

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

SANTA CRUZ COUNTY

COURTNEY L. HENSON

v.

STATE OF ARIZONA, et al.

WILLIAM A RICHARDS

SOLOMON SCOTT KROTZER
CRAIG M WAUGH
ANDREW C STONE
ADAM E LANG
JUDGE FOX

**UNDER ADVISEMENT RULING ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is "Defendants' Motion For Summary Judgment" (the "Motion") filed October 31, 2025. Plaintiff Santa Cruz County (the "County") filed a Response on December 8, 2025, and Defendants filed a Reply on December 29, 2025. The Court heard oral argument on January 16, 2026. For the reasons set forth below, the Court will grant the Motion.

Factual Background

On April 3, 2024, the County discovered the embezzlement scheme of the County's former Treasurer, Elizabeth Gutfahr ("Gutfahr"). After the discovery, the County's Board of Supervisors (the "Board") held regular public meetings and published meeting notices, agendas, and minutes regarding actions taken during the meetings. The agendas reflect that the Board met several times in executive session to discuss Gutfahr's fraud and potential legal action. But the Board and the County never noticed a public meeting or an agenda item indicating the Board was going to discuss in a public meeting whether to authorize and initiate legal proceedings against anyone related to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Gutfahr's embezzlement or whether to retain counsel at County expense to file this lawsuit against Defendants.

The County engaged Snell & Wilmer ("Snell") to represent it related to Gutfahr's embezzlement. On August 19, 2024, Snell served Defendants with a notice of claim on behalf of the County. On November 14, 2024, Snell filed this lawsuit against Defendants on behalf of the County. The County's public records reflect that the Board never voted in a public meeting to engage counsel, serve the notice of claim, or file this lawsuit. Nor did the Board ratify these actions by public vote within 30 days after this lawsuit was filed. Indeed, the Board did not ratify the actions until November 18, 2025, shortly after the Motion was filed.

Defendants contend that the Court must treat the County's lawsuit and the claims asserted in the lawsuit as null and void for violating Arizona's Open Meeting Law ("OML"), and the Court must dismiss the claims with prejudice. The County disagrees, asserting that the November 18, 2025 ratification was timely, Defendants waived the alleged violations of the OML by failing to assert them as an affirmative defense, and the Motion is futile as the County simply could refile the action under the savings statute, A.R.S. § 12-504.

Analysis

Violations of the OML

A.R.S. § 38-431.01(A) provides that "[a]ll meetings of any public body shall be public meetings and all persons so desiring shall be allowed to attend and listen to the deliberations and proceedings" and "[a]ll legal action of public bodies shall occur during a public meeting." The OML defines "legal action" as "a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state." A.R.S. § 38-431(3). The OML authorizes a public body to meet in a non-public executive session for "[d]iscussion or consultation for legal advice with the attorney or attorneys of the public body." A.R.S. § 38-431.03(A)(3). But "[l]egal action involving a final vote or decision shall not be taken in executive session" and "[a] public vote shall be taken before any action binds the public body." A.R.S. § 38-431.03(D).

"All legal action transacted by any public body during a meeting held in violation of any provision of [the OML] is null and void except as provided in subsection B." A.R.S. § 38-431.05(A). A.R.S. § 38-431.05(B) allows a public body to ratify legal action taken in violation of the OML, but ratification is subject to four strict requirements. One of those requirements is that "[r]atification shall take place at a public meeting within thirty days after discovery of the violation *or after such discovery should have been made by the exercise of reasonable diligence.*" A.R.S. § 38-431.05(B)(1) (emphasis added).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Desert Mountain Energy Corp. v. City of Flagstaff, 259 Ariz. 346 (App. 2025) is a controlling case applying the OML to a public body’s decision to initiate legal action. There, the Flagstaff City Council held a special meeting on December 2, 2020, to discuss litigation against Desert Mountain. The City Council went into executive session for “legal advice regarding water litigation” and voted during that session to authorize litigation against Desert Mountain. The City then sued Desert Mountain and obtained a temporary restraining order and preliminary injunction. Desert Mountain successfully appealed the injunction. On September 30, 2022, after remand and almost two years after the litigation commenced, Desert Mountain filed its answer and counterclaim, in which it alleged the City violated the OML. Two weeks later, the City answered the counterclaim. On January 12, 2023, the City Council met again in executive session to obtain legal advice regarding the OML. Five days later, on January 17, 2023, the City Council voted in public to ratify the lawsuit.

Desert Mountain moved for summary judgment arguing that the City’s claims are null and void because of the OML violation and lack of timely ratification. The trial court found material fact issues about ratification and denied summary judgment. Desert Mountain sought special action relief, but the appellate court declined to accept jurisdiction. After taking discovery aimed at ratification, Desert Mountain asked the trial court to reconsider summary judgment. The trial court declined, and Desert Mountain again sought special action relief. This time, the appellate court accepted jurisdiction and granted relief, “instruct[ing] the superior court to enter summary judgment for Desert Mountain.” *Id.* at 355 ¶ 45.

The appellate court first addressed whether the City violated the OML, an issue of statutory interpretation. The City conceded that authorizing litigation is “legal action” under the OML, and the appellate court agreed. *Id.* at 352 ¶ 23. But the City argued that the OML allowed it to take a final vote to authorize the litigation in executive session because A.R.S. § 38-431.03(A) provides that a public body “may instruct its attorneys” in executive session. The appellate court rejected that argument, concluding that “[a] public body can go into executive session to talk with or consult its attorneys about future litigation without authorizing it.” *Id.* at 352 ¶ 25. “But once the public body makes a final and collective decision to authorize litigation, that is a legal action requiring a public vote.” *Id.* (citations omitted).

The appellate court also relied upon its prior analysis in *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567 (App. 2000). There, the trial court ordered a terminated teacher to be reinstated. The school board then met in executive session with the district’s attorney to discuss the litigation and voted in that session to appeal. The teacher argued that the vote violated the OML and the appeal was null and void. The appellate court agreed. As the appellate court stated in *Desert Mountain*:

We concluded “the Board’s private decision to appeal violated the state’s open meeting law and that its notice of appeal is null and void.” . . . The Board’s decision

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

was a “legal action,” and not “only discussion or consultation with its attorneys for legal advice or to give instructions regarding pending litigation under section 38-431.03(A)(3)-(4).” . . . We explained that “[a] decision to appeal transcends ‘discussion or consultation’ and entails a ‘commitment’ of public funds.” . . . “[O]nce the Board finished privately discussing the merits of appealing, the open meeting statutes required that board members meet in public for the final decision to appeal.” . . .

The analysis in *Johnson* applies equally here. Authorizing litigation “transcends ‘discussion or consultation’ and entails a commitment of public funds.” . . . Once the City Council “finished privately discussing the merits of” authorizing litigation against Desert Mountain, the open-meeting law required it to “meet in public for the final decision” to sue.

Desert Mountain, supra at 353 ¶¶ 30-31 (citations omitted).

Next, the appellate court in *Desert Mountain* addressed the timeliness of the City’s ratification of its decision to authorize litigation against Desert Mountain. The City argued that the City Council did not learn about Desert Mountain’s claim that the City violated the OML until five days before its ratification. Desert Mountain contended that the City’s 30-day deadline to ratify started immediately upon the City Council’s original vote in executive session to authorize the litigation. The appellate court agreed with Desert Mountain that the City’s attempted ratification was untimely, stating:

Recall that the City Council re-voted in public session on January 17, 2023. Starting from that date and counting back thirty days, if the City discovered or should have discovered its violation before December 18, 2022, then its ratification was untimely. *See* A.R.S. § 38-431.05(B)(1). We conclude the City should have done so.

Three things should have led the City to discover its violation before December 18, 2022. First, *Johnson*. As explained, we held there that a public body cannot vote in executive session to authorize an appeal. . . . This then is not a case where “no previous Arizona case has addressed the statutory exception at issue and its scope” or where “reasonable minds can differ” on § 38-431.03(A)(4)’s application. . . . Once *Johnson* said a public body cannot authorize an appeal in executive session, it was clear that a public body also cannot authorize a lawsuit that way.

Second, the [Arizona] Agency Handbook [published by the Arizona Attorney General]. The open-meeting law requires a “person elected or appointed to a public body” to review the open-meeting law chapter in the Agency Handbook “at least

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

one day before the day that person takes office.” A.R.S. § 38-431.01(H); *see also Agency Handbook* § 7.1. The Agency Handbook has a section titled, “Litigation, Contract Negotiations, and Settlement Discussions,” which discusses when public bodies can go into executive session under § 38-431.03(A)(4). *See Agency Handbook* § 7.9.5.4. It states that (A)(4) “allows consideration and instruction only[.]” *Id.* Citing *Johnson*, it then explains that “[i]f legal action is necessary by the public body before its representative can take the directed action, the public body must vote on the matter in public session and cannot do so in executive session.” *Id.* The City does not dispute that the City Council members who authorized this litigation received open-meeting law training and read the Agency Handbook.

Third, Desert Mountain’s counterclaim. Desert Mountain filed that counterclaim on September 30, 2022. Two weeks later, the City answered. Although alleging a violation does not always start the ratification clock, . . . the answer and counterclaim here further notified the City that it may have violated the open meeting law. And then, rather than swiftly ratifying, the City waited three-and-a-half months to take a new vote.

Id. at 354 ¶¶ 37-40 (some citations omitted).

The appellate court in *Desert Mountain* concluded that “[b]ecause the City’s deadline to ratify started before December 18, 2022, the City’s ratification was untimely” and “[t]he City’s claims are null and void.” *Id.* at 355 ¶ 43.

Here, Defendants contend that the County violated the OML because “the County did not publicly authorize the commitment of public funds required to pursue this case, or publicly authorize the filing of the claims in this lawsuit which require expenditure of public funds.” (Motion at 8:4-7). The County does not dispute that the Board did not conduct a public vote authorizing the retention of Snell and the filing of this lawsuit before it was filed. Indeed, if the Board had done so, there would have been no need for the Board to vote to ratify the lawsuit on November 18, 2025--18 days after the Motion was filed. Rather, the County asserts that after discovering Gutfahr’s embezzlement, it “took swift and transparent public action to recover these stolen funds,” including (i) voting in public session to conduct a forensic investigation of the County’s bank accounts; (ii) filing a lawsuit against Gutfahr (and related individuals and entities) and announcing the lawsuit in a press release the next day; (iii) serving the State and the Auditor General with a notice of claim and making the notice of claim available on the County’s website; (iv) issuing a press release condemning the Auditor General’s “investigation report” and stating that the County intended to pursue its claim against the Auditor General through the court system; and (v) issuing a public notice that the Board would meet in executive session on November 7, 2024 for “discussion and consultation for legal advice regarding updates of the former County

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Treasurer Elizabeth Gutfahr’s management of County funds.” (Response at 2:23-4:31). Defendants contend that these actions are not a substitute for OML compliance.

The Court agrees with Defendants. As set forth above, the OML statute expressly requires a public vote before a public body decides to take legal action and before taking any action that binds the public body to a commitment of using public funds. As the appellate court explained in *Desert Mountain*, “[o]nce the [Board] ‘finished privately discussing the merits of’ authorizing litigation against [Defendants], the open-meeting law required it to ‘meet in public for the final decision’ to sue.” *Desert Mountain, supra* at 353 ¶ 31. It is undisputed that the Board did not do so, and the County has not cited any authority for a “publicity” or “transparency” exception to the strict mandates of the OML. As such, under A.R.S. § 38-431.05(A), the filing of this action is “null and void” unless the Board timely ratified its actions under A.R.S. § 38-431.05(B).

Ratification

On November 18, 2025, the Board ratified the filing of this action by public vote in a regular public meeting. As set forth in *Desert Mountain*, the Court must count back 30 days to October 19, 2025, and determine whether the County discovered *or should have discovered* its OML violation before that date. If so, the Board’s ratification is untimely under A.R.S. § 38-431.05(B).

Here, Defendants contend that the County was on notice of its OML violation when it authorized this litigation without a public vote sometime prior to the filing of this lawsuit on November 14, 2024. Defendants further contend that the County cannot claim ignorance of its OML violation from that point because: (i) *Desert Mountain* and *Johnson* put the County on notice that a public body cannot authorize a lawsuit without a public vote at a public meeting; (ii) Snell published on its website an article entitled “City Lawsuit Nullified Based on Open Meeting Law Violation,” authored by one of the attorneys representing the County in this lawsuit and another Snell partner, addressing *Desert Mountain* and advising public bodies that “this outcome [in *Desert Mountain*] highlights the importance of timely and proper compliance with the Open Meeting Law when taking *any* legal action” (SOF, Exhibit 23 at 2 (emphasis in original)); (iii) the record shows a pattern of the Board complying with the OML by authorizing legal action and litigation-related contracts through public votes at public meetings, including a public vote to approve a litigation support contract for an e-discovery vendor in this very case; and (iv) displaying its OML obligations on the County’s website with links to OML resources, including the Agency Handbook that each Board member was required under A.R.S. § 38-431.01(H) to review personally at least one day before taking office.

The County responds that “[t]he alleged OML violation was first raised as an issue in the Auditor General’s MSJ on October 31, 2025” and “[o]nce the issue was raised, . . . the County promptly ratified its decision to file this lawsuit within 30 days in a public meeting on

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

November 18, 2025”--which “moots” the Motion. (Response at 12:10-14). The County further contends that *Desert Mountain* is distinguishable because Desert Mountain “immediately raised the OML violation in the form of a direct counterclaim” and the City waited three and a half months after the filing of the counterclaim to ratify the litigation. (*Id.* at 12:15-21). Notably, the County does not dispute (i) the article about *Desert Mountain* and the OML prepared by its counsel; (ii) the OML resources, including the Agency Handbook, posted on the County’s website; and (iii) its prior notices regarding the need to ratify its prior actions.¹ (SOF, ¶¶ 15-29, 31; CSOF, ¶¶ 15-29, 31).

Defendants reply to the County’s argument that the Motion “was the only possible trigger for the thirty-day ratification period” by asserting that “the County ignores the ‘reasonable diligence’ prong and *Desert Mountain*’s holding that the ratification deadline begins when a violation should have been discovered, not merely when it is brought to a public body’s attention.” (Reply at 4:3-6). The Court agrees. Here, as in *Desert Mountain, Johnson* should have led the County to discover its OML violation before the Motion was filed on October 31, 2025. So too should have *Desert Mountain*--particularly considering that the County’s attorneys in this action wrote an article about *Desert Mountain* shortly after the opinion was issued. Moreover, as in *Desert Mountain*, the Agency Handbook posted to the County’s website (with other OML resources) and which each Board member was required by statute to read before taking office should have led the County to discover its OML violation before the Motion was filed. Finally, the Court is not persuaded by the County’s attempt to distinguish *Desert Mountain* because the County should have been triggered to conduct due diligence as to the OML violation by the first two factors addressed in *Desert Mountain--Johnson* and the Agency Handbook--regardless of when Defendants raised the OML violation.²

¹ The County objects that the article prepared by its counsel is irrelevant hearsay. But Defendants are not offering the article for the truth of the matters asserted in the article. Rather, the article is relevant for the non-hearsay purpose of showing the County’s attorneys in this matter were on notice of the OML requirements for initiating legal action and the consequences of an OML violation that is not timely ratified.

² The Court further notes that, in *Desert Mountain*, the appellate court rejected the City’s argument that the City Council did not discover its OML violation earlier because the City Attorney advised the Council that a public body can instruct its attorneys to file a lawsuit in executive session. The appellate court stated: “Individual members of a public body must educate themselves about, and then follow, the open-meeting law. . . . They cannot delegate compliance to the body’s attorney. And, because they cannot do so, they cannot delay ratification based on that attorney’s incorrect advice.” *Desert Mountain, supra* at 354 ¶ 41. If the members of a public body must educate themselves and follow the OML and cannot delay ratification when the body’s own attorney

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

In short, based on the undisputed evidence, the Court finds that the Board's deadline to ratify its decisions to retain counsel and initiate this action started to run before October 19, 2025. As such, the Board's ratification on November 18, 2025, was untimely.

Waiver

The County contends that Defendants waived the OML violation because: (i) it is an affirmative defense that Defendants were required to plead in a responsive pleading under Arizona Rules of Civil Procedure ("Rule") 8 and 12; (ii) Defendants failed to disclose the OML violation under Rule 26.1, and as such, Defendants are precluded from using the OML violation as a defense under Rule 37(c)(1); and (iii) Defendants extensively litigated this case for over a year before raising the OML violation. Defendants disagree, asserting that waiver does not apply when a statute makes an action null and void.

First, as to whether Defendants were required to plead the OML violation as an affirmative defense, Rule 8(d)(1) provides that "a party must affirmatively state any avoidance or affirmative defense," including several enumerated affirmative defenses. Naturally, an OML violation is not among Rule 8(d)(1)'s non-exhaustive list of affirmative defenses. But the County asserts that the OML violation qualifies under the accepted definition of affirmative defenses: "An affirmative defense is '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true.'" *Ball v. Picarello*, 2024 WL 4891488 at *2 ¶ 11 (Ariz. App. Nov. 26, 2024) (*quoting Defense*, Black's Law Dictionary (12th ed. 2024)). "Failure to plead an affirmative defense results in a waiver of that defense and an exclusion of the issue from the case." *Id.* (*quoting Hegel v. O'Malley Ins. Co., Inc.*, 122 Ariz. 52, 5 (1979)) (internal quotation marks omitted).

Defendants do not dispute that the OML violation fits within the definition of an affirmative defense. Rather, Defendants contend that the OML violation fits within affirmative defenses they pled in their answer and, alternatively, that an affirmative defense may be raised at summary judgment even if not pled. Defendants' answer includes the following affirmative defenses (among others): (i) "[t]he Plaintiffs' claims against Defendants are barred, in whole or in part, by the failure to state a claim for which relief can be granted"; (ii) "Plaintiffs' claims are barred, in whole or in part, because of the contributory, comparative, or exclusive fault, negligence, gross negligence, or other wrongful conduct of the Plaintiff"; (iii) "[t]he Plaintiffs' claims against Defendants are barred by the doctrines of waiver, release or estoppel, and/or by virtue of Plaintiff's acts, deeds, conduct and/or failure or omission to act appropriately under the relevant

provides incorrect advice, then the Board here clearly could not wait for Defendants to raise the OML violation before ratifying the decision to file this lawsuit.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

circumstances”; and (iv) “the Plaintiff’s claims are barred, in whole or in part, by the applicable statutes of limitations.” (Answer, Affirmative Defenses, ¶¶ 1, 2, 7, 10).

The OML violation arguably is encompassed within one or more of the affirmative defenses pled by Defendants. “Moreover, a party may raise an affirmative defense in a motion for summary judgment even if the party did not plead that defense.” *Maricopa Turf, Inc. v. Sunmaster, Inc.*, 173 Ariz. 357, 363 (App. 1992) (finding defendant did not waive defense of plaintiff’s failure to comply with notice provisions of materialman’s lien statute); *see also Reidy v. Blackwell*, 140 Ariz. 333, 335 (App. 1983) (“Appellants’ last contention, that appellee cannot raise the affirmative defense of the licensing statute in his motion for summary judgment because he did not plead it, is without merit. An affirmative defense can be raised in a motion for summary judgment although it was never pleaded.”).³

Finally, even if Defendants were required specifically to plead the OML violation as an affirmative defense, Defendants request leave under Rule 15(a)(2) to amend to assert an additional affirmative defense. (Reply at 10 n.9). Given that this complex case has not proceeded beyond the pleading stage despite its age, the Court cannot conceive of denying leave to amend if necessary to raise the OML violation as a defense. As such, the Court does not find waiver here based on Defendants’ failure to expressly plead the OML violation as an affirmative defense.

Second, as to Defendants’ obligation under Rule 26.1 to disclose the OML violation as a defense, Rule 26.1(a)(2) provides that “each party must disclose in writing . . . the legal theory on which each of the disclosing party’s claims or defenses is based, including--if necessary for a reasonable understanding of the claim or defense--citations to relevant legal authorities[.]” Rule 37(c)(1) provides that “[u]nless the court specifically finds that such failure caused no prejudice or orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.”

³ The County cited *Airfreight Exp. Ltd. v. Evergreen Air Center, Inc.*, 215 Ariz. 103 (App. 2007), for the proposition that a party can waive affirmative defenses that are not expressly included in Rule 8(d). Notably, the waiver in *Airfreight* occurred because “Evergreen . . . did not raise issue preclusion as a defense in its motion to dismiss the second action, nor [did] it assert it on appeal as a valid basis for the trial court’s grant of that motion.” *Id.* at 108. In *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328 (1959), another case cited by the County, the appellant proceeded all the way to trial without raising the affirmative defense of authority to enter into a contract. In *City of Phoenix v. Fields*, 219 Ariz. 568, 574 ¶ 28 (2009), another case cited by the County, the Arizona Supreme Court “assume[d], without deciding, that this broad language [that plaintiffs failed to exhaust their administrative, statutory, and/or contractual remedies] preserved the defense” of failing to comply with the notice of claim statute.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Here, the County asserts that Defendants' Rule 26.1 disclosure statement did not disclose the OML violation, and as such, Defendants are precluded by Rule 37(c)(1) from using the OML violation in its Motion. The County further contends that Defendants cannot show good cause for failing to disclose the OML violation or that the failure caused no prejudice. Defendants counter that Rules 26.1 and 37(c) cannot overcome the statutory mandate of A.R.S. § 38-431.05(A) that legal action commenced by a public body without a public vote is "null and void." Defendants further contend that a delay in disclosure alone does not necessarily establish prejudice justifying sanctions and the County cannot claim prejudice because the Board has long known of its OML obligations.

The Court initially observes that Rule 37(c)(1) expressly provides that information not timely disclosed may not be used "*as evidence*" at trial or with respect to a motion. The County seeks to preclude use of an untimely disclosed legal theory. Moreover, for reasons set forth above, the Court agrees with Defendants that the County was aware of the Board's OML obligations and failure to comply with those obligations. And for reasons that will be discussed below, the Court agrees that Rules 26.1 and 37(c)(1) cannot overcome A.R.S. § 38-431.05(A)'s mandate and cannot preclude Defendants from ever asserting the OML violation. In this regard, even if the Court precluded Defendants from using the OML violation with respect to this Motion, the Court does not find it appropriate to preclude Defendants from using the OML violation with respect to a future dispositive motion now that it has been disclosed. Accordingly, the Court does not find that Defendants waived the OML violation defense by failing to timely disclose it under Rule 26.1.⁴

Third, as to Defendants litigating this case for a year before raising the OML violation, a party "may waive [a properly preserved] defense by its subsequent conduct in the litigation." *Fields, supra* at 574 ¶ 29. In *Fields*, the Arizona Supreme Court stated that "[b]y any measure, the City and Board substantially participated in this litigation before raising their notice of claim statute defenses," by "engag[ing] in extensive briefing as to the propriety of class certification without once suggesting that they believed all claims of the Class were barred under § 12-831.01(A)" and "fil[ing] various motions, including several motions for partial summary judgment unrelated to the sufficiency of the notices of claim." *Id.* at 575 ¶ 31. "The motion for summary judgment finally raising the absence of a settlement demand was filed more than four years after the date of the original complaint and more than three years after class certification." *Id.* Under these circumstances, the Supreme Court held that although waiver typically is a question of fact, "in this case, waiver by conduct is apparent from the extensive litigation record below." *Id.* at 575 ¶ 32.

⁴ To be sure, the better practice would have been for Defendants to timely disclose the OML violation as a legal theory for their defense before filing the Motion.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Here, the County asserts that before filing the Motion, Defendants: (i) filed an answer asserting ten affirmative defenses (none of which expressly mentioned the OML violation); (ii) filed a Rule 12 motion to dismiss unrelated to the OML defense; (iii) filed a motion for complex case designation; (iv) filed numerous pleadings, including a counterclaim, third-party complaint, supplemental third-party complaint, and an amended supplemental third-party complaint, which included adding numerous third-party defendants as parties; (v) participated in a key witness deposition; (vi) exchanged disclosure statements and disclosed more than 3,000 pages of documents; and (vii) participated in multiple scheduling conferences and oral arguments. The County contends that (as in *Fields* and other cited cases) this extensive litigation activity waived Defendants' OML violation defense. Defendants counter that the doctrine of waiver cannot be used to salvage an action declared by Arizona law to be "null and void."

In *National Union Indem. Co. v. Bruce Bros.*, 44 Ariz. 454, 463-64 (1934), the Arizona Supreme Court addressed a statute declaring as "void" a contract entered into by a corporation not authorized to transact business in Arizona. The Supreme Court stated that "[a] void contract is one which never had any legal existence or effect, and it cannot in any manner have life breathed into it." *Id.* at 464. The Supreme Court contrasted the statute to one that "give[s] an option to one party or another to declare a contract void," which "in reality is not void, but merely voidable. . . ." *Id.* But the Supreme Court concluded that "under a statute such as ours, there is no room for construction." *Id.* When "[t]he Legislature has repeatedly and solemnly declared that any and all the acts of the corporation are 'void,' without qualification or exception of any nature[.]" "no action that any one could take could give the contract validity." *Id.* Significantly, in such a case, the Supreme Court held that the illegality defense cannot be waived, stating that "[w]ere this contract one of the class which is voidable merely at the option of one of the parties, the defense of illegality could, of course, be waived[.]" "[b]ut as we have pointed out, such is not the situation." *Id.* at 467. The Supreme Court concluded:

Whatever the motive which induced the Legislature to pass the section in question, it has made it applicable to all cases without exception. It has not merely, as in the cases of statutes of limitations, taken away the remedy but has denied the right. It has declared the contract void ab initio. This can be considered nothing but an expression of public policy upon the part of the state, and neither the court nor any litigant has the right to waive the provisions of the act. It is the duty of the court, whenever the facts which render the contract void are called to its attention, to declare the law, and no party may recover in an action where the right of recovery must rest in some manner upon the void contract. It is contended that because Scott, the principal on the bond, has not legally raised the issue, the surety is not permitted to do so. We have been cited to no case, and we are satisfied that none can be found, holding that when a contract which is void ab initio as a matter of public policy, is declared on, that any party whom it is sought to bind under the contract is barred

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

from raising the objection. It has been repeatedly held that statutes or [sic] this nature are constitutional, and when such is the case, the courts have no option but to enforce the law as it is written. We have realized the harshness of the law and the fact that in individual cases its application may work grievous injustice, and wherever there was a doubt as to its applicability, have resolved that doubt in favor of the validity of the contract objected to, but where the facts show, beyond a doubt, that the contract falls within the statute, the question of abstract justice or the effect of the law is not for us. The Legislature has acted within its constitutional authority, and the facts are clear. It appearing from the record that the contract on which plaintiff seeks to recover was by the public policy of this state declared to be void, no recovery can be had thereon as against any person. It is useless for us to consider any of the other questions raised on this appeal.

Id. at 467-68.

The Legislature has declared the public policy that an act in violation of the OML is “null and void.” As the Supreme Court declared in *National Union*, neither the Court nor any party can waive the provision of A.R.S. § 38-431.05(A) declaring acts in violation of the OML “null and void.” Regardless of the harshness of the statute, “[i]t is the duty of the court, whenever the facts which render [the acts in violation of the OML] void are called to its attention, to declare the law, and no party may recover in an action where the right of recovery must rest in some manner upon the void [act].”⁵ Accordingly, the Court concludes that Defendants’ participation in this litigation for the past year cannot be construed as a waiver of the County’s OML violation.

⁵ The Court has reviewed the authorities cited by the County at oral argument. See *Pima County v. City of Tucson*, 2024 WL 4457494 (Ariz. App. Oct. 10, 2024) (concluding that, because the trial court determined a municipal ordinance was adopted in violation of state law and, as a result was void, the declaratory judgment should be amended to preclude the city from enforcing the ordinance against non-parties, but did not require a refund of overpayments collected under the statute because the complaint made no such request); *Mayer Unified School Dist. v. Winkleman*, 219 Ariz. 562 (2009) (claims for compensation for easements and rights of way over state trust lands conveyed between 1929 and 1967 were time-barred even though Enabling Act provides that disposal of trust land in manner not conforming with Act is “null and void”); *Welch v. Cochise County Board of Supervisors*, 250 Ariz. 186, 195-96 ¶ 29 (App. 2020) (appellant abandoned argument that board of supervisor’s appointment of justice of the peace violated the OML by failing to argue in opening brief that ratification was improper), *affirmed in part and vacated in part*, 251 Ariz. 519 (2021). The Court is not persuaded that these authorities mandate a different result.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

Futility And The Savings Statute

The County contends that “[e]ven if the Court was otherwise inclined to dismiss the Complaint, it should not do so because dismissal would be futile, because even if the case was dismissed on a technical OML violation, the County could simply refile the exact same claims under A.R.S. § 12-504(A).” (Response at 13:23-26). A.R.S. § 12-504(A) provides:

If an action is commenced within the time limited for the action, and the action is terminated in any manner other than by abatement, voluntary dismissal, dismissal for lack of prosecution or a final judgment on the merits, the plaintiff, or a successor or personal representative, may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by abatement, voluntary dismissal by order of the court or dismissal for lack of prosecution, the court in its discretion may provide a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.

Defendants contend that A.R.S. § 12-504(A) does not apply because this action was “null and void” from its inception, and as such, was not commenced within the applicable statute of limitations. The Court agrees. *See Safeway Stores, Inc. v. Maricopa County Superior Court*, 19 Ariz. App. 210 (1973). There, a complaint asserting a personal injury claim was signed only by the plaintiff’s husband, who was neither a plaintiff nor a licensed attorney. After the complaint was dismissed for lack of prosecution and a second complaint was filed, the trial court denied defendant’s motion for summary judgment on the statute of limitations. The appellate court accepted special action jurisdiction and reversed, holding that the original complaint “was not sufficient to toll the statute of limitations, and in fact it had no legal significance.” *Id.* at 212.

Here, the County’s complaint was “null and void” under A.R.S. § 38-431.05(A). As such, like the complaint in *Safeway*, it had no legal significance and was insufficient to toll the statute of limitations. In other words, there was no action “commenced within the time limited for the action”--which is a necessary condition for A.R.S. § 12-504(A) to apply. Accordingly, the County’s action is not saved by A.R.S. § 12-504(A).

Disposition

For the reasons set forth above,

IT IS ORDERED granting the Motion.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-032742

03/16/2026

The Court recognizes that this ruling is a significant development in this case, and the County likely will want to seek immediate appellate review of the ruling. To address the impact of this ruling on the remaining aspects of this case, whether to issue a Rule 54(b) final judgment to allow immediate appellate review, and related issues,

IT IS FURTHER ORDERED setting a virtual Rule 16 Conference in this division on **March 20, 2026, at 10:30 a.m.** (90 minutes allowed) to be heard in conjunction with the previously set virtual oral argument

An auto-generated email has been sent to local counsel of record to attend this hearing via Court Connect and Microsoft TEAMS. Should any of the parties not have an updated email address on file with the Clerk of Court or not receive the email, please advise the Court. You may join the hearing using the following link: **tinyurl.com/jbazmc-cvj08**.

Or you may appear via telephone by calling: **1-917-781-4590 Access Code: 335 045 922#**. For further information, please visit: <https://superiorcourt.maricopa.gov/court-connect/>

NOTE: All court proceedings are made digitally in lieu of a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.