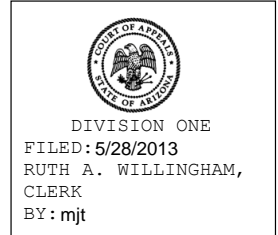


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TOWN OF SUPERIOR, an Arizona) No. 1 CA-CV 12-0366
Municipality,)
) DEPARTMENT C
Plaintiff/Appellant,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
DR. GLENN WILT,) Civil Appellate Procedure)
)
Defendant/Appellee.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. TJ2010-000180

The Honorable Benjamin E. Vatz, Judge *Pro Tempore*

AFFIRMED

K. Kane Graves Superior
Attorney for Plaintiff/Appellant

Schneider & Onofry, P.C. Phoenix
By Jonathan D. Schneider and Douglas (Trey) Lynn

And

Osborn Maledon, P.A. Phoenix
By Kristin L. Windtberg
Attorneys for Defendant/Appellee

B R O W N, Judge

¶1 We address whether the superior court abused its discretion in ordering payment of attorneys' fees as a sanction against the Town of Superior ("Town") and its "acting town attorney," Raya Tahan, arising out of Tahan's unsuccessful efforts to collect criminal fines in a civil proceeding. Tahan has not appealed, but the Town asserts it should not have been sanctioned for Tahan's conduct. For the following reasons, we affirm.

BACKGROUND

¶2 The Town cited Glenn Wilt, owner of several parcels of property located in the Town, with eleven misdemeanor counts relating to dilapidated structures, weeds, litter, and junk vehicles in violation of the Superior Town Code. After Wilt was tried and convicted in absentia in the Town of Superior Magistrate Court, the court sentenced him to pay a fine of \$18,520 to be paid in \$1,000 monthly installments beginning January 1, 2010. Wilt timely appealed this decision to the Pinal County Superior Court on December 30, 2009, but did not begin making monthly payments or obtain a stay of the sentencing order.

¶3 During the pendency of Wilt's appeal, the magistrate court continued overseeing Wilt's case. At a status review hearing on September 23, 2010, the court ordered Wilt to start making payments of \$1,000, beginning October 1, 2010, which he

did. Shortly thereafter, the Pinal County Superior Court denied Wilt's appeal, as well as a subsequent motion for reconsideration. On November 22, 2010, acting under protest, Wilt paid the entire balance of the fine.

¶14 Meanwhile, in August 2010, the Town, by and through its attorney Tahan, filed a "Notice of Filing Municipal Judgment" with the Maricopa County Superior Court to commence civil proceedings against Wilt to collect on the \$18,250 fine, even though the Town had not obtained a criminal restitution order ("CRO") prior to filing the notice. The notice stated the municipal judgment accrued interest at the rate of ten percent per annum until satisfied pursuant to Arizona Revised Statutes ("A.R.S.") section 44-1201(A) (2013).¹ Tahan then served Wilt with a subpoena to appear at a debtor's examination and to bring with him certain categories of documents.

¶15 On September 10, 2010, Wilt appeared without counsel for the debtor's examination at Tahan's office in Phoenix. Expressing confusion as to why the Maricopa County Superior Court was involved in a case pending in Pinal County, Wilt explained that he was scheduled to appear at a status hearing in magistrate court in Pinal County in a couple of weeks. He also told Tahan that the criminal judgment against him was on appeal

¹ Absent material revisions after the relevant date, we cite a statute's current version.

and that the Maricopa County Superior Court had no jurisdiction to proceed with the collection action. Tahan rejected Wilt's explanation and threatened to seek contempt orders and a warrant for his arrest. Tahan also asserted that "[w]hatever you have going on in Pinal County has nothing to do with this judgment in Maricopa County."

¶16 Tahan proceeded with the debtor's examination, asking Wilt many questions about matters unrelated to his ability to pay the judgment, including inquiries about the condition of his properties in Superior and whether they were in compliance with Town codes. Wilt objected to this line of questioning, asking why the condition of his properties was relevant to a debtor's examination and asserting he was willing to "settle the bill" with the Town. After a lunch break, Tahan telephoned the judge presiding over the Maricopa County matter and informed him that Wilt refused to answer questions and did not bring with him the documents listed in the subpoena. Although Wilt explained his jurisdictional concerns, the court determined that without a stay issued on Wilt's appeal in Pinal County the debtor's exam could go forward, relying on Tahan's characterization that she was asking "the standard questions asked during a judgment

debtor exam" and that the case had been properly domesticated in Maricopa County.²

¶17 The Town then filed an application for writ of garnishment on September 17, 2010. Wilt filed an objection, which the court denied. Wilt's wages were subsequently garnished. The Town then sought an award of attorneys' fees based on Wilt's objection to the garnishment order and also filed a motion to compel disclosure of the documents previously subpoenaed for the debtor's examination, which the superior court granted.

¶18 Wilt obtained counsel when the garnishment order went into effect. After Wilt paid the total fine on November 22, the Town filed a satisfaction of judgment, but took no action to prevent continued garnishment of Wilt's wages until April, 2011.

¶19 On November 3, 2010, Wilt filed a motion to stay the collection proceedings based on the pending criminal appeal in Pinal County. He also filed a motion to stay the order compelling disclosure. After briefing and oral argument, the superior court concluded it lacked jurisdiction over the Town's collection proceeding because the Town had failed to obtain a

² Despite the record showing the Town had filed a responsive memorandum in Wilt's appeal then pending in Pinal County Superior Court, Tahan told the Maricopa County judge that she "had never seen any sort of notice of appeal . . . or any sort of appellate documents. I don't know what Dr. Wilt is talking about."

CRO as required by A.R.S. § 13-805 (Supp. 2012). The court thus quashed the garnishment order and subpoena. The court also denied both parties' requests for attorneys' fees, but denied Wilt's request without prejudice to re-file if Wilt produced evidence showing that when Tahan conducted the debtor's exam, she was acting "in a dual capacity" for the Town by (1) collecting the criminal judgment, and (2) acquiring information to support new criminal charges against Wilt.

¶10 On March 1, 2011, Wilt filed an application for an order to show cause why the Town and Tahan should not be required to pay Wilt's attorneys' fees pursuant to A.R.S. §§ 12-341.01(C)(2012)³ and 12-349 (2013), and Arizona Rule of Civil Procedure 11(a). The superior court set a hearing for April 22, 2011. Prior to the scheduled hearing, Wilt requested that a "culprit hearing" be held to determine whether the Town should be responsible for the conduct of its attorney. In response, the Town unsuccessfully requested that the court vacate the show cause hearing and sanction Wilt for his conduct.

¶11 Disputes arose at a subsequent status conference, forcing the court to postpone the show cause hearing to June 8, 2011, and order the parties to provide proposed discovery

³ Effective January 1, 2013, A.R.S. § 12-341.01(C) provides as follows: "The court and not a jury shall award reasonable attorney fees under this section." Only the prior version is relevant here.

summaries and appropriate objections and responses. Wilt did so by providing requests for production, requests for admissions, and interrogatories. The Town did not respond substantively, asserting instead that the "discovery proposal [was] flawed because there is no legal nor factual grounds for discovery to be taking place, nor does this Court have jurisdiction over these matters." Wilt's reply asked the court to "simply enter an order requiring compliance" with the proposed discovery plan. The Town then requested the court enter final judgment and stay the discovery proceedings so appellate review could be obtained.

¶12 The court denied the stay request, stating there was "no legal authority to grant the relief." The court also ordered the Town to comply with Wilt's discovery requests as stated, reasoning the Town had waived any objections to the requests by her failure to respond.

¶13 The Town then sought special action relief from our court and a stay on discovery pending the resolution of the special action. We granted the stay and the superior court vacated the show cause hearing. The Town then moved for a change of judge for cause, which the superior court denied. After briefing and oral argument, on June 30, 2011, this court denied the Town's request for special action relief and lifted the stay.

¶14 The Town then retained new counsel, and Tahan retained counsel. After the superior court denied Wilt's motion for sanctions without prejudice, Wilt filed a "consolidated application" for an order to show cause why both the Town and Tahan "should not be required, jointly and severally, to pay [his] attorneys' fees and costs and to return the money he wrongfully paid." Wilt outlined in detail the alleged misconduct. The court found that Wilt had made a "*prima facie* case that he is entitled to the relief" sought in the consolidated application and set a show cause hearing, which was held on January 18, 2012.

¶15 Tahan did not appear at the hearing and the Town Manager and Deputy Town Manager were the only witnesses who testified. The Town Manager testified generally that she had very little involvement with the matters involving Wilt. She was out on sick leave during much of the time the collection action was being pursued and, due to an office move and server problems, she was prevented from receiving some emails from Tahan. The Town Manager acknowledged, however, that she had discussions with Tahan regarding the collection action in Maricopa County, she attended the special action proceeding in this court, and, as the Town Manager, she was responsible for directing and overseeing town counsel.

¶16 The Deputy Town Manager testified he assumed day-to-day operations of the Town while the Town Manager was out on sick leave and that the Town Manager responsibilities fell to him. He stated he did not know of anybody in the Town that directed Tahan's conduct. He also testified he attended the special action oral argument in the court of appeals, had signing authority for paying bills, and that he worked with Tahan every two weeks when the council meetings were held.

¶17 Following the hearing, the court ordered the parties to submit proposed findings of fact and conclusions of law. The court adopted, in their entirety, Wilt's twenty-four page proposed findings of fact and conclusions of law. As part of the ruling, the court explained it had previously concluded the Town was required to obtain a CRO prior to seeking collection remedies in the superior court and because it failed to do so, the Town's collection action was wrongfully instituted. The court then found that the Town hired Tahan "as its attorney and she was its authorized agent, with actual and apparent authority. The Town is legally responsible for the actions of its counsel." Based on the evidence presented, the court concluded that the Town and Tahan:

- a. Pursued claims and defenses that were not in good faith, harassing, and groundless, making sanctions appropriate pursuant to A.R.S. § 12-341.01(C);

b. Brought and defended claims without substantial justification, unreasonably expanded and delayed these proceedings, and engaged in abuses of discovery, making sanctions appropriate under A.R.S. § 12-349(A); and

c. Repeatedly conducted themselves in this action in an improper manner, in violation of the Rule of Civil Procedure and the Rules of Professional Conduct, needlessly increasing the cost of this litigation and harassing Dr. Wilt and his counsel, making sanctions appropriate under Ariz. R. Civ. P. 11(a) and pursuant to this Court's inherent power to impose sanctions for attorney misconduct.

Accordingly, the court assessed attorneys' fees against Tahan and the Town, jointly and severally. Although Wilt had requested approximately \$157,500 in attorneys' fees and costs, the court awarded \$125,000, "reflect[ing] the reasonable attorneys' fees and costs that Dr. Wilt has incurred in defending against the Collection Action brought in this Court and the Special Action[.]" The court also ordered the Town to return to Wilt the \$3,348.40 he "paid in costs and interest on the Magistrate Court Judgment in order to avoid contempt of this court," reasoning the Town was "not entitled to collect interest or costs on the Municipal Court Judgment." The Town filed this timely appeal and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2013).⁴

⁴ Following oral argument before this court, the Town filed a motion to supplement the appellate record with information

DISCUSSION

¶18 We review the imposition of sanctions for an abuse of discretion and “view the evidence in a manner most favorable to sustaining the award and affirm unless the trial court’s finding . . . is clearly erroneous.” *Phoenix Newspapers, Inc. v. Dep’t of Corrections*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997). We apply a de novo standard, however, to a court’s application of the statute. *Id.* “We may affirm the trial court’s ruling if it is correct for any reason apparent in the record.” *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9, 130 P.3d 538, 540 (App. 2006). Imposition of a sanction under A.R.S. § 12-349 requires proof by a preponderance of the evidence. *Phoenix Newspapers*, 188 Ariz. at 243-44, 934 P.2d at 807-08.

¶19 The Town does not allege that Tahan exceeded her authority as counsel for the Town. Instead, the Town’s overarching theme is that it should not be held liable for payment of attorneys’ fees because it was unaware of and did not participate in Tahan’s misconduct.⁵ Specifically, the Town asserts it “did not oversee the pursuit of the claims against

relating to disciplinary proceedings of the Arizona State Bar against Tahan based in part on her conduct in this case. In our discretion, we grant the Town’s motion, but conclude the information provided does not affect our analysis.

⁵ In its opening brief, the Town argues Tahan’s conduct was not sanctionable. At oral argument, however, the Town withdrew that argument and therefore we do not address it.

[Wilt], nor dictate any discovery requests, nor direct any particular action at all." The fundamental problem with the Town's argument, however, is that it essentially ignores the superior court's findings of fact and conclusions of law and fails to recognize the broad discretion given to courts in awarding attorneys' fees as a sanction. See A.R.S. § 12-349.

¶20 Although Wilt did not seek dispositive sanctions, the superior court held a culprit hearing. When dispositive sanctions are sought, "[t]he requirement that a court conduct a 'culprit hearing' is aimed at protecting a party from dispositive sanctions when the fault lies only with counsel. Such hearings present an opportunity for the client to reveal to the court its lack of involvement in sanctionable conduct." *Lund v. Superior Court*, 227 Ariz. 572, 581, ¶ 34, 261 P.3d 456, 465 (App. 2011). In some instances, therefore, culprit hearings create an exception to the general rule that parties are bound by the acts and omissions of their chosen agents. See *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 14, 204 P.3d 1082, 1087 (App. 2009) (stating general rules of agency apply in attorney-client relationship); *Panzino v. City of Phoenix*, 196 Ariz. 442, 447, ¶ 17, 999 P.2d 198, 203 (2000) (stating that misconduct by a lawyer "does not affect the client's responsibility for the actions of his [or her] lawyer."). Due process concerns underpin this exception. See *Montgomery Ward & Co., Inc. v.*

Superior Court, 176 Ariz. 619, 622, 863 P.2d 911, 914 (App. 1993).

¶21 Without deciding whether the superior court was required to conduct a culprit hearing in this case, given the amount of attorneys' fees at stake, the court wisely chose to hold such a hearing. Presented with conflicting evidence, and weighing and assessing credibility, the superior court found that the fault resulting in sanctions rested both with counsel and the Town. In doing so, the superior court found that Tahan's email correspondence with the Town and her billing statements the Town was responsible for reviewing and paying demonstrate the Town was aware of "the proceedings in the Collection Action and related special action at the court of appeals." The court therefore concluded that despite the Town's knowledge of Tahan's conduct, it took no steps to address Tahan's prior conduct or direct her future actions. Addressing the Town's arguments, accordingly, focuses on whether these factual findings are supported by the record and properly allowed the superior court to conclude, as a factual matter, that the Town "personally shares complicity in the abusive behavior" of Tahan. *Nesmith v. Superior Court*, 164 Ariz. 70, 71, 790 P.2d 768, 769 (App. 1990).

¶22 The Town contends it had nothing to do with directing Tahan's actions and therefore Wilt failed to meet his burden of

showing sanctions were appropriate under any of the grounds stated by the superior court. Contrary to the Town's arguments, there is sufficient evidence in the record demonstrating the Town was aware of, or at a minimum shared complicity in, Tahan's culpable conduct. At the OSC hearing, both the Town Manager and Deputy Town Manager testified they were responsible for directing and overseeing Tahan's work, they had discussions with Tahan about Wilt's case, they appeared at the special action proceedings in our court, and they approved billing statements detailing Tahan's work on Wilt's case. Reasonable inferences from this evidence support the conclusion that the Town was aware of, or at least disregarded,⁶ relevant information pertaining to Tahan's wrongful institution of the collection case against Wilt in superior court. Thus, as a threshold matter, we conclude the Town could properly be held responsible for its attorney's conduct.

¶123 Additionally, the Town argues Wilt failed to meet his burden of proof under §§ 12-341.01 and 12-349, and Rule 11, and the trial court did not make sufficient findings of fact to

⁶ Although the Town Manager and Deputy Town Manger each testified they did not direct Tahan to file collection proceedings in superior court, both of them were aware Tahan had done so based on information received from Wilt and Tahan. Despite their awareness that Tahan was pursuing collection of the fines against Wilt in superior court, neither the Town Manager nor the Deputy Town Manager took steps to inquire into the nature of the litigation, even though it spanned over a year and a half.

support an attorneys' fee award under any of those provisions. Because we conclude sufficient evidence exists to support the superior court's decision under § 12-349(A), we need not address whether the award was proper under A.R.S § 12-341.01(C) or Rule 11.

¶24 Section 12-349 in pertinent part provides as follows:

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

B. The court may allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party.

The plain statutory text mandates an award of attorneys' fees if a court finds that a party or an attorney engages in any of the conduct listed. Allocation of attorney fees under this section

may be "among the offending attorneys and parties, jointly and severally," including against a political subdivision of this state. A.R.S. § 12-349(A)-(B). Additionally, a court must "set forth the specific reasons for the award" and may include any number of factors, if relevant, in its consideration. A.R.S. § 12-350 (2013). Applying § 12-349(A)-(B), we find no abuse of discretion in the superior court's sanction award against the Town and Tahan, jointly and severally.

¶25 Consistent with A.R.S. § 12-350 and in support of its attorneys' fee award under § 12-349, the superior court set forth its reasons for the award, finding that the Town and Tahan "brought and defended claims without substantial justification, unreasonably expanded and delayed these proceedings, and engaged in abuses of discovery." Thus, the court found sanctions were appropriate under three of the four grounds listed in § 12-349. Because the court's findings under §§ 12-349(A)(3) and (A)(4) are reasonably supported by the record, we need not address the court's finding that the Town and Tahan also violated § 12-349(A)(1).

¶26 The superior court found that the Town, pursuant to A.R.S. § 13-805,⁷ was required to obtain a CRO from the

⁷ Section 13-805 provides in pertinent part as follows:

A. The trial court shall retain jurisdiction of the case for purposes of modifying the

magistrate court and that the collection action was therefore "wrongfully instituted." The court also found that Tahan had pursued a number of irrelevant issues during the debtor's examination, which ultimately forced Wilt to file motions to stay the collection action, quash a subpoena, and respond to Tahan's request for attorneys' fees. These issues centered on the condition of Wilt's properties and Wilt's code compliance. Additionally, the court found that one of the purposes of the debtor's exam was to "gather information for future proceedings"

manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires. At the time the defendant completes the defendant's period of probation or the defendant's sentence or the defendant absconds from probation or the defendant's sentence, the court shall enter both:

1. A [CRO] in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges, or assessments imposed.

. . . .

C. A [CRO] may be recorded and enforced as any civil judgment Enforcement of a [CRO] by any person who is entitled to restitution or by the state includes the collection of interest that accrues at a rate of ten per cent per annum. A [CRO] does not expire until paid in full.

D. A [CRO] is a criminal penalty for the purposes of a federal bankruptcy involving the defendant.

against Wilt. An entry in Tahan's billing statements submitted to the Town states as follows:

Prepared questions and held deposition and judgment debtor exam. Asked debtor how he uses his properties so that he admitted on the record they are vacant and some are storage. Asked about his code compliance issues and whether he fixes problems that are cited by the Police and Fire Department so that we can show that he only does the bare minimum and that he has a pattern of doing the bare minimum and then letting the properties fall into disrepair again. Also, ask about the status of his properties, whether they are livable and what condition they are in. Wilt tried to not answer questions, therefore the Judge intervened telephonically and ordered him to answer. The transcript at this deposition will be admissible as evidence in our lawsuit against him for the code-compliance, lot splits, public nuisance, and zoning violations.

Other billing entries provided to the Town likewise demonstrate the Town was actively trying to gather evidence to use against Wilt in future proceedings. We agree with the superior court's conclusion that this was an appropriate factor warranting sanctions.

¶27 The trial court also determined that "[t]he Town did not promptly file a satisfaction of judgment upon receiving payment," which required Wilt to send a demand letter to Tahan and attend a hearing. Even after filing a satisfaction of judgment and without obtaining and serving a CRO on the

garnishee,⁸ the Town continued to garnish Wilt's wages, resulting in additional expansion of the proceedings.

¶128 Additionally, the trial court found that in response to Wilt's proposed discovery plan the Town failed to raise any substantive objections but rather "re-urg[ed] arguments previously ruled upon by [the] Court." As a result, the superior court ruled that the Town waived any objection to the discovery requests and ordered the Town to comply. The Town sought special action relief and a stay of pending discovery, claiming the discovery order would infringe upon the attorney-client privilege. The Town's failure to properly and specifically raise an attorney-client privilege objection in the superior court, however, unreasonably expanded the show cause proceedings. See *Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7, 130 P.3d 1000, 1002 (App. 2006) (requiring a party specifically raise an issue in trial court before raising it in appeal).

¶129 In sum, the trial court's findings are supported by the record. Accordingly, we conclude the superior court did not abuse its discretion in awarding fees to Wilt under §§ 12-349(A)(3) and (A)(4). See *Phoenix Newspapers*, 188 Ariz. at 243-44, 934 P.2d at 807-08.

⁸ The prosecuting attorney is required to serve a copy of the CRO on the garnishee. A.R.S. 13-813(B)(2) (2013).

¶30 Finally, the Town challenges the amount of the attorneys' fees award, arguing it was deprived of a meaningful opportunity to object. The record reflects that counsel for Wilt, at the court's direction, filed its application for attorneys' fees and costs on February 17, 2012, requesting nearly \$157,500 in fees and costs. Attached to the application are (1) an affidavit avowing to the positions and experience of the individuals that worked on the case and (2) a detailed description of the hours billed. The Town, however, did not file any objection to Wilt's application or request a hearing and thus it has waived any challenge on appeal to the reasonableness of the fee award. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26-27, ¶ 13, 13 P.3d 763, 768-69 (App. 2000) (emphasizing that "we generally do not consider issues, even constitutional issues, raised for the first time on appeal."). Although the Town asserts the "procedure was truncated," Wilt's application was filed on February 17, 2012 and the superior court did not enter its order until March 19, 2012. Thus, the Town had ample time to object to the fee application and its failure to do so constitutes waiver.

¶31 Wilt requests attorneys' fees on appeal pursuant to A.R.S. § 12-348(A)(1) (2013), which authorizes an award of attorneys' fees to any party that prevails against the state, or a city, town, or county in "[a] civil action brought by the

state or a city, town or county against the party." Because Wilt has not directed us to any portion of the record where he requested fees pursuant to § 12-348(A)(1) in the superior court, and our review has not revealed any such request, he cannot properly raise that claim on appeal. See *Ayres v. Red Cloud Mills, Ltd.*, 167 Ariz. 474, 480 n.6, 808 P.2d 1226, 1232 n.6 (App. 1990) (declining to consider claim for attorneys' fees under statutory authority that was not asserted in the trial court). Wilt is entitled, however, to an award of costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶32 We affirm the superior court's order granting sanctions against the Town and Tahan, jointly and severally.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
ANDREW W. GOULD, Judge