

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2008-000188-001 DT

05/14/2008

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT  
S. Bindenagel  
Deputy

STATE OF ARIZONA

CARON L CLOSE

v.

GAYLE T CARRUBBA (001)

GAYLE T CARRUBBA  
10828 W UTOPIA RD  
SUN CITY AZ 85373

REMAND DESK-LCA-CCC  
SCOTTSDALE CITY COURT

**RECORD APPEAL RULE / REMAND**

**Lower Court Appeal No. PR2007081665**

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

On August 27, 2007, the Arizona Department of Public Safety (DPS) mailed an Arizona Traffic Ticket and Complaint to the appellant, Gayle Currubba. The complaint accused the appellant of speeding, a violation of A.R.S. §28-701(A), on August 20, 2007. The complaint stated that her court date to address the charge would take place on September 24, 2007, in the Scottsdale City Court. It further noted that if she failed to appear for the court date, a Complaint and Summons would be served on her by personal service.

The appellant failed to appear and a Complaint and Summons was issued by the Court. On October 29, 2007, Edis Kafedzic, a private process server, filed a certificate of service with

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the Scottsdale City Court indicating that he had served the Complaint and Summons on the appellant.

*On Friday, October 12, 2007 at 11:45 p.m., I personally served the documents as follows: Personally serving the Defendant GAYLE T CARRUBBA. Description: CAUC, Female, Approx. 45 yrs. of age, 5'7" tall, Weighing 130lbs., BRN Eyes, BRN Hair, Documents were served at: 10828 W. UTOPIA RD SUN CITY AZ 85373.*

Kafedzic signed the certificate on October 15, 2007, "under penalty of perjury" that it was "true and correct." The Complaint and Summons informed the appellant that she needed to come to Scottsdale City Court on October 29, 2007, for an arraignment on the violation. The appellant failed to appear and on November 1, 2007, the lower court entered a default judgment against her. A \$239.00 sanction was imposed against her and the lower court advised MVD to suspend her license. The Default Judgment Order was mailed out to the appellant on November 1, 2007.

On November 6, 2007, after receiving the default notice, the appellant filed a motion to set aside the default judgment. In the motion she claimed that she had not been served properly, i.e. out of town and never received the mailing of the court date and was never served by the process server. A hearing was held on December 7, 2007. The appellant and a City Prosecutor were present at the hearing; the process server was not present. The lower court informed the appellant that she had the burden of proving that she was not properly served. The appellant told the court that the age listed on the process server's affidavit was inaccurate. The age listed in the description of the appellant was 45 years of age; the appellant was 60 years old at the time. She pointed out that the process server stated in the certificate that he served the appellant at 11:45 p.m.; the appellant told the court at that time of night she would have been home alone and would not have opened a door to a stranger. She also told the court that if the time was a mistake, i.e. p.m. instead of a.m., she would have been at work and not at home. On cross examination the State elicited from the appellant that only she and her husband live at her residence and that the address listed on the certificate was correct. The State did not have any witnesses testify and simply rested on the statements made by the process server in the certificate of service. The lower court then found that the appellant had not proved her burden and affirmed the default judgment.

The appellant filed a notice of appeal and the matter is now before this Court for decision.

The issue in this case is whether the lower court abused its discretion in failing to set aside the default judgment. In her appellate memorandum, the appellant alleges that the lower court did abuse its discretion when it improperly found that the service of process had been

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served on her by the process server. She claims that the lower court never had jurisdiction of her because she had never been served.

In reviewing a trial court's decision on a motion set aside a judgment this court must determine whether there has been a clear abuse of discretion. *Bickerstaff v. Denny's Restaurant, Inc.*, 141 Ariz. 629, 688 P.2d 637 (1984). Review is restricted to questions raised by the motion to set aside. *Hirsch v. National Van Lines, Inc.*, 136 Ariz. 304, 666 P.2d 49 (1983). Absent a clear showing of an abuse of discretion at the time of the hearing, or arbitrariness or unreasonableness, this court has held that the trial court's refusal to vacate a judgment must stand. *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.*, 19 Ariz.App. 342, 507 P.2d 681 (1973).<sup>1</sup> Additionally, “[i]f a court's decision is based upon ‘a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference,’ we will not second-guess or substitute our judgment for that of the trial court.” *General Elec. I*, 172 Ariz. at 188, 836 P.2d at 401, quoting *City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).<sup>2</sup>

“A private process server is an officer of the court.”<sup>3</sup> “In this state, the return may be impeached by a party if clear and convincing evidence of the return's falsity is presented to the court.”<sup>4</sup> The burden of proof was therefore on the appellant to prove by clear and convincing evidence that she was never served.

In this case, the appellant presented facts that questioned the process server's statement in the certificate as to whether he actually affected service of process. A fifteen year age discrepancy raises red flags because the process server was given a description of the appellant (to include her date of birth) and her address in order to serve her. Additionally the time of night he claimed to have served her is also questionable. The lower court had no evidence that could address those two issues because the process server was not present to address them. The State simply rested on the statement in the certificate. Based on the evidence before the lower court, this Court finds that it abused its discretion in not setting aside the default judgment. There was clear and convincing evidence that the service was not completed as sworn to in the certificate of service.

In her memorandum the appellant addresses a matter that was not raised in the lower court. She argues that the lower court did not have subject matter jurisdiction over her based on the signature (of the DPS representative) listed on the Arizona Traffic Ticket and Complaint.

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<sup>1</sup> *Goglia v. Bodnar*, 156 Ariz. 12, 749 P.2d 921 (Ariz.App. Div. 1 1987).

<sup>2</sup> *Hilgeman v. American Mortg. Securities, Inc.*, 196 Ariz. 215, 994 P.2d 1030 (Ariz.App. Div. 2 2000).

<sup>3</sup> *A.R.S. § 11-445(I)*.

<sup>4</sup> *Marsh v. Hawkins*, 7 Ariz.App. 226, 437 P.2d 978 (1968.)

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“An appellate court's review is limited to the record before the trial court.”<sup>5</sup> This Court therefore will not consider the subject matter jurisdiction argument made by the appellant.

IT IS ORDERED dismissing the default judgment and sanction imposed by the Scottsdale City Court.

IT IS FURTHER ORDERED remanding the matter to the Scottsdale City Court for all further appropriate proceedings consistent with this ruling.

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<sup>5</sup> *GM Development Corp. v. Community American Mortg. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (Ariz.App. Div. 1, 1990).