IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JIM COLLINS,
Plaintiff/Appellant,

v.

DANIEL T. KASPER AND JASMINE SORIA SEARS,
Defendants/Appellees.

No. 2 CA-CV 2020-0024
Filed March 4, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20175567
The Honorable Catherine M. Woods, Judge
The Honorable D. Douglas Metcalf, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

Jim Collins, Tucson
In Propria Persona

Mark Brnovich, Arizona Attorney General
By Jason D. Corley, Assistant Attorney General, Tucson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Jim Collins appeals the trial court's dismissal of his state-law claims against Daniel Kasper and its partial grant of summary judgment in favor of Jasmine Sears, arguing the court erred by concluding his claims were barred by his failure to comply with Arizona's notice-of-claim statute. In addition, Collins challenges the court's consolidation of case numbers C20175567 and C20190231, its grant of judgment as to his claims under 42 U.S.C. § 1983, and its dismissal of defendants Rahul Bhadani, Austen Thompson, and Marquez Johnson. We vacate the court's dismissal of Collins's state-law claims against Kasper and its grant of summary judgment in favor of Sears and remand for proceedings consistent with this decision, but we otherwise affirm.

Factual and Procedural Background

¶2 In November 2017, Collins, a graduate student at the University of Arizona, filed a lawsuit against Kasper and Sears,[1] also graduate students, alleging they had published defamatory statements about him related to his conduct as an officer of the University's Graduate and Professional Student Council (GPSC). Kasper and Sears initially retained private counsel to defend against Collins's claims, but the Arizona Attorney General was later substituted as Sears's attorney of record and obtained permission to file a motion to dismiss on Kasper's behalf.

¶3 Sears moved for summary judgment in May 2018, arguing no triable issue of material fact existed because it was undisputed that Collins had failed to serve her with a notice of claim pursuant to A.R.S. § 12-821.01. On the same date, Kasper filed a motion to dismiss for failure to state a claim on the same grounds asserted in Sears's motion. According to Kasper

[1]Collins's original complaint included ten other student defendants, including Bhadani, Thompson, and Johnson, who were later dismissed. We affirmed this dismissal on appeal. *Collins v. Johnson*, No. 2 CA-CV 2019-0037, ¶ 8 (Ariz. App. Sept. 30, 2019) (mem. decision).

and Sears, the GPSC was an officially authorized entity of the University of Arizona, and by extension the Arizona Board of Regents (ABOR) and the state, and they were authorized agents or employees of the state. Kasper and Sears thus argued that because the complaint concerned their conduct within the course and scope of their officially authorized GPSC positions, Collins was required to serve them with notices of claim. Collins opposed both motions, disputing Kasper's and Sears's assertions that they were authorized agents or employees of the state.[2]

¶4 In October 2018, the trial court concluded Kasper and Sears were public employees entitled to protection under § 12-821.01. The court granted Kasper's motion to dismiss Collins's state-law claims and directed Sears to file an answer to Collins's first amended complaint, allowing her to assert the notice-of-claim defense. Collins filed a request for judicial notice along with a motion for reconsideration of the court's rulings with respect to both Sears's motion for summary judgment, which the court had not yet granted, and Kasper's motion to dismiss. Sears subsequently filed an answer asserting the notice-of-claim defense, and in January 2019, the court granted her motion for summary judgment as to Collins's state-law claims against her.[3] In its ruling, the court denied Collins's motions for reconsideration and requests for judicial notice. And, it affirmed its October 2018 ruling granting Kasper's motion to dismiss, noting that the "only claims and causes of action remaining . . . are the claims against Kasper and Sears for alleged violation of federal constitutional rights, and/or claims pursuant to 42 U.S.C. § 1983."

¶5 Collins filed another complaint in January 2019. This complaint was given case number C20190231 and named thirty-four defendants, including Kasper and Sears. In April 2019, several defendants moved to consolidate case numbers C20175567 and C20190231, contending the cases arose "out of substantially the same events, share[d] common issues of fact and law, and rel[ied] on many of the same defendants and

[2] As noted, Collins moved to strike Sears's motion for summary judgment for, among other things, failure to comply with Rule 56(c)(3)(A), Ariz. R. Civ. P. The court denied this motion.

[3] Collins previously attempted to appeal the January 2019 ruling, but the trial court declined to certify its ruling as appealable under Rule 54(b), Ariz. R. Civ. P., reasoning that "[t]he dismissal of [Collins]'s state law causes of action against Kasper and Sears did not bring an end to [his] claim for damages" based on his unresolved federal-law claims.

witnesses." The trial court agreed and, over Collins's opposition, consolidated the cases.

¶6 In September 2019, Kasper and Sears moved for judgment on the pleadings with regard to Collins's claims under § 1983. The trial court granted the motion and denied Collins's request to amend his complaint to cure any defects alleged in the motion for judgment on the pleadings. A final, appealable order was entered in December 2019. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Dismissal and Summary Judgment as to State-Law Claims

¶7 Collins argues the trial court erred in granting Kasper's motion to dismiss and Sears's motion for summary judgment after concluding Kasper and Sears were entitled to notices of claim under § 12-821.01.[4] Generally, we review both a dismissal of a complaint for failure to state a claim and a grant of summary judgment de novo. *See Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, ¶ 9 (2016); *Villasenor v. Evans*, 241 Ariz. 300, ¶ 9 (App. 2016). However, as Kasper and Sears note, in previous cases involving Collins, Kasper, Sears, and other GPSC members and claims nearly identical to those in this case, we "concluded that dismissal and/or summary judgment was inappropriate because issues of fact remained to be tried."

¶8 Specifically, in *Collins v. Sears*, we stated:

> Nothing in the undeveloped record here conclusively establishes whether the GPSC members acted under authority conferred by the university or board of regents. Yet in ruling that the defendants were entitled to notices of claims, the trial court resolved this factual dispute in the defendants' favor. In ruling on a motion to dismiss for failure to state a claim, "a court does not resolve factual disputes between

[4]To the extent Collins challenges the court's dismissal of his state-law claims against other defendants in addition to his claims against Kasper, we do not address any such argument. As noted, all named defendants except Kasper and Sears were dismissed in January 2019, a ruling which we affirmed on appeal. *Johnson*, No. 2 CA-CV 2019-0037, ¶¶ 5, 8.

> the parties on an undeveloped record." To the extent introduction of information outside the pleadings converted a motion to dismiss to a motion for summary judgment, the court's resolution of this factual dispute in the defendants' favor was still erroneous, given the lack of anything in the record conclusively establishing the GPSC members as public employees. Therefore, the court erred in dismissing Collins' claims for failure to serve notices of claims.

No. 2 CA-CV 2019-0082, ¶ 12 (Ariz. App. Feb. 27, 2020) (mem. decision) (citations omitted).

¶9 Similarly, in *Collins v. Kasper*, we determined that by "ruling the notice-of-claim statute applied to Kasper," the trial court resolved the parties' factual dispute as to "whether Kasper acted under authority conferred by the University or ABOR." No. 2 CA-CV 2019-0036, ¶ 10 (Ariz. App. Apr. 24, 2020) (mem. decision). Because "[s]ummary judgment is not intended to resolve factual disputes and is inappropriate if the court must . . . choose among competing inferences," *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, ¶ 12 (App. 2010), we concluded "the court erred in granting Kasper's motion for summary judgment," *Kasper*, No. 2 CA-CV 2019-0036, ¶ 10. Thus, based on our previous decisions, Kasper and Sears concede the court erred in granting their respective motions for dismissal and summary judgment and "agree that [Collins's] state-law claims must be remanded to the [trial] court for further proceedings."[5] We accept this concession.

¶10 Collins further argues that Sears nonetheless "waived her notice of claim defense by failing to assert it in her Answer, and by actively

[5]Collins also raises the following related arguments: (1) "participation in university student government does not entitle students to enjoy the protections" of the notice-of-claim statute; (2) student government organizations are not public entities; (3) indemnification by the state under A.R.S. § 41-621 does not entitle the defendants to assert a notice-of-claim defense; (4) the court erred in denying his motion to strike Sears's motion for summary judgment; and (5) the court erred in denying his motion for reconsideration as to the grant of summary judgment and request for judicial notice. Based on Kasper and Sears's concession of error, we need not address these arguments.

litigating the matter for an extended period of time." He asserts that such conduct was "inconsistent with an intent to object to the lack of notice of claim" and that a subsequent filing "cannot cure the waiver."[6] Thus, Collins contends he "will be severely prejudiced" if we decline to rule on this issue because he will be "forced to relitigate the waiver argument over and over again."

¶11 Generally, waiver is a question of fact and a trial court's finding of waiver "binds this court unless we conclude that the finding is clearly erroneous." *Minjares v. State*, 223 Ariz. 54, ¶ 17 (App. 2009); *see City of Phoenix v. Fields*, 219 Ariz. 568, ¶ 32 (2009) ("[t]ypically, waiver is 'a question of fact'" (quoting *Chaney Bldg. Co. v. Sunnyside Sch. Dist. No. 12*, 147 Ariz. 270, 273 (App. 1985))). However, when "the facts relating to waiver are uncontested, occurred after litigation began, and are wholly unrelated to the underlying facts of the claim," we treat the issue of waiver as a question of law and review de novo. *Jones v. Cochise County*, 218 Ariz. 372, ¶ 28 (App. 2008); *see Russo v. Barger*, 239 Ariz. 100, ¶ 20 (App. 2016) (same).

¶12 Collins filed his initial complaint in November 2017. Sears filed an answer to that complaint in March 2018, but she did not assert she was entitled to a notice of claim under § 12-821.01. Collins subsequently filed his first amended complaint on April 13, 2018. As noted above, Sears filed a motion for summary judgment on May 4, 2018, asserting Collins's failure to file and serve her with a notice of claim barred his claims against her. Collins moved to strike Sears's motion, alleging, among other things, that she had waived her notice-of-claim defense.

¶13 In October 2018, at the hearing on Sears's motion for summary judgment, she argued she had not intended to waive the notice-of-claim defense and would assert it in her answer to Collins's first amended complaint, which she had not yet filed. The trial court stated that

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[6]In his reply brief, Collins urges us to treat Sears's failure to respond to his waiver argument in her answering brief as a confession of reversible error. However, in *Kasper*, No. 2 CA-CV 2019-0036, n.1, we deemed it unnecessary to address Collins's argument that Kasper had waived his notice-of-claim defense, and in our discretion we decline to consider Sears's failure to address this issue a confession of error. *See McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, ¶ 13 (App. 2007) (we may treat failure to respond to argument on appeal as confession of error but are not required to do so).

it was "inclined to grant [Sears's] Motion for Summary Judgment assuming that the Notice of Claim defense is appropriately raised in an answer to the First Amended Complaint" and directed Sears to file such an answer. After Sears filed her answer to Collins's first amended complaint asserting the notice-of-claim defense, the court granted her motion for summary judgment, dismissing all state-law claims against her.

¶14 "An assertion that a plaintiff did not comply with the notice of claim statute is an affirmative defense subject to waiver." *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, ¶ 11 (App. 2014). "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*, 218 Ariz. 372, ¶ 22 (quoting *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55 (1980)). Because an answer to a complaint "must affirmatively state any . . . affirmative defense," Ariz. R. Civ. P. 8(d)(1), "[d]efenses omitted from an answer . . . are therefore waived," *Fields*, 219 Ariz. 568, ¶ 27. Even when a party preserves an affirmative defense in an answer, it may waive that defense by its subsequent conduct. *Ponce*, 234 Ariz. 380, ¶ 11 (notice-of-claim defense waived "when [a] government entity engages in substantial conduct to litigate the merits that would not have been necessary had the defendant not delayed in asserting the defense").

¶15 Here, Sears raised the notice-of-claim defense in her May 2018 motion for summary judgment and subsequently asserted it in her November 2018 answer to Collins's first amended complaint as permitted by the trial court. Because "[a]n answer may be amended at any time before trial" with permission of the court, *Romo v. Reyes*, 26 Ariz. App. 374, 375-76 (1976) (permitting amendment of answer to include statute-of-limitations defense); *see* Ariz. R. Civ. P. 15(a)(2) (party may amend pleading with leave of court and such leave "must be freely given when justice requires"), we conclude Sears did not waive the defense by failing to assert it in her initial answer to Collins's complaint.

¶16 To the extent Collins argues Sears waived her notice-of-claim defense based on her conduct before she filed her motion for summary judgment and answer to his amended complaint, we disagree. He claims Sears "actively litigat[ed]" issues unrelated to the notice of claim "for an extended period of time" before asserting that defense. However, the record does not support this assertion.

¶17 Although several months had passed between Collins's filing of his original complaint and Sears's motion for summary judgment on the notice-of-claim issue, she had filed only an answer to Collins's initial

complaint, a motion to dismiss (and related reply), a motion to strike based on Collins's alleged failure to comply with procedural rules (and related reply), and a motion to permit use of additional interrogatories, as well as a notice of service of interrogatories and a notice of service of her request for production.[7] *Cf. County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶¶ 7-8, 9, 13 (App. 2010) (county waived notice-of-claim defense by failing to raise it in its reply to counterclaim or motion to dismiss and actively litigating claim through "extensive pretrial discovery" and "motions unrelated to" defense before asserting it in motion for summary judgment); *Fields*, 219 Ariz. 568, ¶¶ 31, 33 (waiver where public entity "substantially participated" in litigation through extensive briefing on class certification, various substantive and merits-based motions, and discovery despite assumption that notice-of-claim defense preserved in answer); *Jones*, 218 Ariz. 372, ¶¶ 27, 29 (waiver based on public entity "actively investigat[ing] and proactively defend[ing] the claim" by conducting substantial discovery). The undisputed facts do not support a conclusion that Sears waived this affirmative defense.

Consolidation of Case Numbers C20175567 and C20190231

¶18 Collins also contends the trial court erred in consolidating case numbers C20175567 and C20190231 because the only issues the cases have in common "stem from the [appellees'] specious 'strawman' argument that members of student government are public employees" and the consolidation "has done nothing but sow confusion and waste judicial resources." However, Collins does not make any discernable legal argument in his opening brief, nor does he provide any "citations of legal authorities . . . on which [he] relies" to establish the court erred.[8] Ariz. R. Civ. App. P. 13(a)(7)(A). We therefore consider his argument waived.[9]

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[7]She also filed a stipulation for substitution of counsel.

[8]For the first time in his reply brief, Collins asserts he was prejudiced by consolidation of the two cases and argues the trial court "violated [his] substantive and procedural due process rights when it made its 'back door' ruling that a consolidated trial would be appropriate, without allowing [him] any meaningful opportunity to be heard on that issue." "We will not consider arguments made for the first time in a reply brief." *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91 (App. 2007).

[9]It is not incumbent on this court to develop legal arguments for a party. *See Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987). Moreover, although he is self-represented, Collins is "given the same

See Ritchie v. Krasner, 221 Ariz. 288, ¶ 62 (App. 2009) (appellant waives claims by failing to provide "an argument supported by authority in his opening brief").

Dismissal of § 1983 Claims

¶19 Collins also asserts the trial court erred by entering judgment on the pleadings as to his causes of action under § 1983 and denying his request to allow him to amend his complaint. Specifically, he argues the court had a responsibility to "identif[y] specific defects" in his complaint that "needed to be cured" and "permit [him] to amend" it, as well as a "duty to liberally construe [his] pro se civil rights pleading, rather than requiring strict adherence to (undisclosed) technicalities."

¶20 As noted, an opening brief in this court must contain an argument with "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies." Ariz. R. Civ. App. P. 13(a)(7)(A). Again, because Collins fails to develop his arguments and support them with legal authority in his opening brief, he has waived review of these issues on appeal. *See id.*; *Ritchie*, 221 Ariz. 288, ¶ 62.

Dismissal of Defendants Bhadani, Thompson, and Johnson

¶21 Finally, Collins argues the trial court erred in dismissing defendants Bhadani, Thompson, and Johnson because there is "nothing in the record to show that the Court ever ruled on" their March 2019 motion to dismiss. In his reply brief, he asks us to "stay the appeal at bar with regard to [this issue], pending the outcome" of motions he "has filed, or in the very near future will file," including a "late" motion for reconsideration in *Collins v. Johnson*, No. 2 CA-CV 2019-0037 (Ariz. App. Sept. 30, 2019) (mem. decision), and motions for relief from judgment and to extend time for service of process in the trial court. Collins contends these motions are based on "new law" indicating "a showing of good cause is not necessary to extend the time for service of process, and that, instead, other issues should be given greater weight." Thus, he asserts, because "[s]ervice of process was completed on defendants Thompson, Johnson and Bhadani in

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consideration on appeal as one who has been represented by counsel" and "is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer." *Higgins v. Higgins*, 194 Ariz. 266, ¶ 12 (App. 1999).

early March of 2019, after the occurrence of the events contemplated by, and briefed in, [*Johnson*, No. 2 CA-CV 2019-0037]," the validity of the subsequent service of process was not addressed in that previous appeal.

¶22 In September 2019, we affirmed the trial court's dismissal of Bhadani, Thompson, and Johnson, stating "Collins [had] not demonstrated that the court abused its discretion or committed any legal error" in denying his request for an extension of time to serve these defendants and ultimately dismissing them. *Johnson*, No. 2 CA-CV 2019-0037, ¶¶ 5, 8. Collins did not file a motion for reconsideration or a petition for review from the supreme court, and we issued our mandate. *See* Ariz. R. Civ. App. P. 22(c) (motion for reconsideration on appeal must be filed within fifteen days after decision issued). And, as Kasper and Sears point out, our previous decision as to dismissal of these defendants "became law of the case when [Collins] failed to challenge it," and "therefore [he] cannot again challenge the dismissal in this appeal" based on his service of these defendants in March 2019. *See Emps. Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*, 115 Ariz. 439, 441 (App. 1977) ("[I]f an appellate court has ruled upon a legal question and remanded for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case."). Thus, Collins's argument fails, and we deny his request to stay his appeal as to this issue.

Disposition

¶23 Based on Kasper and Sears's concession of error, we vacate the trial court's rulings granting Kasper's motion to dismiss and Sears's motion for summary judgment with respect to Collins's state-law claims and remand for further proceedings consistent with this decision. However, we affirm the court's consolidation of case numbers C20175567 and C20190231, judgment as to Collins's claims under § 1983, and dismissal of defendants Bhadani, Thompson, and Johnson.