

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2010-000890-001 DT

04/26/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

T. Melius

Deputy

AMER ALSHEMARI

AMER ALSHEMARI

3655 W MYRTLE

PHOENIX AZ 85051

v.

DINH TUCUOHN (001)

DINH TUCUOHN

4819 N 35TH AVE

PHOENIX AZ 85017

ENCANTO JUSTICE COURT

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2009355400**

Defendant Appellant Din Tucuoehn (Defendant) was found liable for breach of contract by the Encanto Justice Court. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

**I. FACTUAL BACKGROUND.**

Amer Alshemari, Plaintiff Appellee, (Plaintiff) sued Defendant alleging: "(1) Received money to pay shop insurance for two years never insured Amer Alshemari or Sami's Auto; (2) Refused to refund money or pay for damages; (3) Made new lease without my consent."<sup>1</sup> The underlying basis for Plaintiff's complaint stemmed from a burglary at Plaintiff's auto repair shop where a van belonging to Plaintiff's customer was stolen. Plaintiff ultimately reimbursed his customer \$10,000.00 for the cost of the van.<sup>2</sup> Plaintiff alleged he believed Defendant was responsible for providing insurance that would have protected Plaintiff and his business from liability and maintained he had reimbursed Defendant for the cost of the insurance. Defendant, the leasing agent for the owner of the premises, filed an answer and a counterclaim. Defendant requested damages of \$6,292 as "unearned free rent and fire insurance premium plus court costs and other

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<sup>1</sup> Complaint; R.T. of 5/27/2010.

<sup>2</sup> Plaintiff's wife testified the Plaintiff later recovered the van and sold it for \$3000.00. R.T. at 4:20.

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compensation.”<sup>3</sup> At trial, Defendant argued the insurance policy insured the premises for fire damage but did not cover liability. Defendant maintained Plaintiff was responsible for purchasing insurance for his business if he wanted liability protection.

Defendant actively participated in the trial. Both during trial<sup>4</sup> and following the court’s judgment,<sup>5</sup> Defendant stated he was not the owner of the building and was the “wrong person.”<sup>6</sup>

The trial court found that Plaintiff paid for (reimbursed) the cost of purchasing both fire and liability insurance and granted Plaintiff judgment for \$8,990.00.<sup>7</sup> This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

*A. Did Appellee Properly Present His Issues on Appeal.*

Appellee failed to file a written memorandum in this matter. Rule 8 (a) SCRAP (Superior Court Rules of Appellate Procedure—Civil provides:

In cases where the Appellee is not represented by counsel, an original and one copy of the appellee’s memorandum shall be filed within 30 calendar days of the filing date of the appellant’s memorandum. . . . If no appellee or cross Appellee memorandum is filed, the matter shall be deemed submitted on the record and the appellant’s or cross-appellant’s memorandum. Non-filing of an appellee or cross-Appellee memorandum shall not constitute confession of error.

*B Did the Trial Court Lack Subject Matter Jurisdiction.*

Defendant argues Encanto Justice Court lacks subject matter jurisdiction over this contract dispute. Subject matter jurisdiction involves a court’s power to hear a case. While Defendant is correct that lack of subject matter jurisdiction can be raised at any time,<sup>8</sup> justice courts have the jurisdiction to hear and decided civil actions when the amount involved is \$10,000 or less. A.R.S. § 22–201. Plaintiff’s claim and judgment is for less than \$10,000. Defendant’s claim lacks merit.

*C Did the Trial Court Lack Personal Jurisdiction*

Defendant claims Plaintiff should have sued someone else and argues lack of personal jurisdiction in his memorandum.<sup>9</sup> Yet Defendant (1) filed a counterclaim against Plaintiff; and (2) actively participated in the trial. Indeed, the trial progressed for approximately 1 hour of testi-

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<sup>3</sup> Defendant’s Answer to Complaint and Counterclaim 6/24/2009.

<sup>4</sup> *Id.* at 4:33.

<sup>5</sup> *Id.*, at 4:47.

<sup>6</sup> *Id.* at 4:33.

<sup>7</sup> This sum included the loss on the van as well as the deposit return. Civil Judgment 5/27/2010.

<sup>8</sup> *State v. Chacon*, 221 Ariz. 523, 525-26, 212 P.3d 861, 863-64, (Ct. App. 2009).

<sup>9</sup> Appellant Memoranda Statement of the Case Statement of Facts Points and Authorities dated September 24, 2010, #10.

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mony—trial began at 3:33 P.M. but Defendant did not challenge his status until 4:20— before Defendant mentioned he was the “wrong person.”<sup>10</sup>

Defendant misconstrues personal jurisdiction. Courts find personal jurisdiction over a defendant when it is reasonable and just for a court to hear a case about a person because the person has contacts with the state where the court is located. It is reasonable for an Arizona court to hear a case about Defendant because he conducts business in Arizona. Furthermore, any challenge to personal jurisdiction must be raised as an affirmative defense and failure to raise this defense acts as a waiver. *Arizona Tile, L.L.C. v. Berger*, 223 Ariz. 491, 224 P.3d 988 ¶ 12 (Ct. App. 2010). In *Montano v. Scottsdale Baptist Hospital, Inc.* 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978), our Supreme Court quoted—with approval— from the Iowa case of *Lonning v. Lonning*.<sup>11</sup>

. . . A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court. . . .

By the Rules of Civil Procedure, Rule 5(3), “The filing of an answer shall constitute an appearance.” Thus, the appearance of the defendants has the same effect as a timely and valid service of process.” . . .<sup>12</sup>

The Encanto Justice Court can exercise personal jurisdiction over Defendant.

*D. Did the Trial Court Abuse Its Discretion in Allowing Plaintiff’s Wife To Testify.*

Defendant alleges there was “Misconduct by Attorney Not in Record at the Court.” Defendant provides no support for his claim and the record does not support the presence of an attorney. Instead, the record indicates Plaintiff, Plaintiff’s wife, and Defendant were sworn at the beginning of trial and Plaintiff’s wife actively participated in the case.

Defendant failed to properly address any challenge to this witness in his appellate memorandum. Merely mentioning an argument is not enough to support a claim. Opening briefs must present significant arguments, supported by authority that sets forth an appellant’s position on the issue raised. The court is “not required to assume the duties of an advocate and search voluminous records and exhibits” to substantiate a party’s claim. *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984). Defendant has not provided this court with any reason why Plaintiff’s wife would not be able to testify.

*E. Did Plaintiff Present Sufficient Evidence To Support His Claim.*

Defendant contends Plaintiff did not present sufficient evidence to support his claim he paid for both liability and fire insurance. This issue relates to the sufficiency of the evidence. When reviewing the sufficiency of the evidence, the appellate court views the facts in the light

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<sup>10</sup> R.T. at 4:20.

<sup>11</sup> 199 N.W.2d 60, 62 (Iowa 1972).

<sup>12</sup> 119 Ariz. at 452, 581 P.2d at 686.

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most favorable to the trial court's decision. "We resolve any conflicting evidence in favor of sustaining the verdict." *State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009).

The parties presented conflicting evidence. Plaintiff and his wife testified the insurance premiums were intended to reimburse the costs of providing fire and liability insurance while Defendant testified the premiums were intended to only cover the cost of fire insurance. The Arizona Supreme Court, in addressing the role of an appellate court in reviewing conflicting testimony said:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

*State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1224 n. 18 (1983) (citation omitted). Since the issue in this case requires the appellate court to assess the conflicting testimony and evidence about the insurance coverage, it is not appropriate for this Court to "substitute [its] judgment for that of the trial judge."

*F. Did Defendant Properly Present His Issues for Appeal.*

Defendant has submitted a memorandum but fails to cite relevant authority. This memorandum does not comply with Rule 8(a)(3), Super. Ct. R. App.—Civil requiring memoranda to include a "concise argument setting forth the legal issues presented with citation of authority."

Furthermore, the appellate court normally does not consider any issue or evidence not first raised at the trial court. "Thus, although Arizona appellate courts have the discretion to hear arguments first raised on appeal, we rarely exercise that discretion." *Harris v. Cochise Health Systems*, 215 Ariz. 244, 160 P.3d 223 ¶ 17 (Ct. App. 2007) In *Town of South Tucson v. Board of Sup'rs of Pima County*, 52 Ariz. 575, 582, 84 P.2d 581, 584 (1938)<sup>13</sup>, our Supreme Court ruled:

. . . One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 3 C. J. 689. The reason for the rule is plain. If the question had been raised below, the situa-

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<sup>13</sup> *Rubens v. Costello*, 75 Ariz. 5, 8, 251 P.2d 306, 308 (1952).

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tion might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. . . . Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it.

The current case is not of such importance as to affect the general public and therefore does not fall outside the rule precluding Defendant from raising issues for the first time on appeal.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Encanto Justice Court's decision was correct and supported by substantial evidence.

**IT IS THEREFORE ORDERED** affirming the judgment of the Encanto Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the Encanto Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS  
JUDICIAL OFFICER OF THE SUPERIOR COURT

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