

**IN THE SUPREME COURT OF THE
STATE OF NEVADA**

MICHAEL SARGEANT, Individually
and on behalf of others similarly
situated,

Appellant,

vs.

HENDERSON TAXI,

Respondent.

Supreme Court No. 70837

District Court Case No.: A714136

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Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Michael P. Villani, District Judge

**OPPOSITION TO MOTION TO STAY THE JUDGMENT OF THE
DISTRICT COURT PENDING THE OUTCOME OF THIS APPEAL**

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INTRODUCTION

Nevada law allows a judgment creditor to enforce its judgment upon a debtor's thing in action, or right to bring an action. If a judgment creditor executes on a debtor's right of action, the judgment creditor steps into the shoes of the debtor and controls the claim. This control gives the judgment creditor discretion over whether it should pursue claims on the debtor's behalf and reap any potential award, or whether it should settle or dismiss the claim. Dismissal may be advantageous to a judgment creditor if the right of action it executed on is between the debtor and the judgment creditor. In such a case, the judgment creditor controls whether it wants to dismiss a case against itself. As is the case here, a thing in action may be the judgment debtor's only asset (or one of few), and thus, a stay of judgment threatens the judgment creditor's ability to collect on its judgment because things in action are only temporarily valuable assets.

STATEMENT OF FACTS

Respondent Henderson Taxi obtained a post judgment attorney fee award of \$26,715 under NRS 18.010(2)(b) in the district court against appellant Michael Sargeant after Sargeant maintained his "unsupported" action, which the district court "had already clearly decided." 1 AA 420-21. While Sargeant appealed the merits of the district court's judgment, Henderson Taxi sought a writ of execution on Sargeant's things in action, including his right to pursue this appeal. *See*

Motion, Exhibit C. Sargeant moved to stay execution of the judgment below but conceded that he did not have any assets (other than things in action) to satisfy the judgment or post a supersedeas bond. The district court denied Sargeant's motion for stay, giving rise to the instant motion. *See* Motion, Exhibit D, I.

ARGUMENT

A. Nevada Law Allows Judgment Creditors to Execute on Things in Action

Once a court awards a money judgment to a party, that party becomes a judgment creditor, while the party against whom the award was made is a judgment debtor. To satisfy its judgment, a judgment creditor may file a writ of execution as per NRS Chapter 21. *See Gallegos v. Malco Enters. of Nev., Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011). NRS 21.080 defines property that is subject to execution as: “[a]ll goods, chattels, money and other *property*, real and *personal*, of the judgment debtor, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action.” (emphasis added). “NRS 10.045 further defines ‘[p]ersonal property’ as including ‘money, goods, chattels, *things in action* and evidence of debt.’” *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 (noting that NRS 10.010 provides “that the definition used in NRS 10.045 applies to the entire statutory title, including NRS 21.080”). Relying on *Black’s Law Dictionary*, this

Court defined a “thing in action” or “choses in action” to mean a “right to bring an action to recover a debt, money, or thing.” *Id.*

This Court concluded “that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment.” *Id.* This Court reasoned that such a holding “accords with this state’s general policy that statutes specifying the kinds of property that are subject to execution ‘must be liberally construed’ for the judgment creditor’s benefit.” *Id.* However, this was not the first or last word this Court has had on the subject. Rather, this Court has consistently upheld a creditor’s right to execute on a debtor’s thing in action.¹

Unlike a thing in action, which means the right to *bring* a claim, a litigant’s defenses in a lawsuit are not considered personal property subject to execution. *See Butwinick v. Hepner*, 128 Nev. 718, 722, 291 P.3d 119, 121 (2012). Sargeant affirmatively misrepresents this Court’s holding in *Butwinick* by stating that it held a “Party’s right to appeal judgment in the same case not subject to NRS 21.080

¹ *See Butwinick v. Hepner*, 128 Nev. 718, 722, 291 P.3d 119, 121 (2012) (reaffirming *Gallegos*); *First 100, LLC v. Ragan*, Docket No. 68342, 2016 WL 4546783 (Order Dismissing Appeal, Aug. 26, 2016) (holding that appellate rights are part of the things in action that can be acquired through execution, stating: “Respondent has filed a motion to dismiss on the ground that appellants’ assets, including their rights to the instant appeal, have been acquired by a third party and that therefore, appellants have lost standing to pursue the appeal. . . . [W]e grant the motion to dismiss”); *Antonio Nev., LLC v. Rogich*, Docket Nos. 64763, 65731, 2015 WL 3368808 (Order Dismissing Appeal, May 20, 2015); *Brandstetter v. Boyd*, Docket No. 54229, 2010 WL 4684450 (Order Granting Motion to Dismiss Appeal, Nov. 12, 2010); *Crenshaw v. Conrad*, Docket No. 49746, 2008 WL 6102109 (Order Dismissing Appeal, Sept. 12, 2008).

execution.” Motion, at 2. This is entirely inaccurate. In *Butwinick*, the plaintiffs sued the defendants and the defendants counterclaimed. *See* 128 Nev. at 720, 291 P.3d at 120. After a bench trial, the district court entered judgment in favor of the plaintiffs, denying any relief to defendants on their counterclaim. *Id.* The defendants appealed the district court’s judgment based only on their defenses made to plaintiffs’ claims but did not appeal the dismissal of their counterclaims. *Id.* Plaintiff-respondents obtained a writ of execution on the judgment and sought to execute on the defendant-appellants’ right to appeal. *Id.* While reaffirming this Court’s decision in *Gallegos*, this Court rejected plaintiff-respondents’ argument “that a litigant’s *defenses* are assignable” because defenses are not personal property subject to execution. *Id.* at 722, 291 P.3d at 121 (emphasis added). Specifically, this Court explained and held that “a ‘thing in action’ subject to execution under NRS 21.080 and NRS 10.045 does not include a party’s defenses to an action” *Id.* at 723, 291 P.3d at 122.

Butwinick did not step back from this Court’s approval of executing on a party’s things in action. *See* 128 Nev. at 722, 291 P.3d at 121. Rather, as recently as one month before the filing of this Opposition, this Court approved one party to an appeal executing on another party to that same appeal’s thing in action and dismissing that appeal. *First 100*, Docket No. 68342 (Order Dismissing Appeal, Aug. 26, 2016). Nothing has changed in the intervening month.

Here, Sargeant argues that, because he appealed the district court's judgment, his appeal is considered "defensive" and not subject to execution. *See* Motion, at 4-5. It is not. Sargeant brought the underlying claims against Henderson Taxi, and, although he is appealing the district court's judgment against him, such appeal does not mutate his thing in action into a "defense." *See supra* note 1. *Butwinick* simply held that actual "defenses" are not property subject to execution under NRS 21.080 like things in action are. 128 Nev. at 723, 291 P.3d at 122. Thus, Sargeant's argument that his appeal is "defensive" (which it is not) is irrelevant because his thing in action is specifically subject to execution under Nevada law, *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289, unlike a defense.

In addition to misconstruing this Court's precedent on the matter—and completely omitting any citation to *Gallegos*—Sargeant's Motion presents cases from other, non-binding jurisdictions to support his policy argument that enforcing judgments on things in action should be prohibited. *See* Motion, at 5-7. Though some states do not allow execution on a party's chose in action, Nevada does.² This

² While some states disagree with allowing execution upon things in action, multiple other states agree with Nevada and have approved this process. *See, e.g., Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006) ("[A] chose in action is personal property subject to execution."); *Applied Med. Tech., Inc. v. Eames*, 44 P.3d 699, 703 (Utah 2002) ("[A] defendant who has acquired claims pending against itself may move to dismiss those claims without abrogating the right of access to the courts."); *Lamoreaux v. Black Diamond Holdings, LLC*, 296 P.3d 780, 785-86 (Utah Ct. App. 2013) (approving purchase of claim against purchaser at judgment execution sale and dismissal of same claim).

Court's binding precedent is clear on this issue and any policy arguments are reserved for the Legislature because judgment enforcement under NRS 21.080(1) and NRS 10.045 control in Nevada as interpreted by this Court.

B. The Constitutional Nature of Sargeant's Things in Action Does Not Exempt them from Execution

Without any legal support for his argument, Sargeant contends that, because his underlying claims arise under the Minimum Wage Amendment to the Nevada Constitution, such claims are superior to and exempt from execution from a judgment creditor. Sargeant presents no support for this argument and it is baseless. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this Court need not consider claims that are not cogently argued or supported by relevant authority).

Constitutional things in action can be executed upon, just like any other claim, as long as the debtor was provided due process. Things in action are considered personal property, NRS 10.045, and are thus protected by procedural due process. *Cf. Pressler v. City of Reno*, 118 Nev. 506, 510, 50 P.3d 1096, 1098 (2002) (stating that individuals who "have a constitutionally protected property interest are entitled to due process before being deprived of that interest"). Here, Henderson Taxi and the district court properly followed all statutory requirements to ensure Sargeant received due process. Moreover, Sargent did not claim below or to this Court that he was deprived of due process.

C. The Motion for Stay of Judgment Should Be Denied to Protect Henderson Taxi's Right to Execute on Sargeant's Only Assets

Sargeant argues that, without a supersedeas bond, this Court should grant his motion for stay because it will maintain the status quo. Motion, at 7. This is false and shows his misunderstanding of what maintaining the status quo entails. A supersedeas bond is generally required to stay execution of a judgment pending appeal “to protect the judgment creditor’s ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay.” *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005). Thus, maintaining the status quo means preserving whatever ability the judgment creditor has to execute upon the debtor’s assets at the time of the district court’s judgment.

In this case, the standard Sargeant asserts balances five factors when determining whether it should grant a motion for stay with a partial or waived supersedeas bond.³ *Id.* at 836, 122 P.3d at 1254. However, Sargeant concedes that

³ Sargeant discusses the *Nelson* factors instead of the factors this Court considers “in determining whether to issue a stay pending disposition of an appeal.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Because Sargeant failed to address the correct standard in his motion, he is prohibited from raising new arguments in his reply. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (“We decline to consider this argument because Francis did not cogently raise the issue in his opening brief; rather, he raised it for the first time in his reply brief, thereby depriving Wynn of a fair opportunity to respond.”). Thus, as Sargeant failed to cogently argue and support with legal authority his motion for stay of judgment

“none of those factors weigh in Sargeant’s favor.” Motion, at 8. Instead, Sargeant tries to rely on the “unusual circumstances” standard from *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302 (1983), which this Court expressly departed from and modified in *Nelson*. See 121 Nev. at 835, 122 P.3d at 1254.

Sargeant argues that the status quo in this case will not be changed by granting his motion to stay because, either way, Henderson Taxi “cannot collect any money from Sargeant to satisfy its judgment.” Motion, at 8. As Sargeant points out, he “has no assets and his sole source of income is social security disability payments and he cannot pay any portion of the sanctions award or post a *supersede[a]s* bond.” *Id.* at 1. Assuming Sargeant’s financial situation is true, this fact only supports denial of Sargeant’s motion for stay. Sargeant’s things in action are the only assets against which Henderson Taxi can execute.⁴

Granting a stay would greatly harm Henderson Taxi as Sargeant’s things in action are only temporarily valuable assets. If this Court grants the motion for stay, Henderson Taxi will forever lose its ability to execute on its judgment because Sargeant’s claim will be valueless after Henderson Taxi is successful on (and has

pending appeal, this Court need not consider his argument. See *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Under either standard, however, Henderson Taxi will suffer irreparable injury if the stay is granted because Sargeant’s things in action are only temporarily valuable assets, and, by Sargeant’s own admission, he has no other way to satisfy the judgment.

⁴ Alternatively, if this Court is inclined to grant Sargeant’s Motion, any stay should be limited to the underlying appeal and not stay execution on Sargeant’s other two things in action. See Motion, Exhibit I, para. 8.

fully paid for) its appeal. *See* 1 AA 420-21. Thus, contrary to Sargeant's claim that granting a stay "will inflict 'no material damage'" upon Henderson Taxi, it is clear that Henderson Taxi will be unable to satisfy any portion of its judgment if it is not allowed to execute upon Sargeant's things in action because, as Sargeant concedes, his financial condition is such that the "judgment is not collectible." Motion, at 9.

Additionally, even under the non-binding factors that other jurisdictions consider, which Sargeant relies upon, *see id.*, Sargeant's motion for stay should still be denied because the probability that he will prevail in this appeal is very low. Sargeant attempts to distinguish the frivolousness of his motions below with this appeal, but this is a distinction without a difference. The district court, in its order awarding attorney fees, concluded that, once Sargeant was on notice that his Union, the lawfully elected representative of its members, had settled all of its members' claims—including his—with Henderson Taxi, Sargeant "had no factual or legal basis" to maintain his suit against Henderson Taxi. 1 AA 421. Nevertheless, Sargeant continued litigation, which gave rise to the attorney fee award against him because Henderson Taxi was forced to litigate a frivolous claim. *Id.* Now, despite the district court's conclusion of law that "[i]t is well-settled that unions may act on behalf of their members and that agents may settle claims for their principals," *id.*, Sargeant's appeal challenges a union's undoubted ability to settle its members' claims. *See* Docket No. 69773

In summary, under the standard Sargeant asserts on appeal, he concedes that none of those factors weigh in favor of granting his motion for stay. And, even considering Sargeant's other argument regarding the strength of his success on appeal, Sargeant also fails because, as the district court concluded, he is challenging "well-settled" law that unions may settle claims for their members. *Id.* Thus, this Court should deny Sargeant's motion for stay of judgment.

CONCLUSION

In light of the foregoing, Henderson Taxi respectfully requests that this Court deny Sargeant's motion.

Dated: September 27, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **OPPOSITION TO MOTION TO STAY THE JUDGMENT OF THE DISTRICT COURT PENDING THE OUTCOME OF THIS APPEAL** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on September 27, 2016.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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