

Unprecedented



What We Can Learn From Lower Court Appeals

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Terminology

- Published Opinion—Rule 111, Arizona Supreme Court
- Memorandum Opinion—Written, not intended for publication
- Memorandum—cited for persuasive value, but only if it was issued on or after 1/1/2015; no opinion adequately addresses the issue before the court

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Terminology

- Superior Court Local Practice Rules, Maricopa County, Rule 9.11
- **a. Designation for Publication.**
- The Appeals Department, upon its own motion or the motion of any party, may designate its decisions for publication in the manner prescribed by Rule 111, Rules of the Supreme Court

Terminology

- Superior Court Local Practice Rules, Maricopa County, Rule 9.12
- Posting of Non-Published Decisions
- A judge may direct that an opinion of the Appeals Department be posted on the Superior Court website. ...

Terminology

- ... While such an opinion is posted, it may be deemed persuasive, but without binding precedential effect, and may be referenced in legal memoranda filed in appeals from limited jurisdiction courts to the Superior Court.

Posted Non-Published Opinions

- <http://www.superiorcourt.maricopa.gov/SuperiorCourt/LowerCourtAndAdminAppeals/index.asp>
- Criminal: written by Crane McClennen
- Not updated for several years
- Civil: written by Myra Harris
- Warning—they can be long

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Criminal Index

§ 28-1381: Driving under the influence
 Additional (Independent) Blood Test
 Arizona Revised Statutes
 Arizona Rules of Criminal Procedure
 Arizona Rules of Evidence
 Arizona Rules of Procedure in Civil Traffic and Civil Boating Violation Cases
 Arrest by officer without warrant
 Article 2, Section 10: Double Jeopardy
 Assault
 Blood, breath, urine or other bodily substance tests
 Chain of custody
 Challenging the constitutionality of a statute
 Change of venue
 Community Caretaker Function

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Civil Index

Arizona Revised Statutes
 Arizona Rules of Civil Procedure
 Authority to issue citations stemming from an administrative department
 Constitutional Law
 Credit card debt
 Engaging in the business of leasing a vehicle to another
 Engaging in the business of picking up passengers at the airport
 Eviction
 Failing to have a driver's identification
 Failing to have and maintain a valid vehicle permit
 Garnishment
 Inheritance
 Judgment

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Online, Non-Posted, Non-Published

- <http://www.courtminutes.maricopa.gov/>
- Can find all Maricopa LCAs here, but hard to search

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Published Opinion

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Expert Witness Availability

- State v. Thompson, 2004 WL 2607771 Sept. 2, 2004
- Trial court denies motion for continuance because of unavailability of expert witness (guess who)
- Had granted 3 earlier MTCs
- Case over 200 days old

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State v. Thompson

- Michael D. Jones: This Court must review the trial court's order denying Appellant's Motion to Continue only for an abuse of discretion. There is no abuse of discretion unless the trial court's actions "substantially prejudiced the defendant."

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State v. Thompson

- "Appellant made no attempt to secure the attendance of another criminalist, who presumably could testify as to the same scientific principles and/or infirmities inherent in the breath analysis process."
- No subpoenas were issued, so counsel "not serious" in securing attendance at trial or not "essential to defense."

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State v. Thompson

- "Finally, the particular facts of this case indicating that Appellant was literally "falling down drunk" and unable to stand unassisted, indicate that the testimony of an expert casting doubt on the Intoxilyzer machine would be of little trial utility..."

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Posted Opinions

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Jurisdiction/Venue After A 10.2 Strike

- State v. Haas, LC2011-136556-001
DT 04/15/2013
- After a 10.2 Change of Judge, case is transferred to different Justice Court
- At jury trial, defense alleged court did not have jurisdiction as offense did not occur there

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State v. Haas

- McClennen cites 22-302 (venue statute), says struck judge was "unable to act"
- Defense waived any other defects by waiting until after trial started.

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No Jury Trial for Prostitution

- State v. Wang, LC2011-000084-001
DT 07/02/2012
- McClennen: no right for jury trial for 13-3214A under Derendal
- No right to jury trial for similar Mesa City Code violations
- *Note that Phoenix City Court does allow for prostitution jury trials

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State v. Wang

- Court properly denied request to have prosecutor testify
- Court properly denied Change of Venue under 10.3

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Medical MJ Eviction

- WRPV, XI , DH , Scottsdale LLC v. Milton, LC2014-000018-001 DT 04/28/2014
- Harris: Lease's crime-free provision overrides tenant's MJ card
- Still illegal under Federal law and threat of forfeiture to LL

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Eviction: Return of Keys

- Lucky Dog Pursuits v. Kember, LC2017-000005-001 DT 03/06/2017
- Tenant claimed returning keys superfluous because have to re-key
- Harris: 33-1310 (3) a two-step process: (1) vacate the premises; and (2) return the keys.

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Tips Not Garnishable Wages

- Elche LLC v. Wright, LC2016-000146-001 DT 07/05/2016
- Harris: 33-1131. As with federal law, Arizona's statutes omit tips from the definition of disposable earnings available for purposes of a garnishment.

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Elche LLC v. Wright

- BUT: when calculating the exemption, you do NOT use the standard minimum wage
- Use the adjusted federal minimum wage of \$2.13 when calculating the employee's exemptions

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Date of Judgment

- Sunrise Meadows Estates Community Association v. Isip, LC2012-000034-001 DT 06/21/2013
- Judge signed Judgment 11/7/2013
- Entered into computer and mailed 11/10/2013
- Attorney received in mail and filed Notice of Appeal 11/23/2013

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Sunrise Meadows

- Harris: The judgment shall be recorded at length in the docket and signed by the justice of the peace.

§ 22-242

- Two separate acts: filing and recording
- Appeal was timely

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Sunrise Meadows

- Defendant filed Motion to Set Aside claiming service was improper
- Harris: Motion based on improper service can be brought at any time
- The standard is that the return of service can only be impeached by clear and convincing evidence.

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Interlude

Court of Appeals

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Credit Card SOL

- Mertola, LLC v. Santos, 241 Ariz. 572 (App. 2017)
- An action for breach of a credit-card agreement must be brought within 6 years after it accrues. 12-548(A)(2)
- This starts at "charge off" or "acceleration" date—date whole balance becomes due

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Mertola v. Santos

- Because, otherwise, could only sue for the minimum payment after each failure to pay the minimum payment
- Specifically differentiates from the "open account" SOL—deliberate decision by the Legislature

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Special Actions

Available Online

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10 Days for 10.2

- Favorito v. Pearce, LC2004-000879-001 DT 02/28/2005
- Michael D. Jones: in the absence of a specific assignment to a judge pro tem, counsel charged with the knowledge that their case will be heard by the judge of that court, from the date of a case's filing within that court.

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Guilty Plea at Arraignment

- Mahan v. Wismer, LC2015-000525-001 DT 06/09/2016
- Attorney tried to bully judge into accepting DUI guilty plea at arraignment and without appearance of State

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Mahan v. Wismer

- Michael D. Gordon: Rule 14 requires only that judge "ascertain" plea at arraignment
- Then set for Change of Plea in accordance with Rule 17.3
- Do not engage in Rule 17.3 colloquy and "accept" later

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Not Posted
But Online and Notable!

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Aggressive Driving Jury Trial

- State v. Shaerzadeh, LC2012-135141-001 DT 04/22/2013
- McClennen: To violate 28-695 a driver must be speeding, while violating one of the civil traffic statutes listed in the subsections of 28-695(A)(1), and while the person's driving is an immediate hazard to another person or vehicle. ...

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State v. Shaerzadeh

- Unequivocally, this is in the "character of operating a motor vehicle so as to endanger any property or individual, which was a jury-eligible offense at common law." *Derendal*

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IWJP Jurisdiction

- State v. Blair, LC2008-167924-001 DT 10/27/2010
- No testimony that offense took place in precinct
- McClennen: Jurisdiction to enforce any OP issued by any court in any court in the State

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State v. Blair

- 13-3602(A): For the purposes of this section, ***notwithstanding the location of the plaintiff or defendant, any court in this state may issue or enforce an order of protection.***

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State v. Blair

- 13-3602(M): For the purposes of this section, ***any court in this state has jurisdiction to enforce a valid order of protection that is issued in this state and that has been violated in any jurisdiction in this state.***

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State v. Blair

- 13-3602 is a specific statute and is an exception to the terms of the general jurisdiction statute, 22-301
- Motion to Vacate Judgment cannot be filed until judgment and sentence entered

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Returned Partial Payment

- Francen v. Slocum, LC2014-000257-001 DT
08/20/2014
- Tenant made 2 partial payments; LL says mailed back; not cashed
- Harris: No Arizona law on point

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Francen v. Slocum

- Court properly determined LL rejected Tenant's attempt at partial payment:
- LL 1) did not negotiate the proffered money orders;
- and (2) LL returned both money orders within days of receiving them

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Francen v. Slocum

- Court did not have to address Counterclaim at trial because
- Rule 8(a): Unless specifically provided for by statute, no counterclaims, cross claims, or third party claims may be filed in eviction actions. Any counterclaim filed without a statutory basis shall be stricken and dismissed without prejudice

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Black Water, ADA

- The Catherine Townhomes at Scottsdale v. Juniel, LC2017-000165-001 DT 08/17/2017
- Tenant has litany of allegations including she had to buy bottled water because her water was black
- Claimed she needed ADA accommodation to appear telephonically at trial

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Catherine Townhomes v. Juniel

- Harris: Tenant did not raise ADA issue when she was in court for IA
- Litigants must provide court with basis to grant ADA accommodation
- Tenant had no statutory or other authorization for self-help of bottled water

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Catherine Townhomes v. Juniel



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Catherine Townhomes v. Juniel

- Footnote 81: Discolored water is not necessarily harmful since the discoloration may result from sediment in the water mains. Alternately depending on the contaminants in the water, the water may be unsafe. Heavy metals such as mercury, lead, thallium and arsenic may make water unsafe. Defendant did not provide any expert testimony about the quality of the water coming from her tap.

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Returned Keys and Service

- Zeta v. West, LC2014-000534-001 DT 02/12/2015
- Tenants claim returned keys via certified mail July 24; service by post and mail after that date; no returned receipt
- LL says that didn't happen
- Judge denied Motion to Set Aside Default w/o a hearing

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Zeta v. West

- Harris: When the record is not clear, the trial court should hold an evidentiary hearing to determine the facts:
- (1) whether Defendants properly surrendered the premises;
- or (2) the service of process issue.

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Zeta v. West

- Court of Appeals addressed the need for a trial court to hold a hearing where a defendant attacks a judgment as being void because of a lack of proper service.
- *Duckstein v. Wolf*, 230 Ariz. 227, 282 P.3d 428, ¶¶ 18–19 (Ct. App. 2012).

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Contesting Service

- Midland Funding LLC v. Golkhajeh, LC2014-000018-001 DT 02/03/2017
- After default, Def contests Affidavit of Service which claims to have served son
- Def contests only with own affidavit, not one of son
- Does not request hearing

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Midland Funding v. Golkhaje

- Harris: Defendant was obliged to demonstrate his claim by clear and convincing evidence.
- It is a well-established rule of law that the return of service of process can be impeached only by clear and convincing evidence.
- *Eldridge v. Jagger*, 83 Ariz. 150, 152, 317 P.2d 942, 943 (1957).

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Midland Funding v. Golkhaje

- Because (1) there is an implied "verity" in an Affidavit of Service; and (2) the standard is that the appellate court will not substitute its opinion for that of the trial court when weighing competing and conflicting affidavits, this Court will not substitute its opinion for that of the trial court

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OP Evidence; Judicial Bias

- Odom v. Clubb, LC2014-000048-001 DT 04/09/2014
- Def wanted continuance during hearing; wanted to play 5 hour video;
- claimed judicial bias

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Odom v. Clubb

- Harris: Defendant has not provided this Court with any authority indicating a litigant has an untrammelled right to control the course of a hearing and present as much evidence as the litigant may choose to present in the form the litigant chooses.

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Odom v. Clubb

- Claims of bias usually arise from an extra-judicial source and not from a judge's rulings in a case.
- A litigant does not demonstrate judicial bias because the litigant disagrees with the trial court's substantive or procedural rulings or with a specific comment about proposed evidence.

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Videotape Harassment

- Choi v. Fredette, LC2014-000370-001 DT 09/22/2014
- Fredette 1st obtained IAH against Choi
- She then proceeded to videotape her on multiple occasions
- So Choi obtained IAH against her

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Choi v. Fredette

- Harris: While 1st IAH imposed no obligation on Fredette, an existing IAH is not tantamount to leave to harass the Defendant in that IAH
- Little law on harassment via videotaping

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Choi v. Fredette

- A reasonable person could find unsolicited contact with a person who obtained an IAH against them to be annoying.
- Fredette did not show a legitimate purpose for videotaping Choi while she was on her own property or for seeking continued contact with her

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Here's the Videotape



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Excusable Neglect

- Security Credit Services v. Fosbinder, LC2014-000018-001 DT 10/08/2014
- Defense attorney missed 3 PTCs!
- Court struck answer and entered Default Judgment (for 2nd time)
- Def moved to set aside; denied

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Security Credit v. Fosbinder

- Harris: if the default judgment occurs because a party is neglectful or forgetful, the party must suffer the consequences of its own neglect.
- However, where the judgment occurs because of events beyond the control of the litigant or counsel, relief may be afforded.

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Security Credit v. Fosbinder

- Def atty should have realized had an "issue" getting notice from the court
- Def atty's illness was well-documented but was not a sudden, unforeseen event
- Should have considered if his health allowed him to adequately oversee the case

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Security Credit v. Fosbinder

- Also, when requesting to set aside a default, must show a meritorious defense
- With facts!
- Not the “possibility” of a defense

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Notice Default to Attorney

- Nationwide Insurance v. Gomez, LC2014-000191-001 DT 06/16/2014
- Safeway Insurance insured Gomez
- Sent letter to Victim, saying:
- “In the event you wish to pursue litigation, please be advised that our insured will be represented by attorney 😊.”

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Nationwide Insurance v. Gomez

- Victim sued but did not provide complaint or App for Default to attorney 😊
- Default entered
- Motion to Set Aside denied

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Nationwide Insurance v. Gomez

- Harris: Arizona has little in the way of binding case law on when, if, or how Plaintiff's counsel should be aware of a Defendant's representation in the absence of specific notification that a particular attorney is representing the defendant.

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Nationwide Insurance v. Gomez

- The entry of default is governed by Rule 140, JCRCP:
- If the party who files the application knows that the party claimed to be in default is represented by an attorney concerning this lawsuit, the application must also be mailed to that attorney whether or not the attorney has formally appeared in the lawsuit.

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Nationwide Insurance v. Gomez

- Depends on what your definition of "know" is
- Despite receiving letter, representation was "conditional" on litigation being filed
- Thus, def atty did not have "actual knowledge" of atty ☺ but did have "constructive knowledge"

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Nationwide Insurance v. Gomez

- Notes that Def took no action when receiving Complaint or App for Default
- Def had BOP that court abused its discretion in denial
- Def did not meet BOP that Court abused its discretion

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Community Debt

- American Express Centurian Bank v. Kravchenko, LC2014-000191-001 DT 11/02/2016
- Defs married; Wife gets AmEx card in her name only—AmEx specifically denies card to Husband
- AmEx sues Husband as John Doe, substitutes in, gets SJ v. both

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American Express v. Kravchenko

- Harris: a presumption that a debt contracted during a marriage is a community debt
- Any party contending the debt is not a community debt has the burden of overcoming the presumption of the community status and that burden must be demonstrated by clear and convincing evidence

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A.R.S. § 25-215(D)

- Except as prohibited in § 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

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Ratification of Contract

- Phoenix Fence Co v. Rentzel Energy Equipment, LC2017-000108-001 DT 08/08/2017
- Plaintiff did construction work; Def never signed contract
- Plaintiff wanted 18% interest and pre-suit attorney fees per contract

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Phoenix Fence v. Rentzel

- Harris: Under statute of frauds, contract was required to be signed
- However, a person not bound by a contract may ratify the contract and thus become bound by its terms, by affirming the contract through words or deeds. *Young Mines Co. v. Citizens' State Bank*, 37 Ariz. 521, 528-29, 296 P. 247, 250 (1931)

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Phoenix Fence v. Rentzel

- Because Defendant admitted it accepted the fence work, it bound itself to the terms of the contract
- Defendant therefore subject to the contract interest rate
- And pre-suit attorney collection fees (limited by the contract to 33% of amount)

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Questions?

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