IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CECILIA CRUZ,
Plaintiff/Appellant,

v.

CITY OF TUCSON;
JONATHAN ROTHSCHILD AS MAYOR OF THE CITY OF TUCSON;
REGINA ROMERO, PAUL CUNNINGHAM,
KARIN UHLICH, SHIRLEY SCOTT,
RICHARD FIMBRES, AND STEVE KOZACHIK
AS ELECTED MEMBERS OF THE TUCSON CITY COUNCIL;
RICHARD MIRANDA AS THE APPOINTED CITY MANAGER;
ROGER RANDOLPH AS THE APPOINTED TUCSON CITY CLERK;
MICHAEL RANKIN AS THE APPOINTED CITY ATTORNEY;
AND DENNIS MCLAUGHLIN AS A PRINCIPAL CITY ATTORNEY,
Defendants/Appellees.

No. 2 CA-CV 2016-0223
Filed August 1, 2017

Appeal from the Superior Court in Pima County
No. C20155573
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Risner & Graham, Tucson
By William J. Risner
Counsel for Plaintiff/Appellant

Bossé Rollman, P.C., Tucson
By Richard M. Rollman and Kevin J. Kristick
Counsel for Defendants/Appellees

OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Cecilia Cruz appeals from the trial court's grant of summary judgment in favor of the City of Tucson (hereinafter "the City").[2] She argues the court erred by finding her notice of claim was untimely and by denying her request to delay ruling on the motion until she could conduct further discovery. Because we find no error, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to the party against whom summary judgment was entered." *Thompson v. Pima County*, 226 Ariz. 42, ¶ 2, 243 P.3d 1024, 1026 (App. 2010). This appeal stems from a previous statutory special action that Cruz had filed pursuant to A.R.S. § 39-121.02(A) following the City's denial of her request for disclosure of public records, the facts of which appear in *Cruz v. Miranda*, No. 2 CA-CV 2015-0131 (Ariz. App. Apr. 21, 2016) (mem. decision) (hereinafter "the public records case").

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Cruz's complaint named the City, the mayor of Tucson, the members of the Tucson City Council, the city manager, the city clerk, and two city attorneys. We collectively refer to all defendants as the City.

¶3 The trial court's final ruling in the public records case was issued on April 28, 2015, and Cruz was awarded a portion of her attorney fees and costs pursuant to A.R.S. § 12-349(A)(3). The court found the City had "intentionally obstructed Ms. Cruz's efforts to obtain a prompt response to her request, made multiple false representations to the Court, and [was] pervasively indifferent concerning compliance with the obligations imposed by Arizona public records law."

¶4 On October 6, 2015, Cruz sent the City a notice of claim asserting that she had "been greatly damaged by intentional lying and other abuses of process by [the City] or [its] agents" during the public records case. She alleged the City had willfully withheld public records, had destroyed public records, had misled and lied to both Cruz and the trial court, and had abused the attorney-client privilege.

¶5 Cruz filed the present action in December 2015, seeking damages for the City's alleged abuse of process and violations of § 39-121.02. The City filed a motion for summary judgment, contending that Cruz's notice of claim and complaint were untimely because her claim had accrued during the pendency of the public records case, as early as August 2013. Cruz responded that her claim could not have accrued until the final ruling was issued in that case and, alternatively, that the continuing tort doctrine applied and accrual did not occur until the City's wrongful acts terminated. Cruz additionally filed a request pursuant to Rule 56(d), Ariz. R. Civ. P.,[3] stating that she needed to conduct additional discovery to uncover facts relevant to her opposition to the City's motion.

¶6 Following a hearing, the trial court denied Cruz's Rule 56(d) request, took the summary judgment matter under

[3]Cruz filed her motion pursuant to Rule 56(f). Ariz. Sup. Ct. Order R-11-0034 (Aug. 30, 2012). Since that time, section (f) has been renumbered as section (d). Ariz. Sup. Ct. Order R-16-0010 (Sept. 2, 2016). We refer to the current version of the rule in this opinion.

advisement, and, later, granted the City's motion. The court concluded that Cruz's claims accrued during the public records case, as early as August 2013 or as late as December 2014, making her notice of claim and complaint untimely under either scenario. We have jurisdiction of Cruz's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Timeliness

¶7 Cruz argues the trial court erred in finding her notice of claim untimely.[4] On appeal from the grant of summary judgment, we determine de novo whether the court correctly applied the law and whether there are any genuine disputes as to any material fact. *Dayka & Hackett, L.L.C. v. Del Monte Fresh Produce N.A., Inc.*, 228 Ariz. 533, ¶ 6, 269 P.3d 709, 712 (App. 2012). When a cause of action accrued is generally a question of fact for the jury, but it may be decided as a matter of law if the record shows when the plaintiff "unquestionably [was] aware of the necessary facts underlying [his or her] cause of action." *Thompson*, 226 Ariz. 42, ¶ 14, 243 P.3d at 1029.

¶8 Section 12-821.01(A), A.R.S., provides that a claimant who wishes to bring an action against a public entity must, "within one hundred eighty days after the cause of action accrues," file a notice of claim with the entity. "[A] cause of action accrues 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 that caused or contributed to the damage." § 12-821.01(B); *see Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, ¶ 7, 311 P.3d 1075, 1078 (App. 2013). The plaintiff "must at least

[4]Cruz's argument is limited to the timeliness of her notice of claim, and she does not address the trial court's additional finding that her complaint was also untimely. Because our resolution of this issue is dispositive, we do not address whether the complaint was timely filed. *See* A.R.S. § 12-821.01(A); *see also State Comp. Fund v. Superior Court In & For Cty. of Maricopa (EnerGCorp, Inc.)*, 190 Ariz. 371, 376, 948 P.2d 499, 504 (App. 1997) ("Under the claims statute, no action [against a public entity] may be maintained when a plaintiff has failed to file a timely, sufficient notice of claim . . . .").

possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury," but "need not know all the facts underlying a cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d 951, 961 (1998) (emphasis omitted). Put another way, "the core question" of when a claim accrued is not when the plaintiff was conclusively aware she had a cause of action against a particular party, but instead when "a reasonable person would have been on notice to investigate." *Walk v. Ring*, 202 Ariz. 310, ¶¶ 23-24, 44 P.3d 990, 996 (2002).

¶9 An abuse-of-process claim requires the plaintiff to show "(1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 11, 92 P.3d 882, 887 (App. 2004), *quoting Nienstedt v. Wetzel*, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982). The essence of Cruz's complaint is that the City committed an abuse of legal process and willfully violated § 39-121.02 by withholding public records and misleading Cruz and the trial court in the public records case. Her claim therefore accrued when she was first aware she had been injured by the City's action and was put on notice to investigate these issues. *See Doe*, 191 Ariz. 313, ¶ 32, 955 P.2d at 961; *see also Walk*, 202 Ariz. 310, ¶¶ 23-24, 44 P.3d at 996. In order for her notice of claim to be timely, Cruz's claim must have accrued no earlier than April 9, 2015.

¶10 The record shows that Cruz was first aware that the City had abused process and withheld public records in August 2013, when she filed a motion for a new trial in the public records case. She asserted that the City "continue[d] to refuse to comply with the [May 2013] public record request" and had not disclosed "public records known to exist." Indeed, the week before Cruz filed her motion, the City disclosed approximately 170 pages of records, even though it had attested in the previous month that it had "fully responded" to Cruz's public records request.

¶11 Notably, as the public records case progressed, a pattern developed in which the City would repeatedly state it had fully complied with Cruz's request, only to later disclose hundreds of additional documents. During the nearly two-year pendency of that

case, Cruz filed numerous motions for a new trial and for relief from judgment based on her claims that the City was continuing to withhold available public records, misleading both Cruz and the court about its efforts to disclose those records, abusing the discovery process, and intentionally destroying relevant public records. Consequently, she had been making the precise claims she makes in this case throughout the litigation in the public records case.

¶12 Additionally, Cruz was not merely on notice to investigate, she in fact did so. She repeatedly sought leave to conduct discovery to investigate her claims. And the trial court allowed her to depose certain City employees based on "the mounting evidence of [the City's] disregard for the obligations imposed by" § 39-121.02, with some of the depositions conducted in November and December of 2013. Those depositions revealed discrepancies between what City employees turned over to the City's in-house counsel shortly after Cruz's request and what was later disclosed to Cruz. The depositions also established that the City's in-house counsel did not notify the City's information technology (IT) department about Cruz's request until August 2013 and did not instruct the IT department to search for e-mails responsive to Cruz's request until September 2013. Based on the City's practice of periodically purging e-mails, this meant that many relevant e-mails had already been expunged from the City's computer system by the time they had been requested.

¶13 In December 2014, Cruz sought to amend her complaint in the public records case to include a request for damages pursuant to § 39-121.02(C), just as she has requested in this case. The trial court denied the motion because she had not filed a notice of claim with the City on that issue.

¶14 As the trial court in the public records case noted in its final ruling, "while the case was initially about whether [the City] could withhold certain specifically identified documents from production, it [became] about the extent to which the actions of [the City] and its in-house attorneys, who are [City] employees, have unreasonably expanded and delayed these proceedings." The record demonstrates that Cruz "unquestionably [was] aware" of the facts underlying her current claim as early as August 2013. *Thompson*, 226

Ariz. 42, ¶ 14, 243 P.3d at 1029. As a result, her claim accrued well before April 9, 2015, and her notice of claim was untimely, thus barring her action against the City. *See* § 12-821.01(A); *see also State Comp. Fund v. Superior Court In & For Cty. of Maricopa (EnerGCorp, Inc.)*, 190 Ariz. 371, 376, 948 P.2d 499, 504 (App. 1997).

¶15 Cruz argues, however, that an abuse-of-process claim does not accrue until a final judgment is issued in the previous case. As support, she cites four out-of-state cases for the proposition that the previous litigation from which a claim arises must be terminated before an action for abuse of process can be filed. *See Sanders v. Leeson Air Conditioning Corp.*, 108 N.W.2d 761, 763 (Mich. 1961); *Blue Earth Valley Tel. Co. v. Commonwealth Utils. Co.*, 167 N.W. 554, 556 (Minn. 1918); *Nat'l Fittings Co. of N.Y., Inc. v. Dursi Mfg. Co.*, 210 N.Y.S.2d 455, 457 (N.Y. Spec. Term 1960); *Friedman v. Roseth Corp.*, 74 N.Y.S.2d 733, 735-36 (N.Y. Spec. Term 1947).

¶16 Three of those cases, however, have drawn express disagreement from courts within their own jurisdictions. *See Moore v. Mich. Nat'l Bank*, 117 N.W.2d 105, 107 (Mich. 1962) (holding in *Sanders* unpersuasive; disposition of previous litigation "immaterial" to abuse-of-process claim and plaintiff's claim thus accrued upon first instance of abuse of process); *Cunningham v. State*, 422 N.E.2d 821, 822 (N.Y. 1981) ("accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor"). Additionally, fifty-three years after *Blue Earth* was decided, in stating the elements of an abuse-of-process claim, the Supreme Court of Minnesota did not include termination of the previous proceedings as one of the elements. *See Pow-Bel Constr. Corp. v. Gondek*, 192 N.W.2d 812, 814 (Minn. 1971) *(*essential elements of abuse-of-process action: "(a) the existence of an ulterior purpose, and (b) the act of using the process to accomplish a result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not"); *see also Crackel*, 208 Ariz. 252, ¶ 11, 92 P.3d at 887 (same).

¶17 Several other states have similarly concluded that an abuse-of-process claim accrues from the date the alleged abuse occurs. *See, e.g.*, *Harvey v. Pincus*, 549 F. Supp. 332, 340 (E.D. Pa. 1982)

(abuse-of-process claim "accrues immediately upon the improper use of the process"); *Yoost v. Zalcberg*, 925 N.E.2d 763, 771 (Ind. Ct. App. 2010) ("A cause of action for abuse of process accrues when the act complained of . . . is committed."); *Corley v. Jacobs*, 820 S.W.2d 668, 672 (Mo. Ct. App. 1991) ("A cause of action for abuse of process generally accrues, and the statute of limitations begins to run, from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued."); *Read v. Fairview Park*, 764 N.E.2d 1079, 1080 (Ohio Ct. App. 2001) ("[T]he statute of limitations for an abuse-of-process claim begins to run on the date of the allegedly tortious conduct.").

¶18 Cruz nevertheless argues public policy dictates that an abuse-of-process claim not accrue until the entry of final judgment in the previous case. She notes that an abuse-of-process claim is different from a public records special action and suggests she would have had to file a separate lawsuit from her statutory special action. She thus reasons that "the service of such a claim and a possible suit while the wrongful special action was itself pending would have simply increased the stakes and costs" incurred.

¶19 But Cruz ignores the fact that, had she filed a separate notice of claim for abuse of process, she could have amended her complaint in the public records case to include that claim. In fact, she attempted to do precisely this, but the trial court denied her motion to amend because she had not filed a new notice of claim. Given the overlap in issues and discovery in the public records case and this one, had she timely served the City with a new notice of claim and amended her complaint, it would ultimately have been less expensive and less burdensome than waiting until the case was over and filing a separate lawsuit. Consequently, Cruz's reasoning undermines, rather than supports, her argument here.

¶20 Alternatively, Cruz argues the accrual date should be tolled until the City's alleged abuses terminated under the continuing tort doctrine. Under this doctrine, a tort claim based on a series of related wrongful acts is considered continuous, and accrual begins at the termination of the wrongdoing, rather than at the beginning. *Watkins v. Arpaio*, 239 Ariz. 168, ¶ 9, 367 P.3d 72, 75 (App. 2016); *see*

Floyd v. Donahue, 186 Ariz. 409, 413, 923 P.2d 875, 879 (App. 1996). Any merit to this argument, however, is undercut by the fact that Cruz has not pointed to any wrongful acts by the City that occurred within 180 days before she filed her notice of claim. *See Watkins*, 239 Ariz. 168, ¶ 19, 367 P.3d at 77. Based on the record, it appears the last wrongful act by the City was its final disclosure on June 4, 2014, which Cruz has contended was incomplete. Consequently, even if the continuing tort doctrine applied, Cruz's notice of claim would be untimely. *See id.*

¶21 Cruz additionally appears to argue that her written declaration sufficiently demonstrates she did not know or have reason to know of the facts underlying her claim until just before she submitted her notice of claim. In it, she avowed she "did not realize that [she] had a cause of action for abuse of process until [her] lawyer was preparing a notice of claim for damages pursuant to" § 39-121.02(C). She also stated she "had not known the cause, source, act, event, instrumentality or condition which caused or contributed to [her] damages." But the standard is not when Cruz conclusively knew she could file an abuse-of-process claim against a public entity, or even knew with certainty the cause of her injury. Her claim accrued once she possessed "knowledge sufficient to identify that a wrong occurred and caused injury," *Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d at 961, and was thus put on "notice to investigate," *Walk*, 202 Ariz. 310, ¶ 24, 44 P.3d at 996. Because that occurred in August 2013, Cruz's declaration is unavailing.

¶22 Cruz further argues the trial court erroneously relied on *Mata v. Anderson*, 685 F. Supp. 2d 1223, 1265 (D. N.M. 2010), for the proposition that an abuse-of-process claim does not require termination of the previous proceeding. She reasons that *Mata* involved a "malicious abuse of process" claim, which Arizona does not recognize, and the court's reliance on that case was therefore "contrary to Arizona law." Regardless of whether a malicious abuse-of-process claim is or is not similar to an abuse-of-process claim, *Mata* recognized the rule was "in line with when similar . . . torts accrue—when a party knows or has reason to know of the injury that constitutes the basis of the action." *Id.* at 1266. This is consistent with Arizona law governing the accrual of claims. *See* § 12-821.01(B); *see*

also Rogers, 233 Ariz. 262, ¶ 7, 311 P.3d at 1078. Moreover, our review is de novo, and we will affirm a trial court's ruling on a motion for summary judgment if it is "correct for any reason." *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996). Thus, whether *Mata* is or is not applicable in Arizona is immaterial to our analysis. As we have already explained, the court correctly determined that Cruz's claim accrued while the previous proceeding was pending.

Amended Complaint

¶23 Cruz also contends the trial court erred by granting the City's motion for summary judgment when the City had not re-filed that motion after she amended her complaint. She appears to argue that, because the amended complaint added factual allegations against certain parties, the City was required to file a separate motion to dismiss or motion for summary judgment specific to the amended complaint. Cruz has not cited any legal authority supporting this argument and has therefore waived it for review. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (argument in opening brief must contain "citations of legal authorities . . . on which the appellant relies"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (argument waived when appellant fails to develop and support it). Furthermore, Cruz's amended complaint did not add any new causes of action. She does not explain, and we fail to see, how those changes would have altered the court's analysis of when her claim accrued.

Rule 56(d) Motion

¶24 Cruz lastly argues the trial court erred by denying her Rule 56(d) request to postpone ruling on the City's motion for summary judgment until she could conduct further discovery necessary to oppose the motion. We review the denial of a Rule 56(d) request for an abuse of discretion. *See Magellan S. Mountain Ltd. P'ship v. Maricopa County*, 192 Ariz. 499, ¶ 10, 968 P.2d 103, 106 (App. 1998).

¶25 Cruz has not included a transcript of the hearing during which the parties and the trial court discussed her Rule 56(d) request. According to the relevant minute entry, the court denied Cruz's

motion "[f]or reasons set forth on the record." The court's final under-advisement ruling does not address the motion. Cruz, as the appellant, was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b)(1). In the absence of the transcript, we presume it supports the court's ruling. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Given that presumption, we cannot say on the record before us that the court abused its discretion in denying Cruz's motion. *See Magellan*, 192 Ariz. 499, ¶ 10, 968 P.2d at 106.

Attorney Fees and Costs

¶26 Cruz has requested her attorney fees incurred on appeal pursuant to § 39-121.02(B). Because she has not "substantially prevailed," we deny her request. *Id.* Both Cruz and the City have requested attorney fees pursuant to § 12-349(A). Neither party has specified which provision of § 12-349(A) it believes applies nor offered evidence to support an award for any of the enumerated reasons under that statute. We therefore deny both parties' requests. However, as the prevailing party, the City is entitled to costs on appeal subject to its compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶27 For the foregoing reasons, we affirm the trial court's grant of summary judgment.