

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

VELDA ROSE ESTATES HOME OWNERS  
ASSOCIATION

CHARLES E MAXWELL

v.

EDITH POGGI (001)

EDITH POGGI  
4132 N 3RD AVE #2  
PHOENIX AZ 85013

JOSEPH I VIGIL  
MESA JUSTICE CT-EAST  
REMAND DESK-LCA-CCC  
MCSO CIVIL DIVISION  
111 S 3RD AVE  
2ND FLOOR  
PHOENIX AZ 85003

MINUTE ENTRY

**Lower Court Case No. CC2012-132551.**

Plaintiff-Appellee Velda Rose Estates Homeowners' Association (Plaintiff) filed a procedural motion—"Procedural Motion—Refer To Superior Court—Motion To Dismiss" dated February 21, 2014,—requesting that this Court dismiss Defendant-Appellant (Defendant) Edith Poggi's appeal because the Defendant filed an untimely Notice of Appeal. Plaintiff alleged that Defendant's December 2, 2013, Notice of Appeal was filed more than 14 days after the East Mesa Justice Court entered Judgment.

Defendant filed a second Notice of Appeal on December 9, 2013, and asked that this Court find her December 2, 2013, Notice of Appeal timely and that the East Mesa Justice Court erred when it dismissed her appeal on December 3, 2013. Because both of these requests relate to the issue of this Court's jurisdiction to consider the appeal, this Court will, in the interest of judicial economy, consider the arguments of both parties in this Minute Entry ruling.<sup>1</sup> Defendant also

---

<sup>1</sup> Defendant's Notice of Appeal is essentially a procedural motion to allow the appeal. However, Defendant did not follow the requirements for a procedural motion pursuant to Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.), Rule 8(c). This Court waives strict compliance with Rule 8, SCRAP—Civ. in the interest of fairness and pursuant to Rule 2, SCRAP—Civ.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

filed a “Response To Procedural Motion To Motion To Dismiss”. In that Response, Defendant requested that this Court waive the time limits for filing a Notice of Appeal in the event this Court determines Defendant’s December 2, 2013, Notice of Appeal was untimely.

For the reasons stated below, the Court denies (1) Defendant’s request to waive the time limits for filing a Notice of Appeal; and (2) the Plaintiff’s Procedural Motion.

I. FACTUAL BACKGROUND.

For purposes of this procedural motion, the underlying facts are both brief and essentially uncontested. Plaintiff initially filed a Complaint to collect past due HOA assessments and obtained a summary judgment from the trial court. Defendant filed a Motion To Set Aside the Judgment more than six months after the summary judgment was entered. The trial court denied this Motion on November 13, 2013. The mailing certificate is dated November 14, 2013. The trial court’s Calendar Events and Hearings lists both dates as the date for the Judgment.

Plaintiff filed a procedural motion and incorporated arguments from its appellate memorandum as the basis for the procedural motion. Defendant filed a responsive pleading; a separate—and second—Notice of Appeal; and also addressed this issue in her appellate memorandum. This Court has jurisdiction to consider these motions pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A) and Superior Court Rules of Appellate Procedure—Civil, Rule 8(c).

II. ISSUES:

A. *May This Court Waive The Time Limits For Filing An Appeal.*

Defendant requested that this Court waive the time limits for filing a Notice of Appeal in the interest of justice. This Court has no power to grant such request. Although this Court may waive most of the rules in the interest of justice, the single exception to this is the time to file the Notice of Appeal. SCRAP—Civ. Rule 2 states:

Except as otherwise provided in these rules, and excepting the requirement of timely filing of the notice of appeal and cross-appeal, a trial or Superior Court may, for good cause shown, suspend the requirements or provisions of any of these rules in a particular case, and may order proceedings in accordance with its decision. These rules shall be liberally construed in the furtherance of justice.

SCRAP—Civ., Rule 4 establishes the time limit for filing a notice of appeal. Rule 4 states—in relevant part:

The notice of appeal shall be filed with the trial court within 14 calendar days after the entry of the order, ruling or judgment appealed from . . . .

This rule incorporates the mandatory language “shall”. As stated in *State v. Lewis*, 224 Ariz. 512, 233 P.3d 625, ¶ 17 (Ct. App. 2010) aff’d, 226 Ariz. 124, 244 P.3d 561 (2011):

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

A general principle of statutory construction is that the use of the word ‘may’ generally indicates a permissive provision; in contrast, the use of the word ‘shall’ typically indicates a mandatory provision.

Defendant had a 14 day window in which to file her Notice of Appeal. If Defendant failed to comply with this requirement, this Court cannot, under our rules, waive her compliance.

*B. Did Defendant Timely File Her Notice Of Appeal And The Trial Court Err When It Ruled Her Appeal Was Abandoned.*

The central question before this Court is whether Defendant timely filed her Notice of Appeal. To determine if the Notice of Appeal was timely filed, this Court must consider not only the date the trial court signed the Judgment, but also the date when the Judgment was entered. Rule 1(f), SCRAP–Civ., defines the Entry of Judgment as:

“Entry of judgment” as used in these rules, shall mean a judgment which has been signed by the judge and filed with the court.

At Justice Court, often the only record of when a filing occurs appears on the Calendar Events and Hearings since, unlike Superior Court, the Justice Court rulings do not include a file stamp indicating the date and time for the entry of the judgment.

Justice courts are required to record their judgments. The applicable statute states:

The judgment shall be *recorded at length* in the docket *and* signed by the justice of the peace. The judgment shall clearly state the determination of the rights of the parties, who shall pay the costs, and shall direct issuance of such process as necessary to carry the judgment into execution.

A.R.S. § 22–242 (emphasis added). The language of this statute lists a two-step procedure: recording at length in the docket and signing by the justice of the peace.<sup>2</sup> This is reminiscent of the two steps required by A.R.C.P. Rule 58(a). SCRAP—Civ. Rule 4, specifically refers to the “*entry* of the order, ruling, or judgment appealed from” and not the *signing* of the judgment (emphasis added).

In this case, the trial court signed the Judgment on November 13, 2013. The signed judgment was not mailed until November 14, 2013, as indicated by the mailing certificate on the Judgment. The single day difference is crucial because if the Judgment had been both signed and entered on November 13, the time to file a Notice of Appeal would have expired 14 days later on November 27. However, if the Judgment was not entered until November 14, 2013—the date indicated on the mailing certificate—the final date to file would have been November 28, 2013. The courts were closed on November 28, 2013, in honor of the Thanksgiving Day holiday. The courts were also closed the following day—November 29, 2013. November 30, 2013, was a

---

<sup>2</sup> The word “and” is a conjunction. Conjunctions are used to connect words, phrases, clauses or sentences. En.wikipedia.org/wiki/Grammatical\_conjunction.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

Saturday and December 1, 2013, was a Sunday. Because the courts were closed from November 28, 2013, until December 2, 2013, the final date for Defendant to file her Notice of Appeal would have been December 2, 2013, assuming the Judgment was entered on November 14, 2013. The trial court's Calendar Events and Hearings does little to clarify the date for the entry of the Judgment as both November 13, and November 14, are listed for the dates of the Judgment. The Calendar Events and Hearings reflect the following Event Note:

APPEAL AS TO ORDER OR FINAL JUDGMENT ENTERED ON 11-13-  
13 ALSO DATED 11-14-13. COPIES TO BOTH PARTIES 12-2-13.

Because the trial court record indicates a date of 11-14-2013 as a date for the entry of judgment, this Court finds Defendant's Notice of Appeal was timely.

The Arizona Supreme Court specifically addressed the issue of when the time begins to run on a judgment for purposes of appeal and noted the procedures for obtaining a judgment in Justice Court differ significantly from those used in Superior Court. The Supreme Court stated the Justice of the Peace is required to:

. . . set forth the terms of the judgment in the docket and sign it. The judgment is entered at the time he signs the docket, A.R.S. § 22-242, and the aggrieved party has 10 days in which to perfect his appeal

*DNB Const., Inc. v. Superior Court*, 125 Ariz. 61, 62, 607 P.2d 380, 381 (1980). The Supreme Court continued:

We note that, because of the short time (10 days) between the entry of judgment and the time within which the aggrieved party must perfect his appeal, when the Justice of the Peace elects to defer the decision until after trial and to notify the parties by mail, the aggrieved party may find it almost impossible to exercise his right of appeal. He gets no solace from Rule 6(e) of the Rules of Civil Procedure, 16 A.R.S., which allows an additional time after service of mail, for the Rule specifically states, "This rule has no application to the mailing of notice of entry of judgment." We can envision situations when the 10 day time limit could operate as a flat denial of a party's right to appeal; for example, mail might be delayed so that the party does not receive notice of judgment within 10 days.

A party should be able to rely upon the mail for notice and should not be required to contact the Justice of the Peace every day to ascertain if judgment has been entered. We believe that upon a proper showing that notice of judgment was received so late as to make appeal within the statutory time limit impossible, that the Superior Court could relieve the appealing party from strict application of the 10 day rule.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

*DNB Construction v. Superior Court*, 125 Ariz. at 62– 63, 604 P.2d at 381–382. The Arizona Court of Appeals noted the difference between making a judgment and entering a judgment and held:

There are several cases from the Arizona Supreme Court which make it clear that ‘entry of judgment’ and ‘rendition of judgment’ are not synonymous. In the American Surety Co. case just cited, the distinction is well drawn:

‘The rendition of a judgment is the act of the court in pronouncing its judgment, and differs from the entry or filing of the judgment in that the former act is the declaration of the court from the bench announcing its decision, while the entry is the act of the clerk in writing it upon the records of the court. . . . rendition is generally, if not always, an oral act by the court from the bench, . . .’

*Fridena v. Maricopa Cnty.*, 18 Ariz. App. 527, 531, 504 P.2d 58, 62 (1972) [citations omitted]. The Arizona Supreme Court recognized the two prong approach and held the dates reflected in the civil docket as the date for the entry of judgment should be the actual date on which the clerk is making the notation.

The clerk, when he enters an order or judgment in the docket, is obliged to show the date that he does it; that is, the date that he is actually entering (noting) the order or judgment. When the clerk notes an order or judgment in the civil docket he is not privileged to date it back to the date that the judge ordered the entry. The dates reflected in the docket should be the actual dates on which the clerk is making the notation or entry.

Judges of the Superior Court should instruct the Clerks of Superior Court that when they make any notation or entry in the civil docket of orders denying motions for new trial and judgments, that the date ascribed to the notation (entry) should reflect the actual date thereof. The civil docket is a public record and should speak the truth. The effective date of such orders and judgment is the date of notation in the civil docket. In the instant case the appeal was timely taken, notice of appeal having been given within sixty days from the entry of the order denying the motion for a new trial.

*Harbel Oil Co. v. Steele*, 81 Ariz. 104, 105-06, 301 P.2d 757, 758 (1956). Similarly, the Arizona Supreme Court held: “The time of entry is the day when the clerk makes the notation in the civil docket.” *Jackson v. Sears, Roebuck & Co.*, 83 Ariz. 20, 23, 315 P.2d 871, 873 (1957). The Arizona Court of Appeals quoted with approval the State Bar Committee Notes to Amended Rule 58(a) and held the purpose of the rule was to fix a date “by reference to the date of its filing.” The Court of Appeals stated:

....  
....

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

The spirit of Rule 58(a) is clear:

“The primary purpose of the amended rule is to formalize by a writing all judgment, decrees and appealable orders, and to fix the crucial act of entry of every judgment, decree or appealable order by reference to the date of its filing . . .” (State Bar Committee Notes to Amended Rule 58(a).)

In order to give full effect to this purpose, such judgments should stand out loud and clear so that the practitioner can ascertain their rendition, they should not be hidden away in a preamble to a judgment upon and entirely separate point.

*Apache E., Inc. v. Means*, 124 Ariz. 11, 14, 601 P.2d 615, 618 (Ct. App. 1979).

The “crucial act of entry” is not less important in Justice Court even if it takes the form of “recording at length in the docket.” This was recognized in the Justice Court Rules of Civil Procedure, Rule 139, which specifically adopts language similar to that used in A.R.C.P. Rule 58(a) and requires judgments to be signed by the judge and filed and entered by the court.<sup>3</sup>

Parties have a right to appeal from adverse judgments. This right is compromised if the party is not apprised of an adverse judgment or if the time to appeal is shortcut. Because the time for filing a Notice of Appeal is (1) jurisdictional and (2) not subject to waiver—SCRAP—Civ. Rule 2—parties must have the full 14 days allowed by SCRAP—Civ. The statutes and rules require two separate acts—(1) signing; and (2) recording. In this case, the recording part occurred either on November 13, 2013, or November 14, 2014. The Calendar Notes are not specific and leave the date ambiguous. Because the right to appeal is so important, this Court determines that for purposes of this case, the entry did not occur until November 14, 2013. Defendant had 14 days in which to file her appeal. The 14 day period expired on November 28, 2013. SCRAP—Civ. Rule 4(a). As stated, November 28, 2013, and November 29, 2013, were legal holidays in Maricopa County and the courts were closed. JCRCP, Rule 115, addresses how to calculate time. JCRCP, Rule 115(a)(3) excludes Saturdays, Sundays, and legal holidays from the calculation.

Last day. The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

December 2, 2013, was the last day in which Defendant could file her Notice of Appeal. Defendant filed her Notice of Appeal on that date. Defendant’s appeal was timely. This determination is in accord with the spirit of the Arizona Supreme Court’s holding in *DNB Const., Inc. v. Superior Court*.

---

<sup>3</sup> The A.R.C.P. governed suits in Justice Court prior to the enactment of the Justice Court Rules of Civil Procedure, promulgated August 30, 2012, and effective Jan. 1, 2013. Rule 101(d) of the new Justice Court Rules states:

**Relationship of these rules to the Arizona Rules of Civil Procedure.** These rules replace the Arizona Rules of Civil Procedure (“the superior court rules”). Differences in language between a justice court rule and a superior court rule are intended only to make the justice court rule simpler and easier to understand. . . .

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000179-001 DT

05/02/2014

We believe that upon a proper showing that notice of judgment was received so late as to make appeal within the statutory time limit impossible, that the Superior Court could relieve the appealing party from strict application of the 10 day rule.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Defendant timely filed her Notice of Appeal.

The trial court has already forwarded Appellant's Memorandum, Appellee's Answering Memorandum and Appellant's Reply Brief to this Court.

IT IS ORDERED that all future filings in this matter shall be filed with the Clerk of the Superior Court.

IT IS FURTHER ORDERED pursuant to Rule 8(c)(4) of Superior Court Rules of Appellate Procedure—Civil the East Mesa Justice Court is to transfer the record on appeal on an expedited basis to this Court within 15 days from the filing of this minute entry.

IT IS FURTHER ORDERED for any future filings that are filed with the Clerk of the Superior Court, the party **MUST** provide one copy of that filing to this Division.

IT IS FURTHER ORDERED that the Appellant nunc pro tunc has leave to file a Reply Memorandum (Reply Brief).

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

050220141040

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.