further than the language to determine its intent). Finally, the Arizona Supreme Court has already held that service of notices of claim may be accomplished by regular mail delivery but has not held that such delivery affects who has to be served under Rule 4.1(i). *Lee*, 218 Ariz. at 237, 239, ¶¶ 8, 19, 182 P.3d at 1171, 1173.

Ariz. 427, 432, 788 P.2d 1178, 1183 (1990). "Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 22, 187 P.3d 97, 104 (App. 2008) (quoting *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)). Waiver by conduct is established by evidence of a party's actions that are inconsistent with the right to assert a defective notice of claim defense. *Id.* at ¶ 23. Generally, a government entity waives the defense of defective notice of claim when it "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.* at 380, ¶ 26, 187 P.3d at 105. In *Young*, this Court found that a city waived the defense of defective service even before litigation commenced when it referred the notice of claim to its claims adjuster, who then considered the claim and subsequently denied it without objecting to the service of process. 193 Ariz. at 114, ¶ 15, 970 P.2d at 946.

¶23 The Kenneys cite *State v. Campos*, 226 Ariz 424, 430, ¶ 23, 250 P.3d 201, 207 (App. 2011), to argue that whether a party's conduct constitutes waiver depends on the facts and circumstances of each case, and in this case, the facts supported a finding of waiver. *Campos* held that the State

engaged in conduct that constituted waiver when it waited more than three years to object to an untimely claim, participated in discovery for over seventeen months, conducted thirteen depositions, and attempted settlement. *Id.* at ¶ 24. In contrast, here, the City promptly raised the defense of defective notice of claim in its motion for summary judgment, which was filed just two weeks after the Kenneys' complaint. The City took no action to litigate the merits of the Kenneys claim.

¶24 Furthermore, the City took no pre-litigation action to consider the Kenneys' claim. Although the city attorney forwarded the Kenneys' claim letter to the risk manager, the risk manager, unlike the adjuster in *Young*, immediately objected to the service of process and took no steps to evaluate the claim. Specifically, the risk manager informed the Kenneys that the city attorney was not "the designated agent for the City . . . in accordance with [A.R.S. §] 12-821.01," and that the city attorney forwarded the claim letter to him "as a matter of record only." The risk manager further informed the Kenneys that the claim letter must be served upon the city clerk. Regardless of whether the Kenneys' counsel received the email, the email establishes that the claim letter was not sent to the risk manager for purposes of evaluation, nor were any steps taken to evaluate it.

¶25 The Kenneys cite both the transcripts of oral argument and the risk manager's email to argue that the City's general protocol for notices of claim is to send them to the risk manager, who is responsible for "keeping track" of them, which then "trigger[s] the investigation and the analysis and evaluation." Accordingly, the Kenneys argue that by forwarding the claim letter to the risk manager, the City began its investigation and evaluation process, thereby waiving the defense of defective service. The Kenneys, however, failed to provide this Court with a copy of the transcripts to which they refer.[10] Because the Kenneys have not provided us with a copy of the transcripts, we must presume the transcripts support the trial court's ruling on this issue. *See Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998). Furthermore, the Kenneys' have not pointed to any evidence in the record which establishes the City actually began investigating, evaluating or analyzing the Kenneys' claim. In fact, the email to which the Kenneys cite establishes that the City refused to evaluate the claim due to defective service. The undisputed facts do not support a finding that the City waived this affirmative defense.

[10] The appealing party shall include in the record a certified copy of transcripts if that party intends to argue that a finding or conclusion is not supported by or is contrary to the evidence. *See* ARCAP 11(b)(1).

CONCLUSION

¶26 There are no genuine issues of material fact precluding summary judgment. As a matter of law, the Kenneys' claims are barred pursuant to A.R.S. § 12-821.01. We affirm the trial court's grant of summary judgment in favor of the City.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
ANDREW W. GOULD, Judge