IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/14/2011
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SANDPIPER RESORTS DEVELOPMENT CORPORATION, an Arizona corporation, Plaintiff/Appellant, v. LA PAZ COUNTY, a political subdivision of the State of Arizona; BUCKSKIN FIRE DISTRICT a quasi-municipal association; CHARLES PHILPOT and DIANE PHILPOT, husband and wife, Defendants/Appellees.	1 CA-CV 08-0637 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules Of Civil Appellate Procedure

Appeal from the Superior Court in La Paz County

Cause No. CV20050103

The Honorable Charles W. Gurtler, Jr. Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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K E S S L E R, Judge

¶1 Sandpiper Resorts Development Corporation ("Sandpiper") appeals the summary judgment in favor of La Paz County (the "County") and the Buckskin Fire District and Charles and Diane Philpot (collectively the "District"). Sandpiper argues the superior court erred by holding that Sandpiper failed to serve its notice of claim on the person or persons authorized to accept service for the County and failed to timely serve its notice on the District. For the reasons stated below, we affirm the summary judgment for the County, but reverse the summary judgment for the District and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 Sandpiper was engaged in the planning, development and construction of the Toscana Townhomes development located within the District in La Paz County. During the planning and development process in late 2002 and early 2003, while Sandpiper experienced delays in the approval of development maps and plans, there was no indication from the County or District that fire suppression systems, fire sprinklers or water storage tanks would be required for a building permit for the development. On

June 24 and July 25, 2003, Sandpiper complained to the County in writing about the length of time the County was taking to approve subdivision maps, which delays were costing Sandpiper money. In the July 25 letter, Sandpiper complained that over the past three and one-half weeks it heard complaints that the fire code required sprinklers, fire flow and storage tanks when those were not required by the relevant codes.

¶3 In November 2003, an attorney for the County wrote Sandpiper stating that the County would accept Sandpiper's engineer's opinion that the development met or exceeded applicable fire suppression requirements so the recent recommendations by the District were simply recommendations. However, on January 16, 2004, Philpot, acting for the District, issued a stop-work order to Sandpiper. The order required Sandpiper to stop construction and submit a technical opinion and report describing the fire protection system Sandpiper intended to install as a condition to continuing work on the project. As a result of the stop-work order, Sandpiper was unable to continue with construction, although it later alleged in its complaint that the District later implicitly lifted the stop-work order and it was able to proceed with construction in March 2004.

¶4 On July 9, 2004, within six months of the stop-work order, Sandpiper sent a notice of claim letter to Philpot, Cliff

Edey, a member of the County Board of Supervisors ("Board"), and Huey Long, the County Administrator ("Long"). The notice of claim stated that Sandpiper had been damaged by the stop-work order and other "unauthorized actions" and "halted construction on the Project for approximately nine months resulting in massive damage to Sandpiper."

¶5 Long forwarded the notice of claim to an administrative assistant to Donna Hale ("Hale"), who was the Clerk of the County Board of Supervisors ("County Clerk"). Hale forwarded the notice to the county attorney, the entire Board and the County's insurance pool. This was the normal processing procedure for claims filed against the County except that the cover letter forwarding the claim would have indicated that Hale was served rather than that Philpot, Edey and Long were served. Hale averred that she and not Long was authorized to accept service of process for the County. According to Long, he probably discussed the claim in executive session with the Board and legal counsel. There is no evidence the County or the District responded to the notice.

¶6 On October 7, 2004, Sandpiper filed suit in the superior court in Maricopa County against the County and the District for damages allegedly resulting from the stop-work

order.[1] The defendants' answers each asserted as an affirmative defense that Sandpiper failed to comply with the notice of claim statute, Arizona Revised Statutes ("A.R.S.") section 12-821.01 (2003).[2]

¶7 The County filed a motion for summary judgment contending the complaint should be dismissed for failure to comply with the notice of claim statute.[3] The County argued Sandpiper filed its notice of claim with the wrong persons for the County because it failed to file the notice with the entire Board as required by ***Falcon ex. rel. Sandoval v. Maricopa County,*** 213 Ariz. 526, 144 P.3d 1254 (2006). The County also argued the notice was untimely because the notice included damages for time pre-dating the stop-work order and dating from the delays beginning in June 2003.

¶8 At various stages of the briefing,[4] Sandpiper argued that as to the County, it filed its notice with the proper

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[1] That complaint was later dismissed without prejudice and Sandpiper filed the complaint in this action in the superior court in La Paz County on July 23, 2005. No party contends that the delay in filing this second action based on the dismissal of the first action makes this action untimely.

[2] We cite to the current version of all statutes unless there have been statutory changes which would affect our decision.

[3] The District simply joined in that motion.

[4] The record is not a model of clarity. Thus, for example, the County's motion was never included in the record on appeal and had to be supplemented by stipulation while this appeal was pending. Moreover, Sandpiper filed numerous responses and statements of fact in opposition to the motion, rather than one response.

persons because: (1) It served the chair of the Board and Long, who, as the County Administrator, qualifies as the County Secretary for purposes of Arizona Rule of Civil Procedure 4.1(i) ("Rule 4.1(i)"); (2) Long conceded he was authorized to accept service for the County; (3) The later transmission of the letter to the County Clerk and entire Board satisfied the filing requirement regardless of whether the delivery was direct from the claimant to the Clerk and the entire Board; (4) The requirements of *Falcon* should not apply retroactively; and (5) The County waived any noncompliance with the statute by "processing" the claim.

¶9 As to timeliness of the notice, Sandpiper argued that the stop-work order was the event which caused its damages because it then had to cease construction. Thus, it argued the notice was timely because it was filed on July 9, 2004, within six months of the January 16, 2004 order. Sandpiper did not explain how its contention that damages began to accrue in June 2003 affected the timeliness of its notice of claim except to state that before the issuance of the stop-work order, it "was investigating whether there were fire suppression issues," "attempted to proceed with construction," and did not realize it was damaged until the January 2004 stop-work order.

¶10 In its responses, Sandpiper pointed out that Long testified during deposition that he had received the notice of

claim and one of his responsibilities as County Administrator was to "receive these [notices of] claims and make sure that they're processed properly." Long also testified that as part of his duties as County Administrator, he was an authorized representative of the County to receive delivery of the claim and that such claims would either come to him or the county clerk. However, Long also testified he had authority "to accept delivery . . . [b]ut no authority to act on the claim itself without taking it to the proper authorities." In explaining his position on whether he had authority to accept service of the claims, Long testified that he only acted as the person to transmit a notice of claim if it was addressed to him:

> A. Here's what I do know. I accept clams on a regular basis that are delivered to my office and have ever since I've been in Arizona. I've never had a -- typically it either goes to the city clerk, county clerk, or in their absence, the city manager or county administrator, and is simply turned over to the city clerk, county clerk, for the processing of those claims.
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> I am never involved in the processing of those claims. And when I say receiving them, I'm just simply -- when -- if it's a signed receipt on delivery, I then I'm the guy -- for example, this one had my name specifically on it, so it would have been delivered to me . . . and I would simply sign it at that point and then turn it over to the county clerk for the handling of that claim.
>
> Q. Understood. And do you understand the distinction between accepting delivery of

> something, of a notice of claim and formally accepting service of that notice of claim? Do you understand the legal distinction . . .
>
> A. I do not know.

¶11 The County relied on Hale's deposition testimony that she accepts service of notice of claims on behalf of the County as clerk of the Board, that she had not received the notice in this case, but that Long had handed the notice to her administrative assistant who drew up a transmittal letter to the insurance pool and the letter and notice were sent to the pool. She also testified that Long did not process the notice of claim and she handled the notice "like I would if it was served to me directly" by transmitting it to the insurance pool, although the transmittal letter was slightly different than if she had been given the notice directly by the claimant. In a separate affidavit, Hale averred Long is responsible for the daily operations of the County and implements policy decisions by the Board, but "was not authorized to accept service of notice of claims."

¶12 The superior court granted the motions for summary judgment for both defendants. The court held that, although timely submitted, Sandpiper's notice of claim to the County was not filed with the persons listed in Rule 4.1(i). The court held that Sandpiper had not served its notice of claim on the

District within 180 days of the accrual of the action as required by section 12-821.01(A) and was thus barred.

¶13 Sandpiper timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. Standard of Review

¶14 We review issues of statutory and rule interpretation *de novo*. *Poulson v. Ofack*, 220 Ariz. 294, 297, ¶ 8, 205 P.3d 1141, 1144 (App. 2009). In reviewing a summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). Summary judgment may be granted when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A motion for summary judgment "'should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 117 n.5, ¶ 21, 180 P.3d 977, 982 n.5 (App. 2008) (quoting *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)). In reviewing the factual record for summary judgment,

we view the facts and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted, in this case, Sandpiper. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

II. Service on the County

¶15 On appeal, Sandpiper argues that it complied with A.R.S. § 12-821.01(A) by filing the notice of claim with the county secretary, the county clerk, and the chief executive officer of the County. Sandpiper contends that Long, with whom Sandpiper directly filed the notice of claim, is effectively the County Secretary, the County authorized him to accept service of claims and that his transmission of the notice of claim to the County Clerk and through her to every member of the Board of Supervisors constitutes filing with the county clerk and the County's chief executive officer. Alternatively, it argues that even if filing was improper, the County waived any such failure by processing the claim with its insurance pool and that even if waiver was not legally available, cases precluding a waiver should not be applied retroactively.

¶16 The County argues that filing had to be completed directly by Sandpiper on either Hale as County Clerk or the entire Board of Supervisors. It also argues that waiver by conduct based on its allegedly processing the claim is no longer

legally possible and that even if it legally could have waived improper filing, it did not do so in this case.

¶17 We hold that filing with the County in this case was improper because Sandpiper did not directly file the notice with the Board of Supervisors or the County Clerk and the forwarding of the notice to the Clerk and the full Board was insufficient. We also hold that even if improper filing can be waived by conduct, the facts in this case do not amount to such a waiver.

¶18 In construing statutes and rules, our ultimate goal is to give effect to the drafters' intent. *Backus v. State*, 220 Ariz. 101, 104, ¶ 8, 203 P.3d 499, 502 (2009) (statutes); *Chronis v. Steinle*, 220 Ariz. 559, 560, ¶ 6, 208 P.3d 210, 211 (2009) (rules). If the language of the statute or rule is clear, we go no further because clear language is the best indicator of the authoring authority's intent. *Campbell v. Barton*, 222 Ariz. 414, 416, ¶ 8, 215 P.3d 388, 390 (App. 2009).

¶19 Section 12-821.01(A) provides, in pertinent part, that

> [p]ersons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within [180] days after the cause of action accrues.

Failure to file within the 180-day period for filing results in the action being barred. *Id.* In turn, Rule 4.1(i) governs service on public entities and employees. It provides that

service upon a county shall "be effected by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof."

¶20 The language of the statute and rule could not be clearer – the notice must be filed with the county chief executive officer, secretary, clerk or recording officer.[5] Sandpiper did not file the notice with the County's chief executive officer when it sent it to Edey, a single member of the board of supervisors, because the chief executive officer of a county for these purposes is the entire board of supervisors, not a single supervisor. *Falcon,* 213 Ariz. at 529, ¶¶ 18-21, 144 P.3d at 1258.[6]

¶21 Sandpiper contends that because Long was the County Administrator, he was also for all intents and purposes the Board's secretary. We disagree. Long is not the County secretary because the Board of Supervisors never appointed him secretary. A secretary is not a county officer created by state statute.[7] A.R.S. § 11-401(A) (2001). While a board of

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[5] Sandpiper does not argue that it filed the notice of claim with a recording officer.

[6] While the July 2004 notice of claim predated the 2006 holding in *Falcon,* we have held that *Falcon* applies retroactively. *Batty v. Glendale Union High School Dist. No. 205,* 221 Ariz. 592, 595, ¶ 12, 212 P.3d 930, 933 (App. 2009).

[7] The County argued strenuously that because there is no statutory office named "County Secretary" we should find that alone enough to conclude that Long is not the county secretary. However, we avoid reading the civil rules in a way that renders

supervisors may create an office with the responsibility of its secretary, a secretary is an agent charged with recording the proceedings in a deliberative meeting and receiving and sending official correspondence. *Black's Law Dictionary* 1381 (8th ed. 2004). Long is not a secretary because he performs policy setting and managerial functions, including supervising the twelve county departments.

¶22 Sandpiper also argues that Long's deposition testimony shows that he was authorized by the County to accept the filing of notices of claims and this should be sufficient for proper service of the notice. We do not need to determine whether a county or other public authority can authorize a person not listed in Rule 4.1(i) to accept filing of a notice of claim. *See Batty v. Glendale Union High School Dist. No. 205*, 221 Ariz. 592, 596, ¶ 15, 212 P.3d 930, 934 (App. 2009) (holding that although school district board could delegate authority to accept service, it could not delegate all of its powers and thus superintendent was not a CEO for notice purposes because a CEO had ultimate responsibility for proper functioning of

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any portion of them void. *King v. Titsworth*, 221 Ariz. 597, 600, ¶ 15, 212 P.3d 935, 938 (App. 2009) (quoting *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503, 821 P.2d 161, 164 (1991)) ("The court must, if possible, give meaning to each clause and word in the statute or rule to avoid rendering anything superfluous, void, contradictory, or insignificant."). In the absence of a statutorily created "county secretary," we will examine the degree to which Long fulfilled that role.

governmental entity). Even viewing the evidence in the light most favorable to Sandpiper, a reasonable jury could not conclude that the County authorized Long to accept filing of claims. *Thruston,* 218 Ariz. at 117 n.5, ¶ 21, 180 P.3d at 982 n.5. While Long testified that one of his responsibilities was to "receive these [notices of] claims and make sure that they're processed properly," he clarified that he had authority "to accept delivery . . . [b]ut no authority to act on the claim itself without taking it to the proper authorities." More importantly, he testified

> I am never involved in the processing of those claims. And when I say receiving them, I'm just simply -- when -- if it's a signed receipt on delivery, I then I'm the guy -- for example, this one had my name specifically on it, so it would have been delivered to me . . . and I would simply sign it at that point and then turn it over to the county clerk for the handling of that claim.

Long also explained the he did not understand the difference between having authority to accept delivery of a notice of claim and formally accepting service of that notice of claim.

¶23 Sandpiper's third argument is that even if it failed to directly file the notice with the full Board or Hale, filing was sufficient when Long sent the notice on to Hale, the County Clerk, or when Hale forwarded the notice to the full board. At first blush, this argument might have merit because the purpose

of the notice of claim statute is to ensure the public entity has sufficient notice of the claim to investigate it and either settle it or plan in its budget for the possible litigation and exposure. *Falcon*, 213 Ariz. at 527, ¶ 9, 144 P.3d at 1256 (citation omitted). This goal would be accomplished if the notice of claim was misfiled by the claimant, but then forwarded to the person authorized to receive the notice. Moreover, this case can arguably be distinguished from *Falcon,* in which the supreme court held that filing of a notice of claim with one supervisor, who did nothing further with the notice, was insufficient. 213 Ariz. at 526, 529, ¶¶ 4, 25, 144 P.3d at 1255, 1258.

¶24 However, closer analysis of the holding and reasoning in *Falcon* defeats Sandpiper's argument. In *Falcon*, the court did not merely hold that the non-receipt of the notice by the other members of the board precluded a finding that it had been filed with the board. *Id.* Rather, the court based its ruling on the fact that the ***plaintiffs*** did not deliver the notice to the person designated in Rule 4.1(i). *Id.* at 530, ¶¶ 27-30, 144 P.3d at 1259. It expressly held that the "rule requires service on the board, not on someone whose usual practice is to forward the claim to the board." *Id.* at ¶ 27. *Falcon* expressly distinguished *Creasy v. Coxon* on those bases. *Id.* at ¶¶ 29-30, (citing *Creasy v. Coxon*, 156 Ariz. 145, 147-48, 750 P.2d 903,

905-06 (App. 1987)). In *Creasy*, the court found that filing of a notice was proper when it was delivered directly from the claimant to the office of the person who was authorized to receive it, but was signed for by someone in that office. *Falcon*, 213 Ariz. at 530, ¶ 29, 144 P.3d at 1259. The court in *Falcon* held that *Creasy* did not apply because "the plaintiffs did not deliver their notice of claim to the office of a person or entity listed in Rule 4.1(i)." *Id.* at ¶ 30.

¶25 Accordingly, claimants do not satisfy the filing requirement of section 12-821.01(A) simply because they send the notice to persons not authorized by statute and rule to receive the notice and those persons by happenstance forward the notice on to persons authorized by Rule 4.1(i) to accept service. Rather, claimants must direct the notice to the office of the persons authorized under Rule 4.1(i) to properly file the notice.

¶26 We recognize that such a rule may be seen as placing form over substance given the underlying purpose of the notice of claim statute. That purpose is to ensure that public entities have sufficient notice of a possible liability to investigate the validity of the claim and either settle it or make provision for potential liability in their budget. *Falcon*, 213 Ariz. at 527, ¶ 9, 144 P.3d at 1256. That purpose can be

met when someone for the governmental entity receives the notice and then passes it on to any person listed in Rule 4.1(i).

¶27 However, balanced against that purpose is that the supreme court rejected an indirect service interpretation of Rule 4.1(i) in *Falcon*. There, it held that receipt by one member of the board or supervisors or the county manager who might forward it on to a person listed in Rule 4.1(i) is insufficient. The court also noted that it favored a clear, black-letter literal interpretation of Rule 4.1(i) because many public entities might not have certain types of officials and limiting filing to the persons identified in the rule would assist claimants in identifying exactly with whom to file the claim.[8] *Falcon,* 213 Ariz. at 528, ¶ 17, 144 P.3d at 1257.

¶28 We read *Falcon* to hold that indirect filing with persons not listed in Rule 4.1(i) who might then send the notice to the authorized person is insufficient filing for purposes of the notice of claim statute.

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[8] This does not mean that mailing or delivery to the office of a person listed in Rule 4.1(i) is insufficient unless the notice was physically given to the person listed in that rule. Obviously, the persons listed in Rule 4.1(i) might have administrative assistants or deputies who open the mail or actually sign for mail. Delivery to such a person in the office of the person listed in Rule 4.1(i) is sufficient. *Creasy,* 156 Ariz. at 147-48, 750 P.2d at 905-06. *See also Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 63-64, ¶¶ 31-34, 234 P.3d 623, 631-32 (App. 2010) (mailing of notice to proper address of clerk precluded summary judgment on failure to properly file notice of claim).

¶29 In this case, Sandpiper failed to comply with the requirement of ***Falcon***. Although Hale actually and physically possessed the notice of claim and passed it on to the Board, it was not addressed to her and reached her only as a result of the County Administrator's forwarding the claim.

III. Waiver of A.R.S. § 12-821.01(A)

¶30 The parties present two issues regarding waiver of improper service of the notice of claim: (1) Whether such improper service can be waived by pre-litigation conduct after ***Falcon***, ***Deer Valley Unified Sch. Dist. No. 97 v. Houser,*** 214 Ariz. 293, 152 P.3d 490 (2007), and ***Martineau v. Maricopa County,*** 207 Ariz. 332, 86 P.3d 912 (App. 2004); and (2) If so, whether the facts in this case amount to a waiver. Without deciding whether waiver by pre-litigation conduct is possible after ***Deer Valley***,[9] we assume that such waiver is still legally

[9] Recent published decisions have recognized that governmental entities can still waive any defects in a notice of claim during the course of the litigation of the claim. ***City of Phoenix v. Fields***, 219 Ariz. 568, 574, ¶ 27, 201 P.3d 529, 535 (2009); ***County of La Paz v. Yakima Compost Co.,*** 224 Ariz. 590, 598, ¶ 11, 233 P.3d 1169, 1177 (App. 2010). Although we decline to decide the issue whether waiver is still legally possible by pre-litigation conduct, we note that the possibility of a government entity waiving compliance with A.R.S. § 12-821.01(A) by pre-litigation conduct has been addressed in several unpublished decisions. ***See Trojanovich v. City of Globe***, No. CV-06-421-PHX-MHM, 2006 WL 2547337, at *4-5 (D.Ariz. Aug. 28 2006); ***Morris v. Maricopa Cnty Adult Prob. Dep't***, No. 1 CA-CV 07-0235, 2008 WL 4149983, at *5-7 ¶¶ 21-34 (Ariz. Ct. App. Feb. 14, 2008); ***FV-Union Centre Professional Suites, L.L.C., v. City***

possible,[10] but hold that the County's conduct in this case was not a waiver.

¶31 Assuming that waiver applies, it is an express, intentional, voluntary relinquishment of a known right or such conduct that inferentially shows such an intent to relinquish the right. *Jones v. Cochise County*, 218 Ariz. 372, 379, ¶ 22, 187 P.3d 97, 104 (App. 2008) (considering County's waiver of compliance with notice of claim provisions during litigation). Waiver based on conduct must be shown by evidence of acts inconsistent with the intent to assert a right. *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). Waiver can be shown inferentially by the entity's acts that are inconsistent with an intent to assert a right so that waiver need not be a conscious decision to relinquish a

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of Phoenix, No. 1 CA-CV 07-0040, 2008 WL 4093803, at *3-4 ¶¶ 17-22 (Ariz. Ct. App. Jan. 22, 2008).

[10] Various other states have held that waiver of notice defects by pre-litigation conduct is possible. *E.g., Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981) (estoppel); *Brown v. State Dep't of Corr.*, 701 So. 2d 1211, 1213 (Fla. Dist. Ct. App. 1997) (waiver). *See also* 63 C.J.S. *Municipal Corporations* § 841 (1999) (noting disagreement among states on whether waiver by pre-litigation conduct is possible and suggesting that unless governmental entity has duty to object prior to litigation, failure to object to claim defect cannot constitute waiver); J. James Frasier III, *A Review of Issues Presented by § 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations,* 65 Miss. L.J. 643, 666 (1996) (noting that some states requiring strict compliance with notice of claim provisions allow waiver or estoppel by pre-litigation conduct if such conduct induced reliance by the claimant that a notice was not needed).

defense. *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 598, ¶ 11, 233 P.3d 1169, 1177 (App. 2010). A clear showing of intent to waive is necessary, and doubtful cases are decided against waiver. *Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987).

¶32 Relying on *Young v. City of Scottsdale*, 193 Ariz. 110, 970 P.2d 942 (App. 1998), *disapproved on other grounds by Deer Valley*, 214 Ariz. at 297, ¶ 12, 152 P.3d at 490, Sandpiper argues that the County waived compliance with A.R.S. § 12-821.01(A) by "processing" the claim before the claim was litigated. We disagree. In *Young*, the city had processed the claim and the claims adjuster denied the claim in writing as untimely. Neither the city nor the claims adjuster contended prior to the litigation that the claim was improperly served. *Id.* at 111-12, ¶ 3, 970 P.2d at 943-44. During the ensuing lawsuit, the city argued that the plaintiff had not complied with the notice of claim statute in part because he had failed to properly serve the notice. *Id.* at 114, ¶¶ 14-15, 970 P.2d at 946. Relying on *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990), which had held that the procedural requirement of filing a claim was waivable, we held the city had waived this argument "when it referred the matter to a claims adjuster, *who considered and denied the claim without objecting*

to the service of process." *Id.* at 114, ¶ 15, 970 P.2d at 946. (Emphasis supplied).

¶33 Here, at best there is a factual dispute that the County simply "processed the claim" by the clerk sending the notice to the full board, the county attorney and the insurance pool. Importantly, unlike in *Young*, there is no evidence the County or the insurance pool took any action on denying based on defects in such filing. We hold that for waiver of the service issue to apply, the County would have had to take action to consider the claim without raising a defect in service or deny it for reasons other than failure of proper service. To hold that a county or chief executive waived a defect in a claim when it merely informed its risk management office or insurer of the claim would be to penalize a governmental entity for taking precautionary actions in case the claim went forward. Informing the insurance pool of the claim, without more, is simply good government in case the county was later found liable for any damages which might be covered by insurance.

¶34 We find support for our reasoning in cases decided by other jurisdictions addressing the waiver issue. *See Brown v. Portland Sch. Dist. No. 1,* 628 P.2d 1183, 1187 (Or. 1981) ("[P]ublic officials may well process and investigate alleged claims without intending to waive their objection to improper notice of such claims"); *Brown v. State Dep't of Corr.*, 701 So.

2d 1211, 1213 (Fla. Dist. Ct. App. 1997) (holding a "mere investigation by agents of a city standing alone will not necessarily have the intended effect. The waiver or estoppel occurs when there is an investigation followed by action in relation to the claimant that would lead a reasonable person to conclude that further notice is unnecessary or causes such person to act or fail to act to his injury." (quoting *Rabinowitz v. Town of Bay Harbor Islands*, 178 So. 2d 9, 13 (Fla. 1965) (internal quotation marks deleted). *Cf. Teresta v. City of New York,* 108 N.E.2d 397, 397-98 (N.Y. 1957) (holding city waived defects in claim when it received it and held examination of claim in presence of claimant).

¶35 Unlike *Young*, in which the city and its agents denied the claim without objecting to the service issue, the County did not fully process and deny the claim on other grounds. Without such additional conduct by the governmental entity, there was no voluntary relinquishment of a known right and thus no waiver. We will not penalize governmental officials with a waiver when their conduct merely reflects prudent decisions to protect the county fisc if a suit was filed and does not show an intentional decision to relinquish a defense by denying the claim for reasons other than the alleged defect.

IV. Timeliness of Service of the Notice of Claim on the District

¶36 The District does not argue that service of the notice of claim upon the District by Sandpiper was improper. Instead, the District argues that, regardless of the propriety of the method of service, the notice was not timely. Sandpiper argues that summary judgment was not appropriate because the notice of claim was timely from the January 16, 2004 stop-work order.

¶37 Factual disputes as to affirmative defenses, including noncompliance with the notice of claim statute, should not be resolved by summary judgment. *Lee v. State*, 225 Ariz. 576, 579-80, ¶ 13, 242 P.3d 175, 178-79 (App. 2010). This includes factual disputes concerning when a claim accrues. *Id.* (citing to *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002)). "When discovery occurs and a cause of action accrues are usually and necessarily questions of fact for the jury." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998). On review of the grant of summary judgment, we view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince*, 185 Ariz. at 45, 912 P.2d at 49.

¶38 Section 12-821.01(A) provides that claims against a public entity or public employee shall be filed "within one hundred eighty days after the cause of action accrues." The

cause of action is deemed accrued "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12-821.01(B); ***Little v. State***, 225 Ariz. 466, 469-70, ¶¶ 9, 12, 240 P.3d 861, 864-65 (App. 2010) (accrual of a claim occurs when the claimant realizes he is damaged and knows or should reasonably know the cause of such damage; holding claim accrued when agent of plaintiff filed a complaint against the physician with the Arizona Board of Medicine).

¶39 We conclude there is a sufficient conflict of facts in the record to preclude summary judgment on the timeliness of the notice of claim. It is clear that Sandpiper began to complain of undue delays and resulting costs to it in June and July 2003, at least from the delays in the County approving subdivision maps. Apparently, the issue of need for additional fire suppression measures first arose in late June or early July 2003 which resulted in the parties debating that issue until the County issued its November 2003 letter. The July 2004 notice of claim references those letters and states that the stop-work order and "other unauthorized actions . . . among other things, halted construction on the Project for approximately ***nine months*** resulting in massive damages to Sandpiper." (Emphasis supplied). Sandpiper's first supplemental disclosure statement

details that delays caused by the County and the District resulted in its being "unable to proceed with construction from June 24, 2003 through February 27, 2004" during which time it incurred substantial damages. Sandpiper argues that it realized it was damaged on January 16, 2004, when the District issued the stop-work order that prohibited Sandpiper from continuing with construction. Thus, it would appear that Sandpiper realized it was damaged as of June 24, 2003.

¶40 However, there is no evidence that the District's conduct as to requiring more fire safety equipment in the Project resulted in delays prior to the January 2004 stop-work order. Rather, the only mention of the fire suppression issue before the stop-work order is in Sandpiper's July 25, 2003 letter which can be construed as attributing delays to the County's failure to approve subdivision maps, with the fire suppression issue arising for the first time in late June or early July 2003 and being a matter of discussion, rather than causing any delays in construction. Moreover, Sandpiper properly points to the County Attorney's November 26, 2003 letter stating that the District's statements as to further fire suppression equipment were merely recommendations and the County was accepting Sandpiper's expert's opinion that such equipment was not required. While Sandpiper claims it was damaged as of June 24, 2003, that could be related solely to the County's

delay on map approval. Whether any delay and damages stemming from the fire equipment issue occurred prior to the stop-work order and whether Sandpiper was or should have been aware of such damages, is a matter to be resolved at trial.

CONCLUSION

¶41 We affirm the superior court's decision that Sandpiper did not properly serve the County. However, we reverse the superior court's decision that the District was not timely served the notice of claim and remand this matter for further proceedings consistent with this decision.

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DONN KESSLER, Judge

CONCURRING:

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PHILIP HALL, Presiding Judge

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PATRICIA A. OROZCO, Judge