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

7 HOWARD SHAPIRO and JENNA  
SHAPIRO

Supreme Court No.: 73943

8 Appellants,

Case No. A-14-706566-C

9 vs.

**Respondents' Opposition to  
Emergency Motion to Stay Execution  
of Judgment**

10 GLENN WELT, RHODA WELT,  
11 LYNN WELT, and MICHELLE WELT,

12 Respondents.

13 The Shapiros twice sought and failed to obtain a stay from the district court.  
14 Their current motion merely recycles these arguments, but fails to address the  
15 reasons the district court denied their two prior requests.

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1 DATED this 14<sup>th</sup> day of September, 2018.

2 WILSON ELSER MOSKOWITZ  
3 EDELMAN & DICKER LLP

4 /s/ Michael P. Lowry

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10 Lynn Welt, and Michele Welt

11 **Memorandum of Points & Authorities**

12 **I. The district court denied relief per NRAP 8(a)(1).**

13 The Shaprios twice asked the district court to stay execution. The district  
14 court granted the first request in part, conditioning a stay upon posting a  
15 \$146,755.02 supersedeas bond.<sup>1</sup> The Shapiros did not post a bond; they instead  
16 filed a second motion for a stay. The order denying the second motion noted  
17 “[o]ne of the factors the court considered in partially granting the first motion to  
18 stay was the lack of information provided concerning the Shapiros’ financial  
19 condition and ability to satisfy the judgment if affirmed on appeal.”<sup>2</sup> The Shapiros  
20 attempted to provide some of this information, but the district court declined to  
consider it. “The document is unverified, lacks an original signature, may be  
incomplete, and is too late. Even if it had been filed with the motion, the

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<sup>1</sup> Order attached as Exhibit 1 to Motion.

<sup>2</sup> Order at 1:25-27; attached as Exhibit 2 to Motion.

document's content would not have been sufficient for the court to grant the relief the Shapiros seek."<sup>3</sup>

**II. The Shapiros present the same arguments, but still lack support.**

A motion to stay per NRAP 8(a) "must concurrently comply with Rule 62(d) requiring a supersedeas bond."<sup>4</sup> The Shapiros admittedly have not complied with NRCP 62(d), so they lack standing to a stay per NRAP 8(a).

**a. The Shapiros do not qualify for a stay anyway.**

The Shaprios' requested is meritless even had NRCP 62(d) been satisfied. A court considering this request evaluates a non-exhaustive list of factors.

- (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
- (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
- (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and
- (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

- **The object of the appeal will not be defeated if the stay is denied.**

The district court entered summary judgment and awarded money damages. There is no argument that enforcing the judgment would result in the waiver of

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<sup>3</sup> *Id.* at 2:7-11.

<sup>4</sup> *State ex rel. Pub. Serv. Comm'n v. Dist. Ct.*, 94 Nev. 42, 44, 574 P.2d 272, 273 (1978).

1 certain claims or defenses, such as *Fritz Hansen A/S v. Dist. Ct.* considered.<sup>5</sup> If the  
2 Shapiros succeed on appeal, the parties simply return to district court for further  
3 proceedings.

- 4 • **The Shapiros will not suffer irreparable or serious harm if the stay is denied.**

5  
6 By way of example, *Fritz Hansen A/S* concluded “litigation expenses, while  
7 potentially substantial, are neither irreparable nor serious.”<sup>6</sup> It also cited a variety  
8 of cases describing what might be considered irreparable or serious harm. *Dixon v.*  
9 *Thatcher* concluded, in the context of injunctive relief concerning the sale of a  
10 home, that an “irreparable harm” is one “for which compensatory damage is an  
11 inadequate remedy.”<sup>7</sup> A stay was appropriate “[b]ecause real property and its  
12 attributes are considered unique and loss of real property rights generally results in  
13 irreparable harm....”<sup>8</sup>

14 *Fritz Hansen A/S* also cited *Wis. Gas Co. v. Fed. Energy Regulatory Com.*,  
15 which also arose in the context of injunctive relief. In denying relief, the court  
16 noted “[i]t is also well settled that economic loss does not, in and of itself,  
17 constitute irreparable harm.”<sup>9</sup>

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18 <sup>5</sup> 116 Nev. 650, 657-58, 6 P.3d 982, 986 (2000).

19 <sup>6</sup> *Id.* at 658, 6 P.3d at 986-87.

<sup>7</sup> 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987).

20 <sup>8</sup> *Id.* at 416, 742 P.2d at 1030.

<sup>9</sup> 758 F.2d 669, 674 (D.C. Cir. 1985).

1 The key word in this consideration is irreparable. Mere injuries,  
2 however substantial, in terms of money, time and energy necessarily  
3 expended in the absence of a stay are not enough. The possibility that  
4 adequate compensatory or other corrective relief will be available at a  
later date, in the ordinary course of litigation weighs heavily against a  
claim of irreparable harm.<sup>10</sup>

5 An exception exists in rare circumstances. “Recoverable monetary loss may  
6 constitute irreparable harm only where the loss threatens the very existence of the  
7 movant’s business.”<sup>11</sup>

8 Applied here, the Shapiros argue the Welts’ judgment  
9 can have a serious impact on Plaintiff Howard Shapiro’s ability to  
10 continue to run his business, Overlook consulting group, Inc.,  
11 registered in the State of New Jersey in 2009, which grosses roughly  
12 \$1,000,000.00 annually. That is because a portion of the business  
13 typically involves monetary draws from lending institutions as well as  
specific client requirements that may preclude Mr. Shapiro from being  
able to access project related employment and/or compensation  
relating to the business.<sup>12</sup>

14 Like in the district court, these claims are not supported by affidavits or any  
15 financial documentation supporting these claims. The district court declined to  
16 accept these claims at face value; they fair no better this time.

17 Even had this argument been supported with evidence, it does not indicate  
18 that the very existence of the Shapiros’ business is threatened by this judgment.

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19 <sup>10</sup> *Id.* (quoting *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C.  
Cir. 1958)).

20 <sup>11</sup> *Id.*

<sup>12</sup> Motion at 2:18-24.

1 They indicate only that the judgment “can have a serious impact” upon it. In  
2 summary, Plaintiffs have not demonstrated irreparable or serious harm beyond  
3 potential economic consequences.

- 4 • **Will the Welts’ will suffer irreparable or serious injury if the stay or  
5 injunction is granted?**

6 The same economic rationale applies to the Welts. At issue is a money  
7 judgment. If the Shapiros will not suffer irreparable harm or serious injury, then  
8 neither will the Welts.

- 9 • **Are the Shapiros likely to prevail on the merits in the appeal?**

10 No. The Shapiros’ do not highlight any obvious, glaring errors that would  
11 effectively merit reconsideration. They instead continue arguments the district  
12 court has rejected, in some circumstances twice. These arguments are the same as  
13 presented in their appellate briefing. Other than noting their grievances, the  
14 Shapiros present no persuasive analysis as to why these arguments should prevail  
15 on their third attempt.

### 16 **III. The Shapiros’ alternative security is inadequate.**

17 Finally, the Shapiros propose alternative security to satisfy NRCP 62(d) and  
18 trigger a stay of execution. The Shapiros claim to “have an existing business that  
19 grosses a fair amount of income annually.”<sup>13</sup> “After the matter is affirmed on  
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<sup>13</sup> *Id.* at 13:22-23.

1 appeal, collecting on the judgment will not take any additional time such that  
2 Respondents will be prejudiced and, Appellants' company, established in 2009, is  
3 not going anywhere and will still earn an income.”<sup>14</sup>

4 *Nelson v. Heer* evaluated when a security other than a supersedeas bond may  
5 satisfy NRCP 62(d).

6 The purpose of security for a stay pending appeal is to protect the  
7 judgment creditor's ability to collect the judgment if it is affirmed by  
8 preserving the status quo and preventing prejudice to the creditor  
9 arising from the stay. However, a supersedeas bond should not be the  
10 judgment debtor's sole remedy, particularly where other appropriate,  
reliable alternatives exist. Thus, the focus is properly on what security  
will maintain the status quo and protect the judgment creditor pending  
an appeal, not how “unusual” the circumstances of a given case may  
be.<sup>15</sup>

11 *Nelson* approved five factors to consider when evaluating whether an alternative  
12 security is appropriate.

13 (1) the complexity of the collection process; (2) the amount of time  
14 required to obtain a judgment after it is affirmed on appeal; (3) the  
degree of confidence that the district court has in the availability of  
15 funds to pay the judgment; (4) whether the defendant's ability to pay  
the judgment is so plain that the cost of a bond would be a waste of  
16 money; and (5) whether the defendant is in such a precarious financial  
situation that the requirement to post a bond would place other  
creditors of the defendant in an insecure position.<sup>16</sup>

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19 <sup>14</sup> *Id.* at 13:25-28.

20 <sup>15</sup> *Nelson v. Heer*, 121 Nev. 832, 835-36, 122 P.3d 1252, 1254 (2005).

<sup>16</sup> *Id.* at 836; 122 P.3d at 1254.

1       The Shapiros gloss over these factors with circular logic. They claim that a  
2 stay of execution is merited because execution efforts “can have a serious impact  
3 on Howard Shapiro’s ability to continue to run his business.”<sup>17</sup> If execution is  
4 stayed, then the business is an adequate security for the judgment. But the  
5 Shapiros do not explain how the business would remain an adequate security if the  
6 judgment is affirmed. Presumably the judgment would still be an existential threat  
7 to the business. If so, the Shapiros’ business is an adequate security only if the  
8 judgment is reversed. This is hardly comforting to the Welts.

9       Second, Plaintiffs offer absolutely nothing that would permit a financial  
10 assessment of their income and assets that would allow the Welts, the court, or  
11 anyone else to determine their ability to satisfy the judgment. The fact that their  
12 application for a supersedeas bond was rejected indicates financial distress that  
13 could impair the Welts’ ability to collect their judgment.

14       Plaintiffs are unable to post a supersedeas bond or offer alternative security.  
15 This emphasizes the potential harm the Welts may suffer if collection efforts are  
16 stayed. Absent adequate security, there is no legal basis to stay enforcement of a  
17 judgment.

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<sup>17</sup> Motion at 2:18-19.



1 **IV. The Shapiros do not qualify for any relief.**

2 This is the Shapiros' third request for a stay of execution. They insist they  
3 have funds to satisfy the judgment, but have never provided any evidence of it.  
4 They claim their business is solvent, but provide no evidence of that either. The  
5 only evidence provided is that the Shapiros' application for a supersedeas bond  
6 was rejected, indicating financial distress. A stay of execution is not merited under  
7 these circumstances.

8 DATED this 14<sup>th</sup> day of September, 2018.

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1 **Certificate of Service**

2 Per NRAP 25(c), I certify that I am an employee of Wilson Elser  
3 Moskowitz Edelman & Dicker LLP, and that on September 14, 2018,  
4 **Respondents' Opposition to Emergency Motion to Stay Execution of**  
5 **Judgment** was served via electronic means by operation of the Court's electronic  
6 filing system to:

7 Alex B. Ghibaud, Esq.  
8 G Law  
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13 BY: /s/ Naomi E. Sudranski  
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