DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ENRIQUE and MATILDA MEDINA, Plaintiffs/Appellees v. OCOTILLO DESERT SALES, LLC; OCOTILLO DESERT CONSTRUCTION, LLC; OCOTILLO DESERT DEVELOPMENT, LLC; BRIAN L. HALL and JANE DOE HALL, husband and wife; FRED T. HALL and JANE DOE HALL, husband and wife, Defendants/Appellants	1 CA-CV 09-0650 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV200500643

The Honorable John P. Plante, Judge

AFFIRMED

Weil & Weil PLLC — Yuma
By John A. Weil
Attorney for Defendants/Appellants

Don B. Engler P.C. — Yuma
By Don B. Engler
Attorney for Plaintiffs/Appellees

K E S S L E R, Judge

¶1 Ocotillo Desert Sales, LLC ("Ocotillo") and several related entities (collectively "Defendants") appeal from the superior court's order denying Ocotillo's application to compel

arbitration. The primary issue is whether Ocotillo's failure to perfect an interlocutory appeal from the court's prior orders refusing to compel arbitration and litigating the claims against it resulted in Ocotillo waiving its right to arbitration under its contractual agreement with Enrique and Matilda Medina (the "Medinas" or "Plaintiffs"). Ocotillo argues it did not waive its right to arbitrate certain amendments to the Medinas' complaint because they were new causes of action not subject to Ocotillo's prior waiver. For the reasons stated below, we affirm the superior court's order dismissing Ocotillo's application to compel arbitration.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 On March 30, 2005, the Medinas entered into a purchase contract, which contained an arbitration clause,[2] with Ocotillo for

[1] The record presented on appeal does not include transcripts from superior court proceedings on the parties' motions or applications. It is the appellant's duty to ensure the appellate record is complete. *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) (citation omitted). We presume the missing record would support the superior court's orders. *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996); *see also* Arizona Rule of Civil Appellate Procedure ("ARCAP") 11(b)(1) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a certified transcript of all evidence relevant to such finding or conclusion.").

[2] The purchase contract's "Arbitration Agreement" provision provides that:

the purchase of a residence on lot 162 for $164,275 in the subdivision "Ocotillo Desert" in Yuma, Arizona. The Medinas were timely approved for financing and paid an initial deposit of $1,000 for a reservation, $4,000 for earnest monies, and a final deposit of $33,469.63. Prior to closing escrow, the Medinas participated in a final walk-through inspection of the property with Ocotillo's authorized representative and requested that various alterations be made in the residence's construction.[3] Prior to closing, on July

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> [A]NY AND ALL CLAIMS . . . BETWEEN THE UNDERSIGNED HOMEOWNER AND THE UNDERSIGNED SELLER ARISING FROM OR RELATED TO THE SUBJECT HOME IDENTIFIED HEREIN OR TO ANY DEFECT IN OR TO THE SUBJECT HOME OR THE REAL PROPERTY ON WHICH THE SUBJECT HOME IS SITUATED, OR THE SALE OF THE SUBJECT HOME BY THE SELLER, INCLUDING WITHOUT LIMITATION, ANY CLAIM OF BREACH OF CONTRACT, NEGLIGENT OR INTENTIONAL MISREPRESENTATION OR NONDISCLOSURE IN THE INDUCEMENT, EXECUTION OR PERFORMANCE OF ANY CONTRACT, INCLUDING THIS ARBITRATION AGREEMENT AND BREACH OF ANY ALLEGED DUTY OF GOOD FAITH AND FAIR DEALING, SHALL BE SUBMITTED TO BINDING ARBITRATION BY AND PURSUANT TO THE RULES OF CONSTRUCTION ARBITRATION SERVICES, INC. (HEREINAFTER "CAS") IN EFFECT AT THE TIME OF THE REQUEST FOR ARBITRATION, OR BY SUCH OTHER ARBITRATION SERVICES AS THE SELLER SHALL, IN ITS SOLE DISCRETION SELECT, AND PURSUANT TO THE RULES OF THAT ARBITRATION SERVICES [sic] IN THE EFFECT AT THE TIME OF THE REQUEST FOR ARBITRATION.

(capitalization in the original).

[3] Ocotillo contends that the Medinas demanded complete and substantial alterations to the home. The Medinas, argue, however, that they provided reasonable notice, as contractually required, of various inadequacies in the residence's construction. Ocotillo's representative prepared a form documenting the Medinas' requests, which include adding pro-sweep weather strip to the back door, changing the bar outlet

5, 2005, the title company informed the Medinas that it received written notice from Ocotillo indicating it intended to cancel escrow. The letter from Ocotillo stated, "[t]he undersigned hereby instructs that Yuma Title Escrow No. 167128-mt be cancelled immediately pursuant to Paragraph 2 of the Purchase Contract herein. Seller intends to list the property for sale to a new potential Buyer." Paragraph 2 of the purchase contract provides:

> Seller shall use reasonable efforts to cause construction to be completed within 120 days from start of construction. In the event construction is not completed within the foregoing deadline, either party may cancel this contract and Buyer(s)' escrow deposit shall be refunded. This shall be the exclusive remedy for failure to complete construction within the deadline. Furthermore, even in the absence of a breach of contract by Buyer, Seller reserves the right to cancel this contract and refund Buyer(s)' escrow deposit at any time up to close of escrow.

¶3 On July 7, 2005, the Medinas filed a complaint in the Yuma County Superior Court against Ocotillo. The complaint alleged two counts, specific performance, Count I, and promissory fraud, Count II. The Medinas alleged that Ocotillo's conduct in this case was merely one example of it entering into purchase contracts with potential buyers, who are qualified to obtain financing, with the specific intent of wrongfully repudiating any contractual obligation owed by Ocotillo to the buyers, to hold the properties

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plate, removing spots from the family room carpet, fixing the grout bordering the fireplace, and decreasing the size of the gas key hole in the fireplace among other things.

for speculation and resale to the highest bidder, and to avoid its contractual duty to construct the residence in accordance with workmanship standards.

¶4 On July 13, 2005, Ocotillo sent a letter to the Medinas' counsel demanding that the matter be arbitrated. The Medinas disagreed and filed an amended complaint on July 19, 2005 adding Count III asserting "Constructive Trust." Approximately one month later, Ocotillo filed a motion to dismiss and to compel arbitration under Arizona Rule of Civil Procedure ("Ariz. R. Civ. P.") 12(b)(1) and (6) and Arizona Revised Statutes ("A.R.S.") sections 12-1501 and -1502 (2003). In its motion, Ocotillo requested that the superior court compel the Medinas to proceed with arbitration in accordance with the arbitration agreement contained in the purchase contract. In its response to Ocotillo's motion to dismiss, the Medinas argued that the purchase contract, including the arbitration clause, was void *ab initio* because it lacked mutuality of obligation in that Ocotillo expressly reserved the right to withdraw and cancel the contract prior to the close of escrow without a breach of contract by the Medinas.

¶5 The court held a hearing on March 27, 2006 and entered an unsigned minute entry denying Ocotillo's motion to dismiss. It held the basis for its ruling was as stated on the record, of which Ocotillo has not provided us with a copy. The court also requested that the parties file supplemental memoranda to address the

purchase contract's validity. The Medinas' supplemental response argued that because Ocotillo expressly reserved the right to repudiate any and all contractual obligations by unilaterally cancelling the purchase contract, it was void *ab initio* because it lacked any mutuality of obligation. The Medinas also asserted that once Ocotillo unilaterally repudiated the purchase contract by cancelling escrow, it waived its right to arbitrate the issues.

¶6 In its reply to the Medinas' supplemental response, Ocotillo argued that the contract was not void *ab initio* because it was entitled to cancel the purchase contract and refund the Medinas' escrow deposit anytime up to the close of escrow. Further, Ocotillo asserted that its unilateral right of termination did not render the contract void for lack of mutuality because the Medinas could enforce the purchase contract at any time. Ocotillo also noted that the Medinas' contention that it repudiated the purchase contract concedes that the contract is valid. Consequently, Ocotillo asked the superior court to declare the purchase contract valid and to direct the parties to proceed to arbitration.

¶7 On June 9, 2006, the superior court entered an order in response to the parties' supplemental briefing on the contract issue. The court found that the contract was illusory because it lacked mutuality of obligation on the basis Ocotillo could cancel the contract at its sole discretion. Thus, the court held that the

contract was illusory and void *ab initio* for lack of mutuality of obligation. Ocotillo did not appeal from the court's order.

¶8 On May 2, 2007, Ocotillo filed a motion for summary judgment arguing that the superior court's June 9, 2006 order, holding the purchase contract was void *ab initio*, effectively erased the written contract necessary to support the Medinas' claims because A.R.S. § 44-101(6) requires a written contract. The Medinas filed a cross motion for summary judgment and conceded that although the court's order, deeming the purchase contract illusory and void, kept them from seeking specific performance of the parties' purchase agreement, it did not prohibit them from seeking relief against Ocotillo on the promissory fraud and constructive trust claims. Although the court granted summary judgment in favor of Ocotillo on the specific performance count, it denied summary judgment on the promissory fraud and constructive trust counts.

¶9 On January 9, 2008, the Medinas filed a motion to amend their first amended complaint. The Medinas sought to amend the constructive trust claim to include the following language:

> A. It be decreed that the improve [sic] real property above referenced shall be held in constructive trust for the sole benefit of the [Medinas] and, upon [Medinas'] payment of the value of lot 162 of the Ocotillo Desert Subdivision to [Ocotillo] that said Trust shall be enforced by this Court's order compelling [Ocotillo] to convey said improved real property to the Plaintiffs forthwith.

The Medinas also moved to: (1) delete Count I as to specific

performance because the superior court granted Ocotillo's motion for summary judgment dismissing that count; (2) amend the caption to Count II to read "Inequitable Conduct/Unjust Enrichment;" and (3) add Count III asserting fraud based upon its allegation that Ocotillo misrepresented that it was licensed to construct the residence. Ocotillo urged the superior court to deny the Medinas' motion arguing the amendment improperly sought to include the specific performance claim that was already dismissed by the court when it granted Ocotillo's motion for summary judgment. The superior court granted the Medinas' motion to amend their first amended complaint.

¶10 On April 24, 2008, Ocotillo filed an application for arbitration arguing the superior court did not address the validity of the arbitration provision after it deemed the purchase contract void *ab initio*. After further litigation of over one year, the court issued an order on June 18, 2009 denying Ocotillo's application for arbitration, but not on its merits. The court characterized Ocotillo's application as a motion for reconsideration of the court's earlier ruling denying Ocotillo's motion to dismiss to compel arbitration. The court noted that after it denied the motion on its merits over three years earlier, Ocotillo never requested an appealable signed order nor did it file an interlocutory appeal. Consequently, the court held that Ocotillo waived its right to arbitration because it failed to

reduce the March 27 and June 9, 2006 orders to signed writings that stated the court's rulings and then it failed to appeal from those rulings. Ocotillo did not appeal from the court's June 18, 2009 order.

¶11 On June 22, 2009, Ocotillo filed another application for arbitration arguing it did not waive its right to compel arbitration for the unjust enrichment cause of action added to the amended complaint. Ocotillo also asserted that since the superior court entered its June 9, 2006 order, the law was substantially clarified regarding whether an arbitration clause is enforceable after a contract is deemed void *ab initio*. On September 15, 2009, the court denied Ocotillo's application finding the Medinas' amendment to Count II "simply clarified the existing cause of action already pled based upon unjust enrichment [in the complaint] . . . and to distinguish the remedy requested imposing a constructive trust upon the residence from the underlying equitable claim." The court also found that "the allegation of fraud stated in Count III of the [a]mended [c]omplaint [was] based upon the underlying and previously alleged operative facts found in the . . . original [c]omplaint . . . ." Thus, the court found that the Medinas would suffer substantial prejudice if it allowed Ocotillo to renounce its waiver in part to compel arbitration.[4]

[4] Neither this renewed application for arbitration nor the court's denial of it referred to Ariz. R. Civ. P. 59.

¶12 Ocotillo timely appealed the superior court's September 15, 2009 ruling and we have jurisdiction pursuant to A.R.S. § 12-2101.01(A)(1) (2003).

DISCUSSION

¶13 Ocotillo argues it did not waive its right to arbitrate certain amendments to the Medinas' complaint because the amendments were new causes of action that were not subject to Ocotillo's prior waiver.[5] The Medinas assert that Ocotillo waived its right to arbitration because it unilaterally repudiated the purchase contract, including its arbitration provision, by sending the July 5, 2005, letter cancelling escrow. This Court is bound by the superior court's determination that Ocotillo waived its right to arbitrate unless it is clearly erroneous. *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 580, 892 P.2d 1365, 1369 (App. 1994) (citing *Goglia v. Bodner*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987) (noting a trial court's determination of whether a right has been waived is a question of fact that is binding on an appellate

[5] Ocotillo failed to appeal from the superior court's March 27, 2006, June 9, 2006, and June 18, 2009 orders and did not seek a new trial from the June 2009 order. Thus, we do not address whether the court erred in denying Ocotillo's motion to compel arbitration or whether the court erred in holding the purchase contract was void *ab initio* for a lack of mutuality of obligation. Nor do we review whether Ocotillo's failure to appeal from these orders by itself amounted to a waiver of its right to arbitrate. Instead, we merely address the court's September 15, 2009 order that Ocotillo appeals from regarding whether Ocotillo waived its right to arbitrate certain amendments to the Medinas' amended complaint.

court unless it is clearly erroneous).

I. Right to Arbitrate

A. Litigation and the Amended Complaint

¶14 Generally, a party will have been deemed to have waived its right to arbitrate when it "engages in protracted litigation that results in prejudice to the opposing party." *Cotton v. Slone,* 4 F.3d 176, 179 (2d Cir. 1993). Thus, litigation of substantial issues going to the merits may waive arbitration. *Sweater Bee by Banff, Ltd. v. Manhattan Indus.,* 754 F.2d 457, 461 (2d Cir. 1985). Protracted litigation can include energetic pursuit of discovery or taking depositions and making substantive motions. *Doctor's Assoc., Inc. v. Distajo,* 107 F.3d 126, 132 (2d Cir. 1997). We will look to see if the factual and legal issues litigated are the same issues which the party now seeks to arbitrate. *Id.* at 133. Prejudice can be found if the party opposing arbitration will be prejudiced by unnecessary delay or expense from the opponent's delayed invocation of its right to arbitrate. *Id.* at 131. Waiver must be determined on the circumstances of each case with a healthy regard for the policy of promoting arbitration. *Id.* at 130 (citations omitted).

¶15 Ocotillo argues it did not waive its right to arbitrate the inequitable conduct/unjust enrichment and fraud claims because the two new claims are entirely new causes of action added to the Medinas' amended complaint which are not subject to any prior waiver. We disagree.

¶16 On January 16, 2008, the Medinas filed a motion to amend their first amended complaint which sought to restate Count II's caption to read "Inequitable Conduct/Unjust Enrichment" and to add a count asserting fraud based upon its allegation that Ocotillo misrepresented it was licensed to construct the residence. First, merely restating Count II's caption did not state an entirely new cause of action. Rather, this amendment clarified the existing cause of action that the Medinas already pled, which alleged Ocotillo's "wrongful conduct . . . constitute[d] unconscionable conduct intended to unjustly enrich" Ocotillo. In addition to our independent review, we give deference to the superior court's assessment because it, being very familiar with the case, found the amendments were not new causes of action. *Meineke*, 181 Ariz. at 580, 892 P.2d at 1369 (citations omitted) (noting a trial court's determination of whether a right has been waived is a question of fact that is binding on an appellate court unless clearly erroneous). Consequently, rather than stating a new cause of action, the amendment distinguished the requested remedy of imposing a constructive trust upon the residence from the underlying equitable claim that through its unconscionable conduct, Ocotillo sought to unjustly enrich itself.

¶17 Second, because the original complaint already alleged promissory fraud, the Medinas did not state an entirely new claim by adding a count asserting fraud because both issues "turn on the

same matrix of facts." *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 620 (9th Cir. 1979) (holding appellant adding a new legal theory of recovery in its amended complaint did not constitute a new issue because the issues in the original and amended complaints turned on the same matrix of facts). Thus, because the amendments to the Medinas' complaint did not state entirely new claims, they were subject to Ocotillo's prior waiver.

¶18 The Medinas would also be substantially prejudiced by now being forced to arbitrate their claims. They have undergone protracted litigation simply because Ocotillo decided not to appeal the first two orders denying its motion to require arbitration and Ocotillo's discovery and litigation on the claims against it. *Doctor's Assoc.,* 107 F.3d at 131 (prejudice can be found by unnecessary delay and expense by the delayed invocation of the right to arbitrate).

¶19 Ocotillo cites a number of cases in its opening brief to argue that its prior litigation of the two original remaining claims cannot serve as the basis of waiver of its right to arbitrate amendments to the Medinas' complaint. We disagree. For example, in *Doctor's Assoc. Inc.*, the franchisor, the Subway sandwich shop, moved to compel arbitration after a group of individuals sued it for breach of contract. 107 F.3d at 127-29. The franchisees argued that Subway waived its right to arbitrate by participating in earlier eviction proceedings involving the same

factual issues and some of the same legal issues regarding the validity of the franchise agreement. *Id.* at 128. The court rejected the franchisees' argument, holding Subway did not waive its right to arbitrate because the suits in question and eviction actions did not "'aris[e] out of the same core facts . . . .'" *Id.* at 133. Further, the court reasoned that the eviction actions were simple collection proceedings to recover small amounts of unpaid fees whereas the suits in question attacked the validity of the franchise agreement and arbitration clause. *Id.* Here, unlike *Doctor's*, because the Medinas' amended complaint did not contain new causes of action, Ocotillo waived its right to arbitrate the amendments because it already substantially litigated these issues.[6]

[6] Similarly, Ocotillo also cites *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324 (5th Cir. 1999), claiming the court held that even though the legal issues related to lease and franchise agreements were "inextricably intertwined" and the claims arose out the same operative facts, Subway did not waive its right to arbitrate. We disagree with Ocotillo's characterization of the court's holding in *Subway*. In *Subway*, entities affiliated with Subway sued franchisees for breach of equipment and real estate leases. *Id.* at 325. These contracts did not have arbitration clauses. The franchisees brought an action against the franchisor alleging a breach of a development agreement, *id.* at 325-26, and brought state court actions which were consolidated with the pending federal action against the franchisor. *Id.* at 326. After delays because of bankruptcy, the franchisor sought to arbitrate the claims. The district court denied that request and the court of appeals reversed. *Id.* The court of appeals reasoned that the franchisor did not engage in any litigation on the merits of the claims it sought to arbitrate because none of the actions brought by a company affiliated with the franchisor arose out of a contract having an arbitration clause. *Id.* at

B. Failure to Take an Interlocutory Appeal

¶20 Under A.R.S. § 12-2101.01(A)(1), an appeal may be taken from "[a]n order denying an application to compel arbitration . . . ." In the present case, the March 27, 2006 order denying Ocotillo's motion to compel arbitration was an unsigned order and was not appealable without being formally entered by a signed written order that is filed with the superior court. *See* Ariz. R. of Civ. P. 58(a) ("[A]ll judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The

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327. The court held that a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate. *Id*. at 328. In *Subway*, the claims litigated did not arise out of a franchise agreement having an arbitration clause. *Id.* Here, the amended claims arose out of the same facts and legal theories subjected to protracted litigation by Ocotillo.

Nor is Ocotillo's reliance on two other cases persuasive. In *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991), the bankruptcy trustee for a customer of Shearson who had invested funds of various noteholders sued Shearson on a number of counts arising from the customer agreement with Shearson and for churning the account. The noteholders also sued Shearson. The trustee sought to arbitrate the claims against Shearson under the agreement. The district court found the claim time-barred and enjoined the arbitration. 944 F.2d at 116-17. The court of appeals held that the trustee only had standing to bring the churning claim and as to that claim, the fact that the trustee had hired the same counsel as the noteholders did not amount to a waiver to bring the claim for the debtor. *See also MicroStrategy Inc. v. Lauricia*, 268 F.3d 244, 250-51 (4th Cir. 2001) (employer's earlier state court actions to protect confidential information were factually and legally distinct from employment discrimination claims in current action and employee could not show prejudice in delay of one month between filing of discrimination claim and employer's request for arbitration).

filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry . . . ."). Further, Ocotillo never appealed from the court's signed June 9, 2006 order. Still, Ocotillo could have either placed the court's order in an appealable status by requesting the court to formalize its order denying Ocotillo's motion to compel arbitration, or taken an interlocutory appeal from the signed order.

¶21 Arbitration is an "expeditious and inexpensive method of dispute resolution." *Rancho*, 140 Ariz. at 182-83, 680 P.2d at 1243-44 (citation omitted). Because public policy favors arbitration, the waiver of an arbitration clause is generally not favored and the facts of each case must be considered in light of the strong policy favoring arbitration. *Id.* at 181, 680 P.2d at 1242; *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370.

¶22 Under well-established Arizona law, "a party to a contract may waive its right to enforce an arbitration agreement by its conduct." *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370 (citing *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 254, 705 P.2d 490, 494 (App. 1985). Waiver occurs when a party relinquishes a known right or exhibits conduct that warrants inference of an intentional relinquishment. *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370. Moreover, "[a]n arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy; in other

words, conduct that shows an intent not to arbitrate." *Id.* (citing *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 24 Ariz. App. 566, 569, 540 P.2d 185, 188 (App. 1975)). Examples of inconsistency include a party engaging in conduct preventing arbitration, proceeding at all times to disregard arbitration, expressly agreeing to waive arbitration, or unreasonable delays requesting arbitration. *Id.*; *City of Cottonwood*, 179 Ariz. 185, 190-91, 877 P.2d 284, 289-90 (App. 1994); *Meineke*, 181 Ariz. at 581, 892 P.2d at 1370.

¶23 Through our review of the record, Ocotillo displays two different types of conduct regarding its intent to arbitrate. One type of conduct shows Ocotillo pursuing its attempt to arbitrate. For example, before filing its answer to the Medinas' amended complaint, Ocotillo filed a motion to dismiss to compel arbitration. After the superior court denied its motion, Ocotillo filed an application for arbitration. More than a year after the court denied its application, Ocotillo filed a second application for arbitration. Still, despite these filings, Ocotillo consistently failed to formalize the court's orders in an appealable status and to file an appeal therefrom as required by A.R.S. § 12-2101.01(A)(1).

¶24 In *Rancho Pescado*, this Court held that defendant's failure to perfect an interlocutory appeal from the denial of its application to compel arbitration constituted a waiver of its right

to arbitrate. *Id.* at 183, 680 P.2d at 1244. This Court reasoned that defendant "made a tactical election of remedy" because it "spent a considerable amount of effort on [the] litigation." *Id.* at 181, 680 P.2d at 1242. It found that although defendant "appeared to preserve its right to arbitrate, once [defendant] decided not to take the necessary steps to appeal, it . . . made a tactical decision not to arbitrate." *Id.* at 181-82, 680 P.2d at 1242-43. Thus, this Court noted that had defendant "truly intended to arbitrate, it was within its power to pursue an interlocutory appeal." *Id.* at 181, 680 P.2d at 1242.

¶25 In the present case, Ocotillo made a similar tactical decision. Despite the superior court denying its motion and applications for arbitration, Ocotillo continued to intensely litigate the matter in superior court. In fact, such litigation spanned over three years during which three volumes of pleadings were filed. Given Ocotillo's work product and the amount of pleadings it filed, we must assume it was familiar with the process of formalizing the court's orders in an appealable status that it could appeal from.[7] *Rancho*, 140 Ariz. at 181, 680 P.2d at 1242.

¶26 More importantly, we need not decide whether the failure to take an interlocutory appeal from the prior orders amounted to waiver after *Preston v. Ferrer*, 552 U.S. 346 (2008). Ocotillo did

[7] The fact that Ocotillo filed a third request to arbitrate after all of the litigation does not excuse its waiver.

not simply fail to appeal, it actively litigated the claims against it. As discussed *supra* ¶¶ 14-19, that amounted to a waiver of arbitration. Not taking the necessary steps to appeal from the court's orders and litigating the merits of the claims shows Ocotillo made a tactical decision not to arbitrate. *Rancho*, 140 Ariz. at 181-82, 680 P.2d at 1242-43.

¶27 Ocotillo asserts that although it could have filed an interlocutory appeal, such an appeal would have resulted in months of delay and expensive attorney's fees. Ocotillo also urges that if this Court moved the matter to arbitration, Ocotillo would save thousands of dollars and a result would be reached in a matter of weeks. Given the amount of time and money already spent litigating this matter, the two main incentives of arbitration have already been lost. It has been over three years since suit was originally filed in this matter and a great deal of expense has been incurred by both parties. Consequently, it would make little sense from a policy standpoint to send this case back for arbitration.

¶28 Further, sending the case back for arbitration would not give a party desiring arbitration a reason to ensure that the order denying its request was formalized by the superior court judge. *Rancho*, 140 Ariz. at 182, 680 P.2d at 1243. Consequently, Ocotillo would have a second bite in the case because it could take its chances on the merits and then appeal the order denying arbitration if unsatisfied with the trial's results. *Id.* at 182, 680 P.2d at

1243. In fact, as the superior court decided, if we permitted this case to go to arbitration it would cause substantial prejudice to the Medinas, not to Ocotillo. Thus, Ocotillo waived its right to appeal because it failed to file an interlocutory appeal from the court's orders and litigated the claims against it.

CONCLUSION

¶29 The Medinas request that they be awarded attorney's fees and costs incurred on appeal pursuant to A.R.S. § 12-341.01(A) (2003) and ARCAP 21(c). We deny the Medinas' request for attorney's fees; however, the Medinas are the prevailing party and will be awarded costs upon timely compliance with ARCAP 21.

/s/_____
DONN KESSLER, Judge

CONCURRING:

/s/_____
MARGARET H. DOWNIE, Presiding Judge

/s/_____
PETER B. SWANN, Judge