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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SUNFED PRODUCE, L.L.C., an Arizona limited liability company,	)	
Plaintiff/Judgment Creditor/Appellee,	)	2 CA-CV 2010-0103 DEPARTMENT B
v.	)	MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
CONECCIONES AGRICOLAS, S. de R.L. de C.V., a Mexican corporation,	)	
Defendant/Judgment Debtor/Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV10229

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

Law Offices of Terry P. Esser, P.C.
By Terry P. Esser — Tucson
Attorney for Plaintiff/Judgment Creditor/Appellee

Scudi Johnson & Ayers, LLP
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Attorneys for Defendant/Judgment Debtor/Appellant

E C K E R S T R O M, Judge.

¶1 The defendant/appellant Conecciones Agricolas, S. de R.L. de C.V. ("Conecciones"), appeals the trial court's order denying its motion to quash a prejudgment writ of garnishment against its assets, issued pursuant to A.R.S. § 12-2402. The plaintiff/appellee, Sunfed Produce, L.L.C. ("Sunfed"), had sought this provisional remedy on the theory that Conecciones was the alter ego or successor entity of defendants indebted and liable to Sunfed. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 The underlying action concerns a pair of "Marketing Agreement[s]" to finance, grow, distribute, and sell certain produce. Sunfed entered into the agreements with All Green, S.A. de C.V., and three individuals, all of whom signed personal guarantees and promissory notes for money that Sunfed advanced to All Green. In March 2010, Sunfed filed a complaint against Conecciones, All Green, and the three individual defendants in the Santa Cruz County Superior Court.[1] Sunfed asserted claims of fraud, breach of contract, tortious interference, and unjust enrichment against All Green and the individual defendants. Against Conecciones, Sunfed alleged claims of breach of contract, tortious interference with contract, and unjust enrichment. It also sought declaratory relief against Conecciones and requested that Conecciones be "found

[1]Neither All Green nor the individual defendants—Conrado Alberto Vega Tostado, Agustin Luis Vega Tostado, and Maria de Jesus Yaroslava Andrade Rios—are parties to this appeal.

liable for [the other defendants'] actions and debts pursuant to the doctrine of successor liability, alter-ego and/or the Uniform Fraudulent Conveyance Act."

¶3 Together with its complaint, Sunfed filed an "emergency application for provisional remedy without notice/writ of garnishment pursuant to A.R.S. § 12-2402" against all the defendants. In the application, Sunfed sought to garnish Conecciones's assets on the theory that it was liable as the "successor" or "alter ego" of the other defendants. Sunfed claimed, *inter alia*, that the writ was necessary to obtain jurisdiction because "[t]he Defendants in this case are all Mexican corporations or citizens of Mexico who reside or do business in Mexico but have no known assets in Arizona other than the monies collected or to be collected on their behalf by the Garnishees."

¶4 After the trial court issued the writ, Conecciones objected and moved to quash it. In the motion, Conecciones argued the remedy was improper because Conecciones was a legitimate Mexican corporation that was a "stranger to th[e] dispute," being neither a party to the agreements sued upon nor indebted in any way to Sunfed. Conecciones did not address Sunfed's contention that the writ was necessary for the trial court to exercise jurisdiction over Conecciones. The court then denied the motion following a hearing.

Appellate Jurisdiction

¶5 Conecciones initially filed a premature notice of appeal from the trial court's unsigned minute entry order. *See Blackman v. Assocs. Loan Co.*, 1 Ariz. App. 11, 11, 12, 398 P.2d 919, 919, 920 (1965) (holding order denying motion to quash garnishment not appealable unless signed). After this court stayed the appeal and

revested jurisdiction in the trial court, a signed order was obtained and provided to this court as a supplement to the appellate record.

¶6 A premature notice of appeal does not require dismissal when, as here, the trial court has subsequently entered a formal, appealable order and the appellee has not alleged it has been prejudiced by the irregularity. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981); *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, ¶ 16, 993 P.2d 1066, 1070 (App. 1999). Accordingly, we have jurisdiction over the present appeal pursuant to article VI, § 9 of the Arizona Constitution as well as A.R.S. §§ 12-120.21(A)(1) and 12-2101(F)(3). *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Greene*, 195 Ariz. 105, ¶ 6, 985 P.2d 590, 592 (App. 1999) (trial court's ruling on motion to quash garnishment appealable as order dissolving or refusing to dissolve garnishment).

Discussion

Motion to Quash

¶7 On appeal, Conecciones raises a number of challenges to the trial court's ruling. We need not reach them, however, because it has failed to address the jurisdictional basis for the writ, which could independently support the court's ruling. The waiver of this issue disposes of the other arguments presented on appeal.

¶8 As noted, Sunfed sought the writ of garnishment on two grounds below, including the ground specified in A.R.S. § 12-2402(A)(3): that the writ was "required to obtain jurisdiction." In its objection and motion to quash the writ, Conecciones did not dispute Sunfed's allegation that garnishment was necessary for the trial court to obtain jurisdiction over Conecciones. We were not provided a transcript of the subsequent

hearing that was held pursuant to § 12-2402(C).[2] In the absence of the transcript and any written findings by the court, we presume that the court found every fact necessary to support its ruling and that the record supports the court's decision. *See Old Republic Nat'l Title Ins. Co. v. New Falls Corp.*, 224 Ariz. 526, n.4, 233 P.3d 639, 644 n.4 (App. 2010); *Able Distrib. Co. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 402, 773 P.2d 504, 507 (App. 1989).

¶9 On appeal, Conecciones has failed to develop an argument in its opening brief as to why the writ was inappropriate under § 12-2402(A)(3). Sunfed reiterated this ground as a basis for upholding the writ of garnishment in its answering brief. Conecciones then substantively addressed the applicability of § 12-2402(A)(3) for the first time in its reply brief.

¶10 "[T]he general law in Arizona [is] that a party must timely present [its] legal theories to the trial court so as to give the trial court an opportunity to rule properly." *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970). A party therefore waives on appeal any argument not presented properly in the lower court. *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990); *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, ¶ 16, 41 P.3d 651, 654 (App. 2002).

¶11 In addition, an appellant must develop and legally support all arguments within its opening brief. Ariz. R. Civ. App. P. 13(a)(6). The failure to do so results in a

[2]Although Conecciones has cited to a reporter's transcript in its opening brief, the record before us does not include such a transcript. As the appellant, Conecciones was required to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b).

waiver of the argument asserted. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006); *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider party's "bald assertion[s] . . . offered without elaboration or citation to any . . . legal authority"). Furthermore, we do not address arguments that an appellant presents for the first time in a reply brief. *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007). Thus, an appellant's failure to address an alternative ground for a ruling in an opening brief may result in waiver of the issue on appeal. *See State v. Aleman*, 210 Ariz. 232, ¶¶ 8-10, 109 P.3d 571, 575 (App. 2005). Here, we find Conecciones has waived any objection to the writ on the basis of § 12-2402(A)(3) because it did not raise the issue below or on appeal.

¶12 None of Conecciones's remaining arguments provides a basis for disturbing the trial court's ruling. Conecciones mainly challenges the evidence purporting to show its liability for the other defendants' actions or debts. Relying on *In re Texas American Express, Inc.*, 190 S.W.3d 720 (Tex. App. 2005), Conecciones also contends that because it was a third party, Sunfed's claims against it were "contingent" or "unliquidated" and therefore "not subject to a writ of garnishment."

¶13 Assuming, without deciding, that this proposition is correct, it does not apply when garnishment is sought to obtain jurisdiction. Normally, garnishment cannot be used for an unliquidated or contingent debt or claim, *see Able*, 160 Ariz. at 403, 406, 773 P.2d at 508, 511, such as one based in tort. *E.g.*, *Ring v. State Farm Mut. Auto. Ins. Co.*, 147 Ariz. 32, 37, 708 P.2d 457, 462 (App. 1985); *Davidson-Chudacoff/Kol-Pak of*

Ariz., Inc. v. Pioneer Hotel Co., 129 Ariz. 254, 257, 630 P.2d 550, 553 (App. 1981). But when garnishment is used to establish jurisdiction, such as quasi-in-rem jurisdiction,

> "the plaintiff does not claim a pre-existing interest in the property; rather, the plaintiff asserts another type of claim (*e.g.*, in contract or tort) against the defendant and seeks to establish an interest in the defendant's property as a basis for exercising jurisdiction over the defendant when personal jurisdiction is unavailable."

Gibbons v. Indus. Comm'n, 197 Ariz. 108, ¶ 13, 3 P.3d 1028, 1032 (App. 1999), *quoting* 16 James W. Moore & Robert C. Casad, *Moore's Federal Practice 3d* § 108.70, at 108-07 (3d ed. 1999).

¶14 We need not address the merits of the trial court's ruling under § 12-2402(A)(3), given Conecciones's failure to raise the issue below, the missing transcript, and the waiver of the issue on appeal. An appellant has the burden to show that the trial court acted erroneously. *Guirey, Srnka & Arnold, Architects v. City of Phoenix*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969). Conecciones has not done so here.

Attorney Fees

¶15 Sunfed has requested attorney fees on appeal in its answering brief pursuant to Rule 21, Ariz. R. Civ. App. P. This rule, however, is not itself a basis for a fee award. *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, ¶ 24, 45 P.3d 1219, 1224 (App. 2002). Given Sunfed's failure to cite the statutory or decisional basis for any fee award, we deny its request. To the extent Sunfed seeks to recover attorney fees under a contract theory, we deny the request on the ground that no determination has yet been made that Conecciones

is liable for other parties' contracts with Sunfed. We also deny Conecciones's request for attorney fees.

Disposition

¶16 For the foregoing reasons, the ruling is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge