

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 05/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHAS ROBERTS AIR CONDITIONING,) No. 1 CA-CV 10-0593
INC., an Arizona corporation,)
) DEPARTMENT D
Plaintiff/Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
GORDON DENNIS PEKRUL and CAROLYN) Civil Appellate Procedure)
PEKRUL, husband and wife,)
)
Defendants/Appellants.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-010586

The Honorable Michael L. Barth, Commissioner

AFFIRMED

Wees Law Firm, LLC
By James F. Wees
Attorney for Plaintiff/Appellee

Phoenix

Gordon Dennis Pekrul and Carolyn Pekrul
Defendants/Appellants *In Propria Persona*

Scottsdale

B R O W N, Judge

¶1 Gordon and Carolyn Pekrul appeal the trial court's ruling that they are not entitled to a homestead exemption for

their motor home under Arizona Revised Statutes ("A.R.S.") section 33-1101 (2007). For the following reasons, we affirm.

BACKGROUND

¶2 In 2008, Chas Roberts Air Conditioning, Inc. ("Chas Roberts") obtained a default judgment against the Pekruls for breach of contract. On December 3, 2009, pursuant to a court order to satisfy the judgment, the sheriff levied on the Pekruls' motor home, which was parked in the driveway of a house in Scottsdale. On December 14, 2009, the Pekruls filed a Declaration of Homestead pursuant to A.R.S. § 33-1101 asserting they "actually reside" in the motor home.¹ Chas Roberts then filed a petition requesting that the Pekruls show cause "why [they should not be enjoined] . . . from falsely claiming a Homestead Exemption on [the motor home]."

¶3 At a contested hearing on the petition, the Pekruls testified in support of their position. Chas Roberts countered with documentation showing that the Pekruls had claimed the Scottsdale home as their residence in other proceedings. Following the hearing, the court noted that the Pekruls testified they had moved into the motor home in March 2008 after transferring title of the house to 223 Wittmann, L.L.C., of

¹ Section 33-1101(A)(3) provides an exemption "from attachment, execution, and forced sale" for "[a] mobile home in which the person resides."

which their daughter was a principal, because the house was a source of "bad financial memories." The court found the Pekruls' testimony was not credible and noted that it was "plagued with inconsistencies." The court determined the transfer to the L.L.C. was "a sham" and the Pekruls continued to reside in the house after the transfer. The court also stated the Pekruls did not produce any "neutral evidence^[] to corroborate their testimony" and there were no "indicia of an ongoing physical presence" in the motor home. Concluding that the word "residence" requires a "personal presence" and "intent to remain," the court ruled the Pekruls were not entitled to a homestead exemption on the motor home. The Pekruls timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(2),(4) (Supp. 2011).

DISCUSSION

¶4 The Pekruls first argue the trial court erred in placing on them the burden of proving they resided in the motor home. Chas Roberts contends the Pekruls failed to preserve this argument because, at the hearing, the Pekruls' counsel agreed with a statement by the court that because the Pekruls were "the ones asserting the homestead exemption, . . . they would have the burden of proving it." Our review of the record shows the Pekruls' counsel acknowledged three times that the burden of proof was on the Pekruls and he expressly waived any objection

to going forward on that premise. Therefore, we find the Pekruls have waived this argument on appeal. See *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (noting appellate courts generally do not consider arguments raised for the first time on appeal).

¶15 Even without a finding of waiver, we disagree that the court improperly shifted the burden of proof to the Pekruls. "The general rule governing the burden of proof in Arizona is that a party who asserts the affirmative of an issue has the burden of proving it." *Black, Robertshaw, Frederick, Copple & Wright, P.C. v. United States*, 130 Ariz. 110, 114, 634 P.2d 398, 402 (App. 1981); *cf. Ryan v. S.F. Peaks Trucking Co.*, 228 Ariz. 42, ___, ¶ 22, 262 P.3d 863, 869 (App. 2011) (holding a party asserting an affirmative defense of comparative fault has the burden of proving the facts supporting that defense). Section 33-1101 plainly states that a person is only entitled to a homestead exemption in a motor home "in which the person resides." In filing the declaration of homestead, the Pekruls swore under oath that they "actually reside[d]" in the motor home. Thus, the court did not err in declaring that the Pekruls bore the burden of proving their assertion was true.

¶16 Next, in their opening brief, the Pekruls challenge the trial court's description of "reside" as requiring a physical presence "for some period of time." However, in their

reply brief, the Pekruls acknowledge they could not qualify for the exemption "without actually living at that spot" and that the statute requires "actual occupancy plus intent" to "make a particular loci [sic] [the claimant's] homestead." And during the hearing, the Pekruls' counsel acknowledged to the court that there must be actual evidence of physical occupancy for the exemption to apply. We agree and do not see a meaningful distinction between a requirement of physical presence "for some period of time" and one of "actual occupancy," as any duration of occupancy would necessarily have to be "for some period of time." See *Morrisey v. Ferguson*, 156 Ariz. 536, 536-37, 753 P.2d 1192, 1192-93 (App. 1988) (finding individual who filed a homestead declaration on his mobile home while in prison did not "reside" in the mobile home for purposes of prior version of A.R.S. § 33-1101(A)(4) and, therefore, did not comply with the requirements of the statute). Thus, the court did not err in describing the legal requirements for establishing a homestead exemption.

¶7 Finally, the Pekruls argue there was "no reasonable basis for the trial court's decision." We will affirm the trial court's findings unless they are clearly erroneous and there is no reasonable evidence to support them. *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, 558, ¶ 18, 88 P.3d 1165, 1170 (App. 2004). Further, we will not substitute our judgment for

that of the trial court in determining the credibility of witnesses and weighing the evidence presented. *Id.* at 559, ¶ 24, 88 P.3d at 1171.

¶8 At the hearing, Chas Roberts submitted into evidence a "verified complaint for emergency declaratory and injunctive relief" the Pekarls filed in January 2010 in an attempt to void the trustee's sale of the house. The Pekarls alleged in the complaint that they "have and continue to reside at" the address of their Scottsdale house. Chas Roberts also submitted a "notice of removal" the Pekarls filed in response to a forcible detainer action which sought to remove them from the house. In this document, the Pekarls referred to the property as their "home." The Pekarls argue that the fact they referred to their Scottsdale address as their residence is "entirely consistent with claiming a residence in the motor home" because the motor home was located in the driveway at the same address. We reject this argument. The documents submitted into evidence were clearly filed in an attempt to preserve the Pekarls' right to live in the *house*, not the motor home, as only the house and the land it was built on were the subject of the foreclosure proceedings and the Pekarls' filings. Further, in their homestead declaration, the Pekarls did not claim a homestead in the land, but only in the motor home itself. Moreover, the Pekarls acknowledge in their opening brief that the transfer of

the property to the L.L.C. was a "misguided idea for [home] ownership preservation against foreclosure."

¶19 The only evidence the Pekarls presented in support of their homestead exemption claim was their own testimony. The Pekarls testified that they had all their personal belongings in the motor home and that they lived in the motor home "for the most part" since they transferred title of the house to the L.L.C. two years prior. They also stated that their son lived in the house and ran a day trading business there. The Pekarls asserted further that they would sometimes stay in the house when there were "electrical problems with the motor home" or when Mr. Pekarl was helping his son with his business. And Mrs. Pekarl admitted that she had slept in the house the night before the motor home was seized. Mrs. Pekarl also testified that she kept clothing and furniture in the house, but that she had sold the furniture and was storing it there for the purchaser. When asked why they stayed in the motor home rather than the house, Mr. Pekarl testified that "[they] liked the motor home" and "[they] didn't have a good feeling about the [house]" because they were losing it to foreclosure. The trial court found the Pekarls' testimony that they actually resided in the motor home

was not credible, and we defer to this finding. See *Nordstrom*, 207 Ariz. at 559, ¶ 24, 88 P.3d at 1171.²

¶10 Accordingly, we conclude there is substantial evidence in the record supporting the trial court's finding that the Pekruls did not reside in the motor home and were thus ineligible for the homestead exemption permitted by A.R.S. § 33-1101.

CONCLUSION

¶11 For the foregoing reasons, we affirm the trial court's ruling.

/s/

MICHAEL J. BROWN, Acting Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

JON W. THOMPSON, Judge

² The Pekruls assert that the credibility of their testimony is "simply irrelevant" "[i]n light of the physical state of affairs at and in the motor home when it was seized by the sheriff." However, aside from the Pekruls' own testimony, there is no evidence in the record suggesting the motor home appeared to have been recently occupied at the time it was seized.