

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

JOHN STUEBER and WILLIAM GOTSES,) 1 CA-SA 13-0090
)
Petitioners,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE HONORABLE DAN SLAYTON, Judge) Rule 28, Arizona Rules of
of the SUPERIOR COURT OF THE) Civil Appellate Procedure)
STATE OF ARIZONA, in and for the)
County of COCONINO,)
)
Respondent Judge,)
)
MORGAN AZ FINANCIAL, L.L.C.,)
)
Real Party in Interest.)
_____)

Petition for Special Action
from the Superior Court in Coconino County

Cause Nos. CV2010-00227, CV2010-00277
CV2010-00848, CV2010-00853 (Consolidated)

The Honorable Dan Slayton, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED IN PART AND DENIED IN PART

Lewis and Roca LLP Phoenix
by Robert G. Schaffer
William G. Voit
Attorneys for Petitioner

Tiffany and Bosco, P.A. Phoenix
by William M. Fischbach, III
Attorneys for Real Party in Interest

T H U M M A, Judge

¶1 John Stueber and William Gotses (Petitioners) seek special action relief from a finding that they must post supersedeas bonds in the full amount of civil judgments entered against them. Petitioners argue the superior court improperly required them to prove their net worth by clear and convincing evidence instead of by a preponderance of the evidence and improperly conflated the concepts of net worth and income. Finding special action jurisdiction is appropriate, because the record does not reflect which standard of proof was applied, this court grants relief in part, denies relief in part and remands the matter for application of the preponderance of the evidence standard.

FACTS AND PROCEDURAL HISTORY

¶2 After Morgan AZ Financial, L.L.C. (Morgan) obtained judgments against Petitioners totaling nearly \$2.2 million, Petitioners appealed. That appeal is pending in CV 13-0046.

¶3 Following entry of the judgments, Petitioners filed a motion with the superior court to set supersedeas bonds. Relying on Arizona Rule of Civil Appellate Procedure (ARCAP) 7(a)(2), which corresponds to Arizona Revised Statutes (A.R.S.)

section 12-2108,¹ the motion sought to have the bonds set at fifty percent of Petitioners' net worth (which Petitioners claim is zero) or, alternatively, that the bond be set at a nominal amount to avoid causing substantial economic harm to Petitioners.

¶4 The superior court held an evidentiary hearing, where Petitioners testified, were subject to cross examination and presented evidence of their financial position, including compilations by certified public accountants. Morgan argued Petitioners' evidence was unreliable and inconsistent; the compilations had not been audited or reviewed and were based on selective information originating with Petitioners; and that Petitioners failed to disclose relevant information, including tax returns, in violation of specific disclosure orders to do so. As relevant here, at various points in the hearing, the superior court made reference to a requirement of clear and convincing evidence.

¹ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated. ARCAP 7(a)(2) was amended effective January 1, 2012 to conform to amendments made in 2011 to A.R.S. § 12-2108. See Ariz. Sup. Ct., Amended December 2011 Rules Agenda Minutes, available at <http://www.azcourts.gov/Portals/20/Dec2011Rules/MinR12132011Amended.pdf>). Although this decision cites the relevant portions of A.R.S. § 12-2108 for clarity, as relevant here, the corresponding language in ARCAP 7(a)(2) is substantially identical.

¶15 After considering the evidence and argument, and weighing and assessing credibility, on December 11, 2012, the superior court denied Petitioners' motion and set the bonds for the full amounts of the judgments. More specifically, the court ruled as follows:

And therefore, this Court finds that [Petitioners] have failed to produce by clear and convincing evidence that they would be likely to suffer substantial economic harm, if required to post the bond in [the full] amount.

Because I cannot find that [Petitioners] have shown their net worth, the bond is set in the full amount of the Judgment in this case.

Petitioners sought reconsideration, both orally and in writing, claiming the court erred in requiring them "to establish entitlement to a zero bond amount by clear and convincing evidence." The Petition states that motion has not been decided.

¶16 On April 12, 2013, Petitioners filed the Petition, asking this court to address two issues:

- I. Did the [superior] court misinterpret A.R.S. § 12-2108 and ARCAP 7(a)(2) in requiring Petitioners to prove their net worth by "clear and convincing evidence"?
- II. Did the [superior] court misinterpret A.R.S. § 12-2108 and ARCAP 7(a)(2) by construing "net worth" to center on evidence of income?

DISCUSSION

I. Jurisdiction.

¶7 Discretionary special action jurisdiction is proper when the party has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Morgan argues that because Petitioners have filed a notice of appeal, they may request a stay in that appeal pursuant to ARCAP 7(c). Although such a request could be pressed in the appeal, challenges to the setting of a supersedeas bond can represent a circumstance where special action jurisdiction is appropriate. See *Salt River Sand & Rock Co. v. Dunevant*, 222 Ariz. 102, 105-06, ¶ 7, 213 P.3d 251, 254-55 (App. 2009); *Bruce Church, Inc. v. Superior Court*, 160 Ariz. 514, 515, 774 P.2d 818, 819 (App. 1989). Accordingly, this court accepts special action jurisdiction.

II. Applicable Burden And Standard Of Proof.

¶8 Presumptively, a supersedeas bond "shall be set as the lesser of the following: 1. The total amount of damages awarded excluding punitive damages; 2. Fifty percent of the appellant's net worth; [or] 3. Twenty-five million dollars." A.R.S. § 12-2108(A). The applicable standard of proof for this presumptive bond amount is not specified in A.R.S. § 12-2108(A) or ARCAP 7(a)(2). As an alternative to this presumptive bond amount, "if an appellant proves by *clear and convincing evidence* that the appellant is likely to suffer substantial economic harm if

required to post bond in an amount required" by A.R.S. § 12-2108(A), the bond may be lowered "to an amount that will not cause the appellant substantial economic harm." A.R.S. § 12-2108(C) (emphasis added).²

¶9 The issue in this special action is which party bears the burden of proof for the presumptive bond amount to be set at fifty percent of Petitioners' net worth and whether the standard required is a preponderance of the evidence or clear and convincing evidence. These questions of statutory interpretation are subject to a de novo review. *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309, 311, ¶ 13, 294 P.3d 147, 149 (App. 2013).

¶10 If no information about the appellant's net worth is provided, the presumptive bond amount is the lesser of either \$25 million or the total amount of non-punitive damages awarded.

² Petitioners originally sought alternative relief pursuant to A.R.S. § 12-2108(C) (ARCAP 7(a)(2) second to last sentence), but at the evidentiary hearing disavowed that claim for relief. Applying A.R.S. § 12-2108(C), the superior court found Petitioners "failed to produce by clear and convincing evidence that they would be likely to suffer substantial economic harm, if required to post the bond in [the full] amount," a finding supported by the record and not challenged here. By seeking and then disavowing this alternative relief pursuant to A.R.S. § 12-2108(C), which by statute and rule uses a clear and convincing evidence standard, Petitioners may have caused uncertainty about the standard used in considering Petitioners' claim under A.R.S. § 12-2108(A). Petitioners' argument under A.R.S. § 12-2108(C) is not part of this special action and the statute is quoted for the limited purpose of identifying the standard of proof expressly set forth in that provision.

See A.R.S. § 12-2108(A)(1), (3). If the third option -- fifty percent of appellant's net worth -- is properly shown to be lower than the other two options, the court "shall" set the bond at fifty percent of the appellant's net worth. A.R.S. § 12-2108(A)(2). Because Petitioners assert that the third option applies here, they have the burden to prove their net worth and that fifty percent of their net worth is less than the other options. See, e.g., *John E. Shaffer Enters. v. City of Yuma*, 183 Ariz. 428, 431, 904 P.2d 1252, 1255 (App. 1995) ("[T]he party who asserts the affirmative of an issue has the burden of proving it."); *Yeazell v. Copins*, 98 Ariz. 109, 116, 402 P.2d 541, 546 (1965) ("The party who asserts a fact has the burden to establish the fact.").

¶11 Turning to the standard of proof required, the "typical evidentiary standard in civil cases is by a preponderance of the evidence." *Rasmussen v. Fleming*, 154 Ariz. 207, 224, 741 P.2d 674, 691 (1987) (citation omitted); see also *Aileen H. Char Life Interest v. Maricopa Cnty.*, 208 Ariz. 286, 291, ¶ 11, 93 P.3d 486, 491 (2004) (noting "usual rule" in civil actions required proof "by a preponderance of the evidence"). Although the more demanding clear and convincing evidence standard has been adopted in civil cases "involv[ing] personal interests more important than those found in the typical civil dispute where private litigants squabble over a sum of money,"

no such interests have been identified here. *Rasmussen*, 154 Ariz. at 224, 741 P.2d at 691. As such, to obtain the benefit of the presumptive bond third option -- fifty percent of appellant's net worth -- Petitioners have the burden to prove their net worth by a preponderance of the evidence. See *id.*

¶12 As applied, after hearing the evidence presented, the superior court set the supersedeas bonds as the full amounts of the judgments. In doing so, the court correctly placed the burden on Petitioners to show their net worth. It is unclear, however, what standard of proof the court used. As quoted above, in finding Petitioners failed to show their net worth (a prerequisite to obtain the benefit of the presumptive bond third option), the court did not specify any standard of proof. In comments leading up to that ruling, however, the court placed on Petitioners the "burden to prove [their financial circumstances] by clear and convincing evidence." In denying Petitioners' immediate oral motion to reconsider, the superior court explained that another portion of the statute (A.R.S. § 12-2108(B)), which uses the clear and convincing evidence standard, was not applicable.³ At no time, however, did the court specify

³ A.R.S. § 12-2108(B) states that notwithstanding the presumptive bond amount specified in A.R.S. § 12-2108(A), "if an appellee proves by clear and convincing evidence that an appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment, the court may require the appellant to post a bond in an amount up to the full amount

that it was using the preponderance of the evidence standard applicable when setting the bond pursuant to A.R.S. § 12-2108(A).⁴

¶13 Because the record is unclear what standard of proof was used, relief is granted and the matter is remanded to the superior court. Upon remand, the bond amounts should be determined under A.R.S. § 12-2108(A), including whether Petitioners have met their burden of proof to show their net worth by a preponderance of the evidence. On remand, the court may make this finding based on the record previously made, or should that court in its discretion find that additional evidence is appropriate, receive and consider such additional evidence.

III. Net Worth Versus Income.

¶14 Arguing that income is not relevant to net worth, Petitioners claim the superior court erred by "misconstruing the term 'net worth' to turn on 'income.'" Although not synonymous,

of the judgment." *Accord* ARCAP 7(a)(2) (third from last sentence).

⁴ Morgan argues harmless error even if the superior court used a clear and convincing standard for the A.R.S. § 12-2108(A)(2) determination. Such an argument implicates reweighing and reassessing the evidence and conclusions made by the superior court, including credibility determinations. Because the superior court is uniquely suited to do so, this court declines to make such determinations. *See also Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998) ("defer[ring] to the trial court's determination of witnesses' credibility").

income has an impact on net worth and can properly be considered in assessing both net worth and credibility, particularly when a party is claiming no net worth or a negative net worth. In this case, the court expressed substantial concerns about the credibility of Petitioners, the exhibits they presented and the documents they failed to present (including the Petitioners' tax returns, which had been requested by Morgan but not produced).

¶15 As the superior court noted, tax returns are filed under penalty of perjury, list a good deal of relevant information other than taxable income and, at the evidentiary hearing, that information "was missing." In addressing credibility, the court stated:

Interestingly, what I can't understand was I had two, two I think extremely intelligent men, and when asked about their tax returns, I believe Mr. Stueber's answer to this Court's way of looking was very vague. And Mr. Gotses' answer, candidly, . . . really, really I think struck his credibility. And that was, when asked . . . what he reported to the IRS, he said: I don't remember. Just last year. What did he report to the IRS?

This is a man who was phenomenal in his memory in how his contracts were structured, how his IRAs were structured. He had a plethora of documentation and financial information that he could really call up to every single question . . . asked [of] him. But when it came to that one, to this Court's mind, crucial piece of evidence, the one that he has to report under penalty of perjury, the one that in fact has been, the one piece of evidence that has in fact been

the subject of a tremendous amount of disclosure, due to the Defendants' allegation of fraud on the part of Plaintiff's, that is overstating their income, those documents were never produced.

¶16 Recognizing the differences between the interrelated concepts of income and net worth, Petitioners have not shown that the superior court improperly construed net worth to turn on income. The fact-intensive considerations challenged in this portion of the Petition are uniquely and properly committed to the superior court. See *Spaulding v. Pouliot*, 218 Ariz. 196, 199, ¶ 8, 181 P.3d 243, 246 (App. 2008) (giving deference to the superior court's findings of fact unless clearly erroneous and affirming judgment if supported by any reasonable evidence); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998) ("defer[ring] to the trial court's determination of witnesses' credibility"). Accordingly, to the extent Petitioners allege the superior court erred in construing net worth to turn on income, relief is denied.

CONCLUSION

¶17 This court accepts jurisdiction, grants relief in part and denies relief in part, and remands the matter to the superior court for further proceedings consistent with this decision. This court's prior order granting Petitioners' motion to stay execution of the judgments shall expire upon the

superior court's issuance of a ruling regarding the amount of the supersedeas bond on remand.

¶18 The parties shall bear their own attorneys' fees incurred in this special action. Petitioners may recover their costs in this special action upon compliance with ARCAP 21.

/S/_____
SAMUEL A. THUMMA, Acting Presiding Judge

CONCURRING:

/S/_____
LAWRENCE F. WINTHROP, Chief Judge

/S/_____
PATRICIA A. OROZCO, Judge