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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MELINDA GABRIELLA VALENZUELA,) 1 CA-CV 11-0612
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
DAVID ALLEN GRIFFITH; VALENTINO OTERO,) - Rule 28, Arizona
) Rules of Civil
Defendants/Appellees.) Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-019804

The Honorable John A. Buttrick, Judge

REMANDED WITH INSTRUCTIONS

Melinda Gabriella Valenzuela, *In Propria Persona* Florence

N O R R I S, Judge

¶1 Melinda Gabriella Valenzuela timely appeals the superior court's dismissal without prejudice¹ of her lawsuit

¹Ordinarily, a dismissal without prejudice is not appealable. See *Garza v. Swift Transp. Co., Inc.*, 222 Ariz. 281, 284, ¶ 15, 213 P.3d 1008, 1011 (2009) (citations omitted). Valenzuela's amended complaint, however, alleged Griffith and Otero committed "intentional acts" and "assaults" against her on various dates between 2005 and 2007. Accordingly, because the applicable two-year statute of limitations has run, the superior court's dismissal would "in effect determine[] the action" and is appealable. *Id.*; see also Ariz. Rev. Stat. § 12-542(1)

against David Allen Griffith and Valentino Otero.² She argues the court should not have dismissed her suit when she failed to file a supplemental pretrial statement by the court-ordered deadline because she was incarcerated with the Arizona Department of Corrections ("ADOC") and had timely filed the statement by delivering it "to prison officials to mail out." As we explain, the record presents an issue of fact as to whether Valenzuela timely filed her statement under the prison mailbox rule.

¶2 Valenzuela initially filed suit in 2005 for what seemed to be tort claims arising out of alleged assaults against her. As the superior court recognized, and the record confirms, the court "many times . . . requested that [Valenzuela] outline in writing with specificity the expected trial testimony of her witnesses, the intended trial exhibits and her damage claim." Despite the court's best efforts, Valenzuela failed to do so.

(2003) (two-year statute of limitations on actions for "injuries done to the person of another"); see generally *Murdock v. Balle*, 144 Ariz. 136, 139, 696 P.2d 230, 233 (App. 1985) (A.R.S. § 12-542 applies to actions that "could range from physical assault to invasion of privacy").

²We note Griffith and Otero failed to file answering briefs; and thus, we could regard their failure to do so as confession of error. See ARCAP 15(c). In our discretion, we decline to do so. *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (confession of reversible error doctrine is discretionary) (citation omitted).

¶13 On July 20, 2011, the superior court ordered Valenzuela to "file a Supplemental Final Pretrial Statement" that complied with its prior orders by July 29, 2011 and appear telephonically for a trial setting conference on August 8, 2011. At the time of the August 8, 2011 conference, the court "reached [Valenzuela on the telephone] at her unit, but [she] refused to participate." Based on the record available to the court at the time of the conference, Valenzuela had not complied with its July 20, 2011 order by filing her statement. Because Valenzuela refused to appear at the conference and the record reflected she had not filed a statement, the court dismissed her suit without prejudice.

¶14 Subsequently, on August 9, 2011, the clerk of the superior court received and filed Valenzuela's statement. Valenzuela also filed a "Notice of Service" that stated she had "provid[ed] the Supplemental Pretrial Statement" to Griffith and Otero "via [ADOC] legal mail" on July 29, 2011. In contrast, her statement and notice of service both simply stated: "original X 1 mailed this 29 Day of July 2011" to the clerk of the superior court, the superior court judge, Griffith, and Otero.

¶15 Generally, under the "prisoner mailbox rule" a *pro se* prisoner is deemed to have filed a document when he or she

delivers it "properly addressed, to the proper prison authorities to be forwarded to the clerk of the superior court." *State v. Goracke*, 210 Ariz. 20, 22, ¶ 5, ¶ 8, 106 P.3d 1035, 1037 (App. 2005) (citations omitted) (applying prison mailbox rule to petitions for appellate review; citing cases applying rule in other contexts).

¶16 On the record here, it appears Valenzuela used the prison mail system to serve her statement on Griffith and Otero. But, the record is not clear whether she used the prison mail system to send the statement to the clerk of the court or the superior court judge. Accordingly, as to the clerk of the court and the court, we cannot determine whether she complied with the court's July 20, 2011 order under the prison mailbox rule.³ Thus, we remand to the superior court to determine whether Valenzuela timely delivered her statement to prison officials for mailing to the clerk of the court, superior court judge, Griffith, and Otero. See *id.* at 23, ¶ 11, 106 P.3d at 1038 (quoting *Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995)) ("When there is no clear record as to when the [filing] was delivered to prison authorities, the proper course

³Valenzuela could have explained precisely what she had done if she had appeared telephonically at the August 8, 2011 conference. Nevertheless, the superior court did not dismiss her suit simply because she failed to appear at the conference, see *supra* ¶ 3.

of action is to remand to the trial court to make this determination.").

¶7 For the foregoing reasons, we remand to the superior court to determine whether Valenzuela timely complied with its July 20, 2011 order.

 /s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

 /s/
DIANE M. JOHNSEN, Judge

 /s/
JON W. THOMPSON, Judge