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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/02/2012  
RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

TIMOTHY RUSSO and ANNETTE RUSSO, ) No. 1 CA-CV 11-0023  
husband and wife; on behalf of )  
themselves and as parents and ) DEPARTMENT A  
next best friend of SOPHIA RUSSO, )  
a minor, and SARAH RUSSO, a ) **MEMORANDUM DECISION**  
minor, )  
) (Not for Publication -  
Plaintiffs/Appellants, ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
v. )  
)  
JOSE ARSENIO RAMIREZ ALONSO and )  
JANE DOE ALONSO, husband and )  
wife, )  
)  
Defendants/Appellees. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-050365

The Honorable Linda H. Miles, Judge

**REVERSED AND REMANDED**

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By Thomas A. Germuska, Jr.	
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**T I M M E R**, Presiding Judge

¶1 Timothy Russo and Annette Russo appeal the superior court's judgment dismissing their complaint against Jose Arsenio Ramirez Alonso for failing to serve him with process pursuant to Arizona Rule of Civil Procedure ("Rule") 4.2(i). For the following reasons, we reverse and remand.

**BACKGROUND**<sup>1</sup>

¶2 In August 2008, the Russos were involved in a two-vehicle accident on Interstate 17 in Phoenix. They noted the license plate number of the other vehicle, which departed before a Department of Public Safety officer arrived. After the Russos related the plate number to the officer, he identified the other vehicle as one registered to Alonso, who reportedly resided on 30th Drive in Phoenix.

¶3 In September and October, the Russos' attorney sent letters to Alonso at the 30th Drive address requesting both the identity of the driver at the time of the accident and pertinent insurance information. Alonso responded later in October by sending an insurance premium bill and identification card reflecting coverage at the time of the accident. Both documents listed Alonso's address as being on 27th Avenue in Phoenix. The

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<sup>1</sup> Alonso asserts the Russos improperly attached exhibits to their opening brief and drew improper inferences from them. He asks us to strike or disregard various statements. We review only the documents that appear in the superior court record and draw our own inferences. We therefore deny the motion as moot.

attorney then contacted the insurance company, which responded it would investigate the matter.

¶14 In early November, Alonso sent the Russos' attorney his vehicle registration information for the period June 2008 through June 2010 and a signed Affidavit of Non-Insurance stating his vehicle was not insured at the time of the accident.<sup>2</sup> Both documents listed the 30th Drive address as his residence.

¶15 Approximately fourteen months later, on March 18, 2010, the Russos sued Alonso for personal injuries stemming from the accident and provided the summons and complaint to a process server along with the 30th Drive and 27th Avenue addresses. The process server attempted service on April 5 but was told by Alonso's purported brother that Alonso had "moved to Mexico" the previous month.<sup>3</sup> The next week, the Russos' attorney informed Alonso's insurance company that Alonso had "[a]pparently . . . moved to Mexico" and asked if the company was authorized to accept service for Alonso. The company responded it lacked authority to accept service but related that, to its knowledge, Alonso resided at the 27th Avenue address. The Russos' attorney next ordered a skip trace, which revealed that the post office was continuing to deliver Alonso's mail at the 30th Drive

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<sup>2</sup> The insurance company later took the opposite position, informing the Russos' counsel that coverage was available.

<sup>3</sup> The record is unclear whether the process server attempted service at one or both provided addresses.

address and "proprietary computer databases" reflected that Alonso lived at that address.

¶16 On May 26, the process server again attempted service at the 30th Drive address but was told by relatives that Alonso was "in Mexico." The Russos then served Alonso by publication in the Arizona Business Gazette; service was completed July 29.

¶17 On September 7, Alonso appeared for the limited purpose of moving to dismiss the complaint pursuant to Rule 12(b)(5) for insufficient service of process to confer personal jurisdiction. He argued the Russos did not properly serve him because they failed to serve him in compliance with Rule 4.2(i), which sets forth how to serve persons in a foreign country. After the Russos filed a response and Alonso replied, the superior court granted the motion, dismissing the complaint without prejudice stating only that it agreed with Alonso's argument.<sup>4</sup> This timely appeal followed.

#### DISCUSSION

¶18 We review the superior court's dismissal for lack of personal jurisdiction de novo. *Bohreer v. Erie Ins. Exchange*, 216 Ariz. 208, 211, ¶ 7, 165 P.3d 186, 189 (App. 2007).

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<sup>4</sup> We have jurisdiction because the dismissal was entered after the statute of limitations had run. See Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(3) (West 2012) (renumbered from A.R.S. § 12-2101(D), with no material revisions since the cause of action arose); *Garza v. Swift Transp. Co.*, 222 Ariz. 281, 284, ¶¶ 15-16, 213 P.3d 1008, 1011 (2009).

Likewise, we review de novo the interpretation of court rules. *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 456, ¶ 16, 224 P.3d 950, 953 (App. 2010).

¶9 The Russos argue the superior court erred by dismissing the complaint because Rule 4.1, which applies to service of process within Arizona, applies to assess the sufficiency of service on Alonso, and service by publication was proper under Rule 4.1(n). Alonso counters that because he resided in Mexico at the time service was attempted, Rule 4.2(i) and our supreme court's decision in *Cardona v. Kreamer*, 225 Ariz. 143, 235 P.3d 1026 (2010) required service through Mexico's Ministry of Foreign Affairs as the exclusive means of service upon a Mexican resident. Therefore, he argues, service by publication in Arizona was insufficient.

¶10 Rule 4.2(i) governs service upon individuals residing in foreign countries and permits service "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention." Rule 4.2(i)(1). In *Cardona*, our supreme court analyzed the interplay between Rule 4.2(i) and the terms of Mexico's accession to the Hague Service Convention ("Convention") and held that the exclusive means of service upon a Mexican resident, as established through the Convention, is through the Mexican Ministry of Foreign Affairs. *Cardona*, 225 Ariz. at 147, ¶ 16, 235 P.3d at 1030. But the

court further held that the Convention does not apply "where the address of the person to be served with the document is not known." *Id.* at 145, ¶ 8, 235 P.3d at 1028 (quoting Hague Service Convention art. 1, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163). Rule 4.2(i)(2) and (3) authorize alternate means of service if "the applicable international agreement allows other means of service." Rule 4.2(i)(2). Although the Convention sets forth such means, it permits member-states to object to alternate service. *Cardona*, 225 Ariz. at 145, ¶ 10, 235 P.3d at 1028. Because Mexico has registered such an objection, no alternate means for service in Mexico exist. *Id.* at 146, ¶ 11, 235 P.3d at 1029.

¶11 The record does not reflect that the Russos knew where Alonso was located in Mexico at the time they attempted to serve him with the complaint. For that reason, the Convention did not apply. *Id.* at 145, ¶ 8, 235 P.3d at 1028. Additionally, in light of Mexico's objection to alternate means of service authorized by the Convention, no other means of service existed for the Russos to serve Alonso in Mexico. For these reasons, the Russos were not required to serve Alonso pursuant to Rule 4.2(i), and the superior court erred by dismissing the complaint on this basis.

¶12 Alonso alternatively argues the superior court properly dismissed the complaint because the Russos failed to

comply with the requirements for service by publication.<sup>5</sup> But this argument was not the basis for Alonso's motion to dismiss and the court did not explicitly address it in the dismissal order.<sup>6</sup> Alonso's sole argument in his motion was that because the Russos failed to comply with Rule 4.2(i) by failing to serve Alonso through the Mexican Ministry of Foreign Affairs, service by publication was improper. Because we "will generally not consider an issue on appeal that was not first presented to the trial court for resolution," *Maricopa County v. State*, 187 Ariz. 275, 281, 928 P.2d 699, 705 (App. 1996), we do not consider whether the Russos were entitled to serve Alonso by publication. Resolution of this issue must be made initially by the superior court after consideration of a sufficiently developed record regarding Alonso's residency and the Russos' efforts to locate him. See *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73-74, ¶ 15, 90 P.3d 1236, 1239-40 (App. 2004) (explaining the

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<sup>5</sup> The parties dispute whether the applicable publication rule is Rule 4.2(f) or Rule 4.1(n), but we need not resolve this issue as our decision is not dependent on identifying the applicable rule.

<sup>6</sup> Replying to the Russos' argument that service by publication was sufficient under the facts of this case, Alonso replied that their inability to find him in Arizona "[did] not meet the diligency requirements of service by publication" as they never attempted to find Alonso outside Arizona. But arguments raised for the first time in a reply are untimely and do not preserve the issues for appeal. *Westin Tucson Hotel Co. v. Ariz. Dep't of Revenue*, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997) (holding arguments raised for first time in trial court reply deemed waived on appeal).

availability of service by publication depends in relevant part on whether the plaintiff exercised due diligence in attempting to locate the defendant and serve him personally).

¶13 For the foregoing reasons, the superior court erred by dismissing the complaint for the Russos' lack of compliance with Rule 4.2(i). We therefore reverse and remand for additional proceedings.<sup>7</sup>

#### **ATTORNEYS' FEES ON APPEAL**

¶14 The Russos request an award of attorneys' fees on appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (West 2012).<sup>8</sup> This action does not "aris[e] out of a contract" and the Russos do not allege Alonso's defense was groundless and in bad faith. A.R.S. § 12-341.01(A), (C). Consequently, the Russos are not entitled to an award of attorneys' fees. As the successful party on appeal, however, the Russos are entitled to costs pursuant to A.R.S. § 12-341

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<sup>7</sup> To the extent the Russos alternately contend they sufficiently served Alonso solely by notifying the insurance company of the suit, we disagree. See *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 157, ¶ 59, 213 P.3d 288, 306 (App. 2009) (stating court will address issues likely to arise on remand). Alonso's insurer is not a party to the Russos' lawsuit, and a nonparty insurer is not the insured's agent for purposes of service of process. *Pargman v. Vickers*, 208 Ariz. 573, 581, ¶ 42, 96 P.3d 571, 579 (App. 2004).

<sup>8</sup> Absent material revisions after the relevant date, we cite a statute's current version.



subject to their compliance with Arizona Rule of Civil Appellate Procedure 21.

**CONCLUSION**

¶15 For the foregoing reasons, we reverse the superior court's dismissal order and remand for further proceedings.

/s/  
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/  
John C. Gemmill, Judge

/s/  
Margaret H. Downie, Judge