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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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THOMPSON/MCCARTHY COFFEE CO.,  
*Plaintiff/Appellant-Cross Appellee,*

*v.*

REPUBLIC BANK AZ N.A.,  
*Defendant/Appellee-Cross Appellant.*

No. 1 CA-CV 18-0349  
FILED 12-10-2019

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Appeal from the Superior Court in Maricopa County  
No. CV2014-014647  
The Honorable Dawn M. Bergin, Judge

**VACATED IN PART; REMANDED WITH INSTRUCTIONS**

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**MEMORANDUM DECISION**

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

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**M O R S E**, Judge:

¶1 Thompson/McCarthy Coffee Company, Inc. ("Thompson") appeals a superior court order granting summary judgment to RepublicBank AZ N.A. ("Republic"). Republic cross-appeals the court's denial of its application for attorneys' fees and costs. For the following reasons, we vacate in part, and remand for further proceedings consistent with this decision.<sup>1</sup>

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Between 2010 and 2012, Republic made commercial real estate loans to Thompson that were guaranteed by the U.S. Small Business Administration ("SBA") and underwritten by Republic (the "Construction Loans"). In 2013, Thompson decided to move its loans to Mutual of Omaha ("MOH"). Republic agreed to sell the Construction Loans to MOH pursuant to a Loan Purchase and Sale Agreement ("LPSA"). Thompson signed a document entitled "Consent of Obligors and Pledgors" (the "Consent") as part of the loan-purchase transaction in September 2013.

¶3 Thompson filed suit against Republic in 2014 and served Republic with its Second Amended Complaint in April 2015, alleging negligent misrepresentation and fraudulent inducement. In its answer, Republic asserted numerous affirmative defenses, including "waiver." In December 2016, Republic moved for summary judgment premised upon

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<sup>1</sup> We also deny Republic's motion for leave to file a sur-reply brief, or in the alternative, to strike Thompson's reply brief.

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the Consent, referring to it as an "express waiver of any and all claims against Republic." Thompson responded, asserting the Consent was unenforceable under various contract law theories, including fraud. In its reply supporting summary judgment, Republic referred to the Consent as a "waiver and release."

¶4 Two weeks after Republic filed its reply brief, Thompson filed a motion for supplemental briefing. In the motion, Thompson requested additional briefing and time to conduct discovery to support its fraud defense to Republic's motion for summary judgment but did not advance any other defenses. Republic opposed the motion, asserting that Thompson waived the request by not asserting it pursuant to Arizona Rule of Civil Procedure 56(d). In reply, Thompson asserted that Republic waived the release defense when it failed to plead "release" as an affirmative defense in its answer, and subsequently waived release by its conduct during the litigation, including waiting 18 months before raising it.<sup>2</sup> Although Thompson asserted these arguments in its reply in support of its motion for supplemental briefing, it never requested to supplement its opposition to the motion for summary judgment to assert waiver of the release defense. However, during argument on the motion for supplemental briefing, Thompson orally requested supplemental briefing on the waiver-by-litigation-conduct argument and asked the superior court to preclude Republic from asserting the release defense.

¶5 After the hearing, the superior court granted Thompson's written motion for supplemental briefing on fraud and denied Thompson's oral request for supplemental briefing on whether Republic's litigation conduct waived its release defense.

¶6 The superior court eventually granted Republic's motion for summary judgment, but denied Republic's request for attorneys' fees and most of its costs. Both parties timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and -2101(A)(5)(a).

## DISCUSSION

### I. Failure to plead release in the answer.

¶7 Thompson argues the superior court erred in failing to preclude Republic's use of the release defense because it did not plead

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<sup>2</sup> Republic filed a motion to strike Thompson's reply, which the court denied.

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release in its answer. "Affirmative defenses are required to be pleaded to prevent surprise." *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 333 (1959); *see also* Ariz. R. Civ. Proc. 8(d)(1)(M) (defendant must "affirmatively state" defense of "release" in answer). However, the superior court "may properly allow a defendant to amend an answer to include an omitted defense as long as the plaintiff is not surprised or prejudiced." *Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 186 (App. 1990); *see also Gary Outdoor Advertising Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 241-242 (1982). We review the superior court's decision on preclusion of an affirmative defense for an abuse of discretion. *Sirek*, 166 Ariz. at 185. Additionally, "liberality in permitting amendments of pleadings to conform to the evidence is the general rule." *Bujanda v. Montgomery Ward & Co., Inc.*, 125 Ariz. 314, 316 (App. 1980).

¶8 On this record, we cannot say that the superior court abused its discretion. In answering the first amended complaint, Republic affirmatively asserted waiver, which is often used interchangeably with release. *See, e.g., Lindsay v. Cave Creek Outfitters, LLC*, 207 Ariz. 487, 491, ¶ 12 (App. 2003) ("trial court [concluded] that by signing the release, the plaintiff had waived her right to sue"); *see also Robert W. Baird & Co. Inc. v. Whitten*, 244 Ariz. 121, 125, ¶ 9 (App. 2017) ("Waiver is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right.") (citing *Green v. United States*, 355 U.S. 184, 191 (1957)). Republic produced the Consent in discovery in July 2015. Thompson also received the LPSA and Consent from MOH in October 2014, prior to initiating the lawsuit. Finally, Thompson's principals are the individuals who signed the Consent on behalf of Thompson in September 2013.

¶9 Thompson asserts that it suffered prejudice from the delayed disclosure. However, "[d]elay, standing alone, does not necessarily establish prejudice." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288 (1995). The relevant question is whether the delay "is harmful to the opposing party or to the justice system." *Id.* A party can suffer prejudice "if there is insufficient time to investigate fully and prepare rebuttal." *Link v. Pima County*, 193 Ariz. 336, 340, ¶ 10 (App. 1998). Here, Thompson does not contend it was unable to fully respond to Republic's arguments, and the superior court allowed it extra briefing on the release issue. Additionally, at Thompson's request, the court deferred ruling on Thompson's fraud defense to allow Thompson to pursue additional discovery in support of its argument.

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¶10 Although Republic did not formally amend its answer to include release as an affirmative defense, it offered during the oral argument to move to amend its answer, and we construe the court's ruling as effectively granting that motion. *See generally In re McCauley's Estate*, 101 Ariz. 8, 17 (1966) ("Rule 15(b) . . . permits the granting of a motion to amend a pleading to conform to proof unless the objecting party can show [a]ctual, as distinguished from [l]egal surprise."); *cf. also Electrical Advertising, Inc. v. Sakato*, 94 Ariz. 68, 71 (1963) ("Failure to formally amend the pleadings will not affect a judgment based upon competent evidence.").

**II. The record below is insufficient to address Thompson's claim of waiver by litigation conduct.**

¶11 Thompson also argues the superior court erred in failing to preclude Republic's use of the release defense due to waiver by litigation conduct. Even if properly pled in an answer, affirmative defenses are subject to waiver by a defendant's litigation conduct that is inconsistent with the affirmative defense. *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶¶ 27-29 (2009). Waiver of an affirmative defense "should be found when the defendant 'has taken substantial action to litigate the merits of the claim that would not have been necessary had the [defendant] promptly raised the defense.'" *Id.* at 575, ¶ 30 (quoting *Jones v. Cochise County*, 218 Ariz. 372, 380, ¶ 26 (App. 2008)).

¶12 Waiver is generally a question of fact and a superior court's finding of waiver generally "binds this court unless we conclude that the finding is clearly erroneous." *Minjares v. State*, 223 Ariz. 54, 58, ¶ 17 (App. 2009) (citing *Goglia v. Bodnar*, 156 Ariz. 12, 19 (App. 1987)); *see also Fields*, 291 Ariz. at 575, ¶ 32 ("[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*, 218 Ariz. 372, 380, ¶ 28; *see Russo v. Barger*, 239 Ariz. 100, 105, ¶ 20 (App. 2016) (same).

¶13 Because the superior court did not consider Thompson's arguments regarding waiver by conduct, the record does not contain facts, contested or otherwise, bearing upon the issue.<sup>3</sup> Thompson asserts that

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<sup>3</sup> We note that although Thompson first raised the waiver-by-conduct issue in its reply brief to a motion for supplemental briefing on fraud as a

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extensive unnecessary discovery, including preparation of four expert reports, occurred during the 18 months between the second amended complaint and Republic's motion for summary judgment. Republic contends that no substantive motions were filed, no depositions were taken, the discovery was necessary because much of it was relevant to the enforceability of the release, and Thompson sought additional discovery after the motion for summary judgment was filed. We are not the trier of facts and the record contains neither undisputed facts nor factual findings we can review for clear error. Accordingly, we must vacate summary judgment and the superior court's March 9, 2017, order denying Thompson's request to assert waiver by litigation conduct as a defense to the release. We remand to the superior court to determine, in the first instance, whether Republic "engage[d] in substantial conduct to litigate the merits that would not have been necessary had [Republic] not delayed in asserting the defense." *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 383, ¶ 11 (App. 2014).

CONCLUSION

¶14 Because we remand to the superior court to determine whether Republic waived its release defense through litigation conduct, we also conditionally vacate the entry of summary judgment in Republic's favor, the superior court's orders denying Republic's request for fees, and the order partially granting the request for costs. This decision should not be interpreted as favoring one outcome over another. We decline to address any of the other issues raised by the parties concerning the merits of the release defense. If the superior court determines that Republic did not waive the release by its litigation conduct, the court shall reinstate its entry of summary judgment and other orders on the existing record. Because neither party prevailed, we decline to award fees or costs incurred on appeal.



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

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defense to the release, Republic has addressed the merits of Thompson's waiver arguments on appeal and has not asserted before this court that Thompson waived the argument below.