

IN THE SUPREME COURT OF NEVADA

JASON T. SMITH, an individual,
Appellant,
vs.
KATY ZILVERBERG, an individual; and
VICTORIA EAGAN, an individual,
Respondents.

Supreme Ct. No. 80154
Dist. Ct. Case No.: A19-070817-11 Filed
Feb 10 2020 11:40 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT’S OPPOSITION TO MOTION TO EXPEDITE
APPEAL**

Appellant, Jason T. Smith (“Appellant”), hereby submits this Opposition to the Motion to Expedite Appeal filed on February 3, 2020 by Respondents Katy Zilverberg and Victoria Eagan (collectively, Respondents). This Opposition is supported by the attached memorandum of points and authorities.

Dated this 10th day of February 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondents filed the underlying Motion to Expedite Appeal (“Motion”) regarding briefing, oral argument, and resolution of this appeal pursuant to Nev. R. App. P. 2, 26(d) and 31(a). Yet, Respondents fail to state any issue of profound significance for such a preferential briefing or oral argument setting.

Despite an attempt to cite rules to apply to such a request, Respondents fail to state any rule in the Nevada Rules of Appellate Procedure that is directly on point. This is not a criminal appeal, in which Nev. R. App. P. 4(f) specially provides for expedited appeals in criminal matters to promote justice.

I. There is No Good Cause to Suspend the Rules and Expedite This Appeal.

Here the only rule that is on point would be to allow for the suspension of the Nevada Rules of Appellate Procedure. Nev. R. App. P. 2 states that “[o]n the court’s own or a party’s motion, the court may — to expedite its decision or for other good cause — suspend any provision of these Rules in a particular case and order proceedings as the court directs, except as otherwise provided in Rule 26(b).” (*Emphasis added*).

There is no good cause to expedite the briefing schedule nor the hearing on this appeal. Good cause exists to expedite the hearing of this appeal under Ninth Circuit Rules 27-12, 34-3 and 28 U.S.C. § 1657 because Plaintiffs-Appellants suffer ongoing irreparable harm and would thus entitle a priority in hearing. Ninth Circuit

Rule 27-12(3) provides that a motion to expedite hearing an appeal “will be granted upon a showing of good cause,” which exists when irreparable harm may otherwise occur. *See also* 5th Cir. R. 27.5 (As a general matter, motions for expedited appeal in civil and criminal cases made to the Fifth Circuit require a showing of “good cause.”).

Ninth Circuit Rule 34-3(5) also provides that appeals are entitled to priority in hearing for good cause shown pursuant to 28 U.S.C. § 1657. Good cause exists “if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.” 28 U.S.C. § 1657(a). Additionally, hearing priority is afforded to civil cases seeking injunctive relief. Ninth Cir. R. 34-3(3).

Irreparable harm in the deprivation of constitutional rights is not present here. Respondents will not suffer ongoing irreparable harm. While, Respondents attempt to argue that because this is an Anti-SLAPP matter that a delay will somehow chill their First Amendment rights, they are being disingenuous at best to this Court.

The first appeal in this case (docket number 80154) involves an appeal from the district court’s order granting Defendants Special Motion to Dismiss Pursuant to Nev. Rev. Stat. § 41.660 (Anti-SLAPP). After the filing of the first appeal, on December 20, 2019, the district court entered a post-judgment order awarding attorney’s fees, costs and statutory awards to the Respondents, and granting

Respondents' Motion to Dissolve the Preliminary Injunction; and Appellant filed the second appeal (docket number 80348)¹. Based on the current district court rulings, there is nothing standing in Respondents way to delay resolution or chill their First Amendment rights. There is no injunctive relief currently in place against the Respondents. While the district court did grant a stay as to any collection activities for the attorney's fees, costs and statutory awards upon the filing of a supersedeas bond, nothing in the stay order put any restrictions on the Respondents and their ability to practice free speech. Additionally, the posting of the supersedeas bond protects any prejudice to the Respondents.

II. This Appeal Does Not Involve the News Media.

In Nevada, there is no specific statute or rule which provides for an expedited appeal in cases involving news media subpoenas. A motion to stay a district court order must be made in the district court prior to the filing of a motion to stay a district court order that is filed in the Nevada Supreme Court.

Appeals may be expedited, particularly when there is a pressing need for the reporter's information and the need for prompt review to avoid any further burdening or violation of such interests. The main issue in this case on appeal is whether Appellant is a public figure and whether his status rises to the level of the need to

¹ There is a motion to consolidate currently pending in both appeals 80154 and 80348.

alert the public on issues of public interest rather than being a personal vendetta by the Respondents. Respondents are **not** reporters, and the statements made were made not in a publication widely distrusted, but on their social media pages. Contrary to Respondents' arguments in their Motion, there is not a pressing need for Respondents information to be disseminated to the public.

There are no special considerations that affect news media subpoenas; however, journalists found in contempt under § 1826 should move for an expedited appeal under § 1657 or possibly seek an injunction against the subpoenaing party at an earlier point so that they may use the expedited appeal process. Where a reporter has been jailed for contempt, his or her appeal must be disposed of as soon as practicable but, in no event, later than thirty days from the filing of the appeal. 28 U.S.C. §1826(b). This is not the case here with the Respondents.

In the Sixth Circuit, there is no provision in federal law for expedited appellate review of the merits of a court order requiring a reporter to comply with a subpoena. The best way to get expedited relief is to seek a stay of the court's disclosure order pending resolution of the merits of an appeal. In Kansas, the rules of appellate practice pertaining to expedited appeals do not apply to those involving journalist privilege issues or the shield law. *See*, Kansas Supreme Court Rule 10.01 and 10.02. In Illinois, there are no special considerations that affect news media subpoenas. *See*, Illinois Supreme Court Rule 311.

As federally and in other states, Nevada has no specific statute or rule which provides for an expedited appeal in cases involving news media. And again, Respondents are not news media. Thus, Respondents should have even less protection under the law. Moreover, Respondents' should have brought a motion to stay the district court versus this Motion in the Nevada Supreme Court, if they felt they were under any chilling effects of the preliminary injunction, which ironically, has been dissolved.

III. This Motion Was Not Timely.

In the Third Circuit, expedited appeals are governed by Local Appellate Rule 4.1, which provides that a motion for expedited appeal must be filed within 14 days of the notice of appeal and must set forth the exceptional reason that warrants expedition and be accompanied by a proposed briefing schedule. Here, Appellant filed his second notice of appeal on December 30, 2019. Yet, Respondents filed this Motion on February 3, 2020, only after the case went to the Settlement Judge and moments after the Settlement Judge filed his Final Report that the case did not resolve. Again, this shows Respondents real motive in bringing this Motion, which again is an attempt to collect on their award of attorney's fees quicker. This Motion has nothing to do with Nevada's anti-SLAPP laws or First Amendment Rights.

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IV. Conclusion.

For the foregoing reasons, Appellant respectfully requests that this Court deny Respondents' Motion and allow this appeal to be briefed and heard and decided in the normal course and allow Appellant his right to a thoughtful and proper appeal.

Dated this 10th day of February 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, on this 10th day of February 2020, the **APPELLANT’S OPPOSITION TO MOTION TO EXPEDITE APPEAL** was served upon each of the parties via electronic service through the Supreme Court of Nevada’s electronic filing.

/s/ Andi Hughes

An employee of Flangas Dalacas Law Group