

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

---

LISA M. AUBUCHON, et. al, *Plaintiffs/Appellants*,

*v.*

MARICOPA COUNTY, *Defendant/Appellee*.

No. 1 CA-CV 17-0301

FILED 5-22-2018

---

Appeal from the Superior Court in Maricopa County

No. CV2011-014754

The Honorable Joshua D. Rogers, Judge

**REVERSED**

---

COUNSEL

Lisa M. Aubuchon and Peter R. Pestalozzi, Tempe  
*In propria persona*

David and Anna Hendershot, Peoria  
*In propria persona*

Edward P. Moriarty, Billings, Montana  
*In propria persona*

Sacks Tierney P.A., Scottsdale  
By James W. Armstrong, and Jeffrey S. Leonard  
*Counsel for Defendant/Appellee*

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

---

**MEMORANDUM DECISION**

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

---

**T H O M P S O N**, Presiding Judge:

¶1 Plaintiff-appellants (collectively, Aubuchon) appeal the trial court's dismissal of its complaint against Maricopa County (the county), the imposed pre-remand sanctions under Ariz. R. Civ. P., Rule 11, and Arizona Revised Statutes (A.R.S.) § 12-349 (2016) and the post-remand attorneys' fees under A.R.S. § 12-341.01 (2016). Finding the trial court erred in granting judgment on the pleadings in county's favor, we reverse. As to the sanctions, we remand until this matter resolves. On the issue of the A.R.S. § 12-341.01 attorneys' fees below, we remand for a new determination once there is a successful party.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 The general history of this matter and related matters can be found at *Aubuchon v. Brock*, 1 CA-CV 13-0451, 2015 WL 2383820 (Ariz. App. May 14, 2015) (mem. decision), *Aubuchon v. Maricopa County*, CV 14-0176-Phx SPL, 2016 WL 7130942 (D. Ariz. Feb. 29, 2016), and *In re Lisa M. Aubuchon*, SB-12-0035-AP (2013).

¶3 The initial complaint and the first amended complaint were filed in August of 2011. The county promptly moved to dismiss for violations of Rule 8(a), (e), 10(b), and 12(b)(6).<sup>1</sup> Additional motion practice occurred and all defendants were dismissed in November 2012. Aubuchon appealed, but the appeal was dismissed for lack of Rule 54(b) language in 2013. In June 2013, the court finalized an appealable order. A valid appeal followed. And two years later, in May 2015, this court issued the memorandum decision in *Aubuchon v. Brock*, affirming the trial court's

---

<sup>1</sup> The initial matter concerned many defendants, including a law firm, the Board of Supervisor's members, the county, the county attorneys' office and the state of Arizona. All the defendants, other than the county, were dismissed with prejudice.

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

dismissal of Aubuchon's 2012 proposed second amended complaint under Ariz. R. Civ. P. 12(b)(6).

¶4 This court upheld the trial court's "determination of futility with respect to the majority of the claims," as well as its conclusion that "the claims for breach of contract and breach of the covenant of good faith and fair dealing were sufficiently pled." In doing so, we agreed with the trial court's depiction of the original complaint as "unintelligible," and the first amended complaint "equally unintelligible." As to the sanctions, we found while the "plaintiffs clearly engaged in sanctionable conduct, the final calculation of sanctions in favor of the county must await the conclusion of the case on remand," because we had reversed the complaint's two contract claims.

¶5 The remaining claim against the county asserted that Aubuchon "worked as a County employee for the MCAO [Maricopa County Attorney's Office] and that her employment contract provided for 'payment of attorneys' fees to defend against any bar complaints made against her for her actions while she was employed as a deputy county attorney.'" She also asserted a claim against MCAO officials for failing to provide an attorney to represent her in that action for which she incurred attorneys' fees and costs.

¶6 After remand, in August 2015, the county filed its answer. Among other assertions, the county asserted Aubuchon failed to satisfy the notice of claim (NOC) statute, A.R.S. § 12-821.01 (2016) for the contract claims remaining in the complaint.

¶7 The county then, in June 2016, moved for judgment on the pleadings under Rule 12(c). The county asserted that Aubuchon: (1) misidentified the party at issue because, to the extent she had a contract, MCAO would be the proper party; (2) failed to comply with the NOC statute because her NOC did not specify contract claims; and (3) alleged employment contract was barred by issue preclusion given the decision by the federal district court. The federal district court granted summary judgment to the county because "Aubuchon failed to meet her burden of proving the existence of a valid employment contract beyond a unilateral contract in which she was offered a job and corresponding wages and which she accepted by performance of her duties." The federal court stated that Aubuchon's claims had "little merit" and that she "could not identify the terms of the contract [plaintiffs] allege was breached." That complaint concerned a stipulated \$101,293.75 in state bar costs and expenses.

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

¶8 Aubuchon responded, asserting that she had complied with the notice of claim statute because it does not require an assertion of specific legal claims but merely of facts by which a defendant could infer the basis of liability. Aubuchon also asserted that the belated challenges to the sufficiency of the notice of claim “should be precluded” because they were not presented “before the case went up on appeal years ago.”

¶9 Aubuchon continued that the breach of contract claim was factually supported in the NOC because it stated an “abuse of employment benefits [and] violation of employment benefits” and included facts that her supervisors fired her pre-bar complaint counsel without her consent and were aware of the “deprivation of counsel and the inability of county officers to obtain conflict-free legal counsel.” Aubuchon asserted that the federal court decision was erroneous in determining no contract between her and the county and failed to properly take note of our earlier court of appeals decision which stated “An employment relationship is contractual in nature” and cited A.R.S. § 23-1501(A) (2016).

¶10 The county replied in support of its claims. The county asserted it raised the failure to comply with A.R.S. § 12-821.01 as an affirmative defense in its first responsive pleading in this matter and, further, Aubuchon’s notice of claim failed to set forth any factual support for the existence of a contract with the county containing terms that were breached.

¶11 Before a ruling on the motion for judgment on the pleadings, both parties moved for summary judgment. The trial court found for the county on the motion for judgment on the pleadings, based on the NOC defense. It rejected the county’s claims that judgment was concurrently required based on issue preclusion and the naming of the county as a defendant, rather than MCAO. As to issue preclusion, the trial court said that the federal decision was written broadly enough to “seem to” apply here, but in fact the alleged contractual terms at issue in federal court were not the same terms at issue in this proceeding. A motion for reconsideration re-urged the waiver issue, but that motion was summarily denied.

¶12 Following that ruling, the county asked for reinstatement of the sanctions and award of attorneys’ fees. The trial court reinstated the prior sanctions of \$35,486.50 and awarded an additional \$27,360.50 for post-remand attorneys’ fees under A.R.S. § 12-341.01. A timely notice of appeal was filed by Aubuchon.

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

**ISSUES**

¶13 On appeal, Aubuchon<sup>2</sup> asserts:

1. The trial court erred in finding her notice of claim did not comply with A.R.S. § 12-821.01;
2. The trial court erred in awarding attorneys' fees, particularly fees that had been expended during the years that the county failed to raise the notice of claim issue; and
3. The trial court erred in awarding sanctions against plaintiffs and their then-lawyer Moriarity.

**DISCUSSION<sup>3</sup>**

A. Notice of Claim Statute

¶14 Aubuchon asserts that her NOC gave sufficient information to put the county on notice of potential liability and, alternatively, that the county waived its right to object by waiting until August 2015 to raise it. Because we do find waiver by the county, we need not examine the sufficiency of Aubuchon's NOC.

¶15 In reviewing a defendant's motion for judgment on the pleadings, "we accept as true the factual allegations of the complaint, but review the trial court's legal conclusions de novo." *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218–19, ¶ 6 (App. 2007). We review de novo issues of statutory interpretation. *City of Phoenix v. Harnish*, 214 Ariz. 158, 161, ¶ 6 (App. 2006).

¶16 Section 12-821.01 provides that, before filing a lawsuit against a public entity or employee, the claimant must, within 180 days after the cause of action has accrued, file a notice of claim, which must contain "facts sufficient to permit the public entity or the public employee to understand the basis upon which liability is claimed." A.R.S. § 12-821.01(A).

---

<sup>2</sup> Plaintiffs Hendershot and the plaintiffs' former lawyer Moriarity join in the appeal of the sanctions that were granted jointly and severally.

<sup>3</sup> The county does not assert any other basis for affirming the dismissal other than the sufficiency of the NOC.

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

¶17 The county challenges the sufficiency of Aubuchon's NOC. Failure to comply with the A.R.S. § 12-821.01 is an affirmative defense subject to waiver. *Ponce v. Parker Fire Dep't*, 234 Ariz. 380, 383, ¶ 11 (App. 2014) (citing *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶ 27 (2009)). Even where a defendant has raised the defense in its answer, it may waive the defense by its subsequent conduct. *Fields*, 219 Ariz. at 574, ¶¶ 28-29 (citing *Jones v. Cochise Cty.*, 218 Ariz. 372, 379-80, ¶¶ 22-23, 27 (App. 2009) (finding waiver when a government entity substantially participated in litigation)). Waiver occurs when the government entity engages in substantial conduct to litigate the merits that would have been unnecessary had the defendant not delayed in asserting the defense. *Fields*, 219 Ariz. at 575, ¶ 30. The active litigation of issues unrelated to the notice of claim defense waives the defense. *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 597-98, ¶¶ 9, 11 (App. 2010). A governmental defendant asserting a notice of claim defense must have sought prompt resolution. *Id.* at ¶ 11.

¶18 Here, the county raised the NOC issue in its answer. However, that answer was not filed for approximately four years. Nothing kept the county from raising a notice of claim problem in its first motion to dismiss in September 2011. Before it filed its answer, the county moved to dismiss, moved for Rule 11 sanctions and an A.R.S. § 12-349 award, responded to Aubuchon's request to file a second amended complaint, applied for fees, moved for summary judgment, participated in an appeal, and filed a joint report pursuant to Ariz. R. Civ. P. Rule 16(d). None of those documents refers to the NOC.

¶19 Indeed, the NOC would be expected to be one of the first things examined. The notice of claim statute is meant to provide "the government entity with an opportunity to investigate the claim, assess its potential liability, reach a settlement prior to litigation, budget and plan." *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 223, ¶ 30 (App. 2008). The potential plaintiff is unable to file a complaint until the governmental entity has had sixty days to consider the NOC. A.R.S. § 12-821.01(E).

¶20 For these reasons, we find that the county participated in substantial litigation and has waived that defense. We express no opinion as to the underlying merits of Aubuchon's contract case. This matter is remanded to the trial court.

AUBUCHON v. MARICOPA COUNTY  
Decision of the Court

B. Rule 11 Sanctions and Attorneys' Fees  
Under A.R.S. § 12-349

¶21 Aubuchon next asserts the trial court erred in confirming the initial award of sanctions of \$35,486.50 for filings in the early part of the case. As to sanctions, this court found "the superior court acted well within its discretion when it determined that the appellants had engaged in sanctionable conduct," but consideration of the amount of sanctions was deferred "until the case is resolved on remand." The reasoning supporting the sanctions has not changed from that outlined in *Aubuchon v. Brock*, 2015 WL 2383820.

¶22 The trial court did reimpose these sanctions on remand from the court of appeals. However, because we too are remanding, sanctions should be deferred until the case has been resolved. The award is reversed and remanded.

C. Attorneys' Fees Below under A.R.S. § 12-341.01

¶23 The county sought attorneys' fees of \$66,359 for fees incurred after remand from the court of appeals. The trial court awarded the county \$27,360.50. Because the successful party has not yet been determined, we reverse and remand as to contract fees.

**CONCLUSION**

¶24 For the foregoing reasons, we reverse the trial court and remand for further proceedings.



AMY M. WOOD • Clerk of the Court  
FILED: AA