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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 7,)
ARIZONA RULES OF CIVIL) Supreme Court No. R-11-____
APPELLATE PROCEDURE)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to adopt the attached proposed amendment to Rule 7 of the Arizona Rules of Civil Appellate Procedure (“ARCAP”). This proposed amendment is designed to implement a new statutory provision concerning supersedeas bonds in civil actions, as adopted by Laws 2011, Chapter 99, SB 1212. Because this law becomes effective on July 20, 2011, Petitioner requests this Court to adopt the proposed amendment on an emergency basis, with a comment period to follow.

I. Background and Purpose of the Proposed New Rule. Section 16 of SB 1212 contains a finding that “the size of damage awards in civil actions has escalated in recent years,” and that “defendants who are subject to overly large

damage awards may simply be unable to post a bond to protect their assets and assert their appeal rights.” Another finding states that the enactment of a limit on a bond to stay the execution of a judgment “...is a matter of substantive law that falls within the jurisdiction of the legislature.”

Section 3 of Senate Bill 1212 enacted a new statute, A.R.S. §12-2108, entitled “Preservation of right to appeal judgment without execution.” A.R.S. § 12-2108(A) establishes a limit on the allowable amount of a supersedeas bond. This new statute provides that a bond to stay execution of a judgment during appeal “shall be set as the lesser of the following:”

1. The total amount of damages awarded excluding punitive damages.
2. Fifty per cent of the appellant’s net worth.
3. Twenty-five million dollars.

A.R.S. § 12-2108(B) and (C) are exceptions that allow the court to set a higher or lower amount than provided in subsection (A).

Rule 7(a) currently states in part that a supersedeas bond “...shall be conditioned for the satisfaction in full of the judgment remaining unsatisfied” Rule 7(a) conflicts with the new statute because the amount of a supersedeas bond, as calculated under the statute, might not fully satisfy the unpaid balance of a judgment. The proposed amendment to Rule 7(a), as shown in the Appendix, conforms this rule to the requirements of A.R.S. § 12-2108.

II. Contents of the Proposed New Rule. The proposed amendment to Rule 7 does not alter the established procedures for obtaining a supersedeas bond. Rather, the proposed amendment adds language from the new statute that directs the trial judge to abide by the new statutory limits for determining the bond amount. The proposed amendment removes guidance to the trial judge contained in the current rule that conflicts with the new statutory formula for setting the bond amount.

There are three other revisions in the proposed amendment, as follows:

(1) The provision that the bond be determined “in accordance with these rules” was changed to “in accordance with any applicable statute and these rules.” This recognizes the applicability of A.R.S. § 12-2108 without mentioning it specifically, so that if the statute is renumbered in the future, the rule will not require amendment.

(2) Rule 7(a) currently has three subsections. Text headings have been added to these subsections for guidance and clarity.

(3) A syntactical change has been made in the last sentence of the first paragraph of Rule 7(a)(1).

III. Preliminary Comments. This petition has not been sent to the court communities for pre-filing comments because of the short period of time since enactment of the legislation.

IV. Request for Emergency Adoption. SB 1221 has an effective date of July 20, 2011, and it specifically applies “to all actions that are pending on or that are filed on or after the effective date of this act.” (SB 1212, section 17.) Petitioner therefore requests expedited adoption of the proposed amended rule with a formal comment period to follow, as permitted by Supreme Court Rule 28(G).

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

By _____
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Appendix

Proposed amendment to Rule 7(a), Ariz. R. Civ. App. P.

Additions are shown by underline; deletions are shown by ~~strikethrough~~.

Rule 7. Stay of Proceedings to Enforce a Judgment.

(a) Stay Upon Appeal; Supersedeas Bond.

(1) *Filing the Bond.* Except in cases involving custody of children, whenever an appellant entitled thereto desires a stay on appeal, he may obtain a stay by filing a supersedeas bond in the superior court in accordance with any applicable statute and these rules. The bond may be filed before or after the filing of the notice of appeal. The amount of the bond may be determined upon stipulation or upon motion. A hearing on such motion shall be held forthwith. The court may make any further order, other than or in addition to the bond, appropriate to preserve the status quo or the effectiveness of the judgment. The stay is effective when the supersedeas bond, as stipulated or as ordered by the court, is filed, and when appellant has complied with all other conditions imposed by the court ~~have been complied with~~.

The superior court, in its discretion, may determine the amount of the bond ex parte upon submission to the court of an affidavit stating:

- (a) that appellant has made a good faith attempt to obtain a stipulation from the other parties; and
- (b) the efforts, if any, which have been made to give notice, and the reasons why it is not feasible under the circumstances to give the other parties the opportunity to be heard before the setting of the bond.

(2) *Amount of the Bond.* ~~The bond shall be conditioned for the satisfaction in full of the judgment remaining unsatisfied, together with costs, interest, and any damages reasonably anticipated to flow from the granting of the stay including damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and costs, interest, and damages as the appellate court may adjudge and award, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security or imposes conditions other than or in addition to the bond.~~ The amount of the bond shall be set as the lesser of the following:

- (i) The total amount of damages awarded, excluding punitive damages;
- (ii) Fifty per cent of the appellant's net worth;
- (iii) Twenty-five million dollars.

Notwithstanding the foregoing, the court may require an appellant to post a bond in an amount up to the full amount of the judgment if an appellee proves by clear and convincing evidence that the appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment; or the trial court may lower the bond amount to an amount that will not cause an appellant substantial economic harm if the appellant proves by clear and convincing evidence that the appellant is likely to suffer substantial economic harm if required to post a bond in the amount set pursuant to the provisions of (i), (ii), or (iii) above.

In determining the amount of the bond, the court shall consider, among other things, whether there is other security for the judgment, or whether there is property in controversy which is in the custody of the sheriff or the court.

(3) Objections to the Bond. Not later than 10 days after the bond is served, any party may file objections to the bond, specifying the particulars in which it is claimed that the bond is erroneous or defective, or that the surety is insufficient. If the amount of the bond has been determined ex parte, then the party may also object to the sufficiency of the amount of the bond. All errors, defects, or insufficiencies in a supersedeas bond not specified in the objections are waived. The superior court shall hold a hearing within 10 days after service of the objections.

(b) through (d): [No changes.]