IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 70837

Dist. Ct No.: A-15-714136-C

MICHAEL SARGEANT, Petitioner,

vs.

HENDERSON TAXI, Respondents

REPLY TO OPPOSITION TO MOTION TO STAY THE JUDGEMENT OF THE DISTRICT COURT PENDING THE OUTCOME OF THIS APPEAL

Leon Greenberg, NSB 8094
A Professional Corporation
2965 S. Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
Telephone (702) 383-6085
Fax: 702-385-1827
Attorney for Petitioner

Appellant ("Sargeant") presents this reply in support of his motion to stay the judgment of the district court pending the resolution of this appeal.

ARGUMENT

I. APPELLEE VIOLATES NRAP 36(c)

Appellee cites three unpublished decisions of this Court that pre-date January 1, 2016 in violation of NRAP Rule 36(c). Those decisions have no persuasive or precedential value and should be ignored.

II. APPELLEE MISREPRESENTS THIS COURT'S PRECEDENTS

Appellee claims Sargeant is not pursuing "defensive appeal rights" as in *Butwinick v. Hepner*, 291 P.3d 119, 122 (Nev. Sup. Ct. 2012) and *Butwinick* does not bar the appeal attachment it seeks. That is untrue and *Butwinick's* discussion of the circumstances of that case, involving an appellant seeking only to reverse a monetary judgment against themselves, does not render its holding supportive of appellee. Neither *Butwinick* nor the only other precedent of this Court cited by appellee, *First 100 LLC v. Ragan,* 2016 Nev. Unpub. LEXIS 645 (Nev. Sup. Ct. 8/26/16), allows a judgment creditor, through a judgment execution, to terminate an appeal of that same judgment because the judgment debtor is too poor to stop that judgment execution by posting a *supersedes* bond.

A. Appellant's appeal is "defensive" as in *Butwinick*

This judgment arises from appellee's successful post final judgment motion

pursuant to NRS § 18.010(2)(b) for a $26,715 award of attorney's fees as a lawsuit's "prevailing party." Appellee will lose its status as a prevailing party, and such award, if Sargeant successfully appeals the district court's final judgment. *See, Lehrer McGovern v. Bullock Insulations*, 197 P.3d 1032, 1043 (Nev. Sup. Ct. 2008) ("...in light of this opinion [reversing final judgment and remanding for further proceedings] we necessarily vacate the [post judgment] award of attorney fees.")

Sargeant has separately appealed the district court's final judgment, appeal number 69773, and its post judgment award of attorney's fees. He must do so to secure this Court's jurisdiction to review the district court errors in each. *See*, *Campos-Garcia v. Johnson*, 331 P.3d 890, 891 (Nev. Sup. Ct. 2014) (Timely appeal from final judgment proceeds, no timely separate appeal was filed on post-judgment award of attorney's fees and no appellate jurisdiction over same).

Sargeant can only challenge the district court's error in granting final judgment, and appellee's "prevailing party" status upon which its award of $26,715 depends, by perfecting appeal number 69773. His prosecution of that appeal is, as in *Butwinick*, "defensive." If he is successful in that appeal he will terminate appellee's "prevailing party" status and necessarily void, as in *Lehrer,* the very judgment appellee is seeking to execute upon by attaching such appeal. He will lose that "defensive" appeal right through appellee's attachment and

dismissal of such appeal, as this Court will lack jurisdiction to consider whether the final judgment was in error, and whether appellee was a "prevailing party," in Sargeant's separate appeal of the post-judgment order. *See, Campos-Garcia,* 331 P.3d 890-891 and NRAP 4(a)(1).

B. <u>This Court has never approved of the appeal attachment sought.</u>

Appellee states that in *First 100* "...this Court approved one party to an appeal executing on another party to that same appeal's thing in action and dismissing that appeal." That is untrue and did not occur in *First 100* or any other precedent of this Court. In *First 100* "....after appellants filed the notice of appeal, a third party, Omni Financial LLC acquired all of appellants' assets, including pending litigation..." 2016 Nev. Unpub. LEXIS 645, at p.1. The appellants in *First 100* lost their appeal standing through a judgment attachment by a third party, not by an attachment from the same judgment under appeal.

Appellee also mischaracterizes the lone additional non-Nevada authority it cites and that was not discussed in Sargeant's moving papers. The claim purchased, and dismissed, in *Lamoreaux v. Black Diamond Holdings LLC*, 296 P.3d 780, 782 (Ut. Ct. App. 2013), involved a third party's judgment execution, not a judgment creditor's attachment of the very appeal contesting their judgment.

III. THE NEVADA CONSTITUTION BARS THE VITIATION OF AN INDIGENT'S APPEAL RIGHTS

Appellee argues that because Nevada allows attachment of a judgment

debtor's choses in action by their judgment creditors it does so in all circumstances. It dismisses, without discussion, the only judicial decisions directly on point from other jurisdictions and discussed in Sargeant's moving papers as containing mere "policy" arguments that "are reserved for the Legislature." They do not and appellee is seeking to abridge Sargeant's fundamental constitutional right to due process and equal protection.

Nevada, having granted litigants a right to civil appeals, cannot restrict that right to wealthy litigants. *See, Lindsey v. Normet,* 405 U.S. 56, 77-78 (1972) (State granted appellate review but excessive bonding requirements it imposed upon appellants, because they were not "reasonably tailored," violated equal protection clause of United States Constitution by preventing poor litigants from securing appellate review). This Court has similarly found that a litigant's indigency cannot result in them being subject to unreasonable restrictions on their right to seek judicial relief. *See*, *Barnes v. Eighth Judicial District Court*, 748 P.2d 483, 486 (Nev. Sup. Ct. 1987) (NRS 12.015(1), requiring an attorney's "certificate of merit" from a litigant unable to pay the filing fee, violates equal protection guarantees of Nevada Constitution, *citing Lindsay*).

Nevada does not require civil litigants to post a *supersedeas* bond to seek appellate review, though it grants them the right to do so. *See,* NRCP 62(d). Appellants who fail to post a *supersedeas* bond do not waive their right to appeal

and are subject to enforcement of a judgment pending appeal. Yet appellee argues that *every* losing litigant subject to *any* money judgment will, through Nevada's judgment execution process, have no right to appellate review *except* if they post a *supersedeas* bond. Appellee goes so far as to argue that it has a vested, and valuable, legal right to *destroy* Sargeant's appeal through such execution and it will be harmed by the requested stay since Sargeant has nothing else of value.

Accepting appellee's arguments will mean every indigent appellant, such as Sargeant, will have their appeal attached as a "chose in action" and then dismissed to satisfy the exact same appellee/judgment creditor's judgment they are seeking to appeal. Such a result will make a *supersedas* bond a prerequisite for any civil litigant to secure appellate review even though Nevada's statutes do not require such a bond (nor could they under *Lindsey* and *Barnes).* This Court's doors will be barred to all indigent litigants who will never be able to post a *supersedeas* bond (their counsel also being barred from doing so on their behalf per NRPC § 1.8(l)). Such an abridgment of the poor's fundamental constitutional equal protection and due process rights cannot be allowed. Or at least not as long as Nevada chooses to provide appellate review in civil matters and this Court is to remain available to all civil litigants irrespective of their wealth or indigence.

CONCLUSION

Wherefore, appellant's motion for stay of judgment should be granted.

Dated: Clark County, Nevada
September 29, 2016

Submitted by
Leon Greenberg Professional Corporation

/s/ *Leon Greenberg*
Leon Greenberg, Esq.
Attorney for the Appellant
2965 South Jones Boulevard - Suite E3
Las Vegas, Nevada 89146
(702) 383-6085

CERTIFICATE OF MAILING

The undersigned certifies that on September 29, 2016, she served the within:

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

by Electronic Court filing to:

Anthony L. Hall, Esq.
R. Calder Huntington, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Fl.
Las Vegas, NV 89134

Attorneys for Respondents
Henderson Taxi

/s/ Sydney Saucier
Sydney Saucier