

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF REBECCA POWELL,
THROUGH BRIAN POWELL, AS
SPECIAL ADMINISTRATOR; DARCI
CREECY, INDIVIDUALLY AND AS
HEIR; TARYN CREECY,
INDIVIDUALLY AND AS HEIR;
ISAIAH KHOSROF, INDIVIDUALLY
AND AS HEIR; AND LLOYD
CREECY, INDIVIDUALLY,

Appellants,

vs.

VALLEY HEALTH SYSTEM, LLC,
D/B/A CENTENNIAL HILLS
HOSPITAL MEDICAL CENTER, A
FOREIGN LIMITED LIABILITY
COMPANY,

Respondent.

Supreme Court No. 84861
District Court Case No. A-19-788787-C

Electronically Filed
Mar 10 2023 09:27 AM
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENT'S MOTION TO REQUIRE POSTING OF OR
INCREASING AMOUNT OF SUPERSEDEAS BOND BY APPELLANTS**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent (“VHS”) obtained a judgment against Appellants (“Plaintiffs”) served with notice of entry on June 7, 2022 (**Appendix Vol. I Exh “A”, pp. 1-49¹**). Plaintiffs filed their notice of appeal and case appeal statement on June 7, 2022 (**Vol. I, Exhibit “B”, pp. 50-57**). Neither the docket sheet from the District Court (**Vol. I, Exhibit “C”, pp. 58-97**), nor the docket sheet from this Court (**Vol. I, Exhibit “D”, pp. 98-99**) reflects that any supersedeas bond was ever posted in this case.

On September 27, 2022, one day prior to a scheduled judgment debtors’ examination, and two weeks after the District Court ordered Plaintiffs to supply documentary evidence of their respective assets (**Vol. I, Exhibit “E”, pp. 100-107**), Plaintiffs filed a motion to stay execution of judgment in District Court (**Vol. I, Exhibit “F”, pp. 108-126, Vol. II, Exhibit “F”, pp. 127-209, and Vol. III, Exhibit “F”, pp. 210-243**). Plaintiffs failed to appear for the court ordered judgment debtors’ examination and failed to provide the court ordered documentary evidence two weeks earlier. A transcript of that appearance is annexed hereto (**Vol. III, Exhibit “G”, pp. 244-261**).

On September 28, 2022, the District Court set a hearing on Plaintiffs’ stay

¹ Page references to Vol. I - Vol. VII Exhibits are to the Bates numbers of Appendix Volumes I-VII filed conterminously herewith.

motion for November 9, 2022, which the District Court continued on its own until November 16, 2022. A copy of the transcript from that hearing is annexed hereto (**Vol. III, Exhibit “H”, pp. 262-282**). VHS opposed Plaintiffs’ motion and countermoved for contempt and costs (**Vol. III, Exhibit “I”, pp. 283-415, Vol. IV, Exhibit “I”, pp. 416-492, Vol. V, Exhibit “I”, pp. 493-524**), to which Plaintiffs interposed an improper reply and opposition, raising for the first time issues not raised in their original motion and not addressed to the countermotion before the District Court (**Vol. V, Exhibit “J”, pp. 525-547**). Instead of addressing the improprieties of Plaintiffs’ conduct, the contempt issues, the improperly interposed legal argument on reply, and the Plaintiffs’ misstatement and misapplication of multiple legal arguments, the District Court summarily denied VHS’s countermotion and granted Plaintiffs’ motion to stay enforcement proceedings until this Court determined the outcome of Plaintiffs’ appeal without requiring any supersedeas bond by Plaintiffs.

At the same hearing, VHS requested that Plaintiffs post a supersedeas bond equivalent to the amount of the judgment (**Vol. III, Exhibit “H”, pp. 278:24 – 280:7**), based upon Plaintiffs’ counsel’s representations in court (**Vol. III, Exhibit “G”, p. 255:14-19**), in his motion and reply that Plaintiffs lacked even the available funds to appear in Nevada (**Vol. I, Exhibit “F”, pp. 119-120; Vol. V, Exhibit “J”, pp. 540:22-24; 546-547**), thus demonstrating a clear inability to pay the judgment

should Plaintiffs' appeal prove unsuccessful. Plaintiffs maintained throughout the aforementioned motion practice that no appeal bond was even necessary (**Vol. I, Exhibit "F", pp. 119-120**). At that time, the District Court indicated that an appeal bond in the amount of \$500 was posted July 7, 2022 (**Vol. III, Exhibit "H", p. 279:4-6**). VHS represented to the District Court that it was never served with nor notified that any appeal bond had been posted to which the District Court noted that it would not be reflected in any of the filings to which VHS would have been notified (**Vol. III, Exhibit "H", p. 279:7-15**). At that point, VHS requested that an order be issued to increase the bond amount to the amount of the judgment, plus accrued interest (**Vol. III, Exhibit "H", pp. 279:16 – 280:1**). VHS's request was denied as the District Court questioned whether it even had jurisdiction to make that determination given the appellate posture of the case (**Vol. III, Exhibit "H", pp. 278:10-19; 280:15-17**), but nevertheless stayed VHS's enforcement of its judgment.

After the District Court's refusal to decide the issue due to what it perceived to be a lack of jurisdiction on the matter, VHS moved in this Court on December 2, 2022 for the same relief regarding the bond's posting by Plaintiffs.² On February 3, 2023, this Court remanded the matter to the District Court for formal determination of the bond issue (**Vol. V, Exhibit "K", pp. 548-550**), but due to the election of

² Said motion is not being included as part of the exhibits but is contained in its entirety in this Court's docket system.

Justice Bell (then the assigned District Court judge), the matter was eventually reassigned to Judge Kathleen Delaney who had no prior knowledge of nor experience with this particular matter. The District Court requested supplemental briefing on the issue (**Vol. V, Exhibit “L”, pp. 551-567 and Vol. V, Exhibit “M”, pp. 568-604, Vol. VI, Exhibit “M”, pp. 605-701, Vol. VII, Exhibit “M”, pp. 702-757**) and conducted a hearing on February 14, 2023 after submission of the aforesaid briefs (**Vol. VII, Exhibit “N”, pp. 758-773**). Thereafter the District Court issued an order manifestly abusing its discretion by denying VHS’s request that a supersedeas bond be posted by Plaintiffs, and at the same time retained the prior District Court judge’s order staying VHS’s enforcement of the judgment (**Vol. VII, Exhibit “O”, pp. 774-786**). In other words, Plaintiffs are being permitted to prosecute an appeal with no bond to protect VHS’s judgment, and VHS has been simultaneously precluded from enforcing its judgment against Plaintiffs.

II. LEGAL ARGUMENT

NRAP 7 states in pertinent part:

(a) When Bond Required. In a civil case, unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking that includes security for the payment of costs on appeal, the appellant shall file a bond for costs on appeal or equivalent security in the district court with the notice of appeal. But a bond shall not be required of an appellant who is not subject to costs.

(b) Amount of Bond. The bond or equivalent security shall be in the sum or value of \$500 unless the district court

fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the Supreme Court or Court of Appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of \$500 is given, no approval thereof is necessary.

(c) Objections. After a bond for costs on appeal is filed, a respondent may raise for determination by the district court clerk objections to the form of the bond or to the sufficiency of the surety.

NRAP 8 requires that motions pertaining to stay and bond postings are to be made first in the District Court. In this case, as demonstrated above, the District Court denied VHS's request for a supersedeas bond in the amount of the judgment, making this motion proper.

NRS § 20.037 states in pertinent part:

1. Notwithstanding any other provision of law or court rule, and except as otherwise provided in this section and NRS 20.035, if an appeal is taken of a judgment in a civil action in which an appellant is required to give a bond in order to secure a stay of execution of the judgment during the pendency of any or all such appeals, the total cumulative sum of all the bonds required from all the appellants involved in the civil action must not exceed the lesser of \$50,000,000 or the amount of the judgment.

NRS § 20.037 obligates a party who is otherwise obligated to post a bond for appeal (Plaintiffs so qualify), to post a bond for at least the amount of the judgment entered in order to obtain a stay of enforcement of that judgment while the appeal is pending.

In this case, the amount of the judgment is \$118,906.78 plus post judgment interest from June 2, 2022, the date of the judgment, up through and including at least the date of the latest District Court hearing, February 14, 2023 (06/02/2022 - 06/30/2022 \$495.99 (29 days @ \$17.10/daily @ 5.250%/year); 07/01/2022 - 12/31/2022 \$4,046.09 (184 days @ \$21.99/daily @ 6.750%/year); 01/01/2023 - 02/14/2023 \$1,392.68 (45 days @ \$30.95/daily @ 9.500%/year)) with interesting totaling \$5,934.75, for a grand total amount of \$124,841.53.

Additionally, NRCP 62 notes that stays of judgment enforcement are obtained by the posting of a supersedeas bond after filing of a notice of appeal. “The purpose of security for a stay pending appeal is 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); *see also McCulloch v. Jeakins*, 99 Nev. 122, 123, 659 P.2d 302, 303 (1983) (“The purpose of a supersedeas bond is to protect the prevailing party from loss resulting from a stay of execution of the judgment.”).

A bond is usually set in an amount that will permit full satisfaction of the judgment. *See Nelson, supra*, 121 Nev. at 834–35, 122 P.3d at 1253; *see also* NRS 108.2415 (in the context of a mechanic’s lien release pending appeal, setting minimum bond amount at 1.5 times the judgment). A bond may be set in a lesser amount, or other security may be permitted, where other appropriate and reliable

alternatives exist for maintaining the status quo and protecting the judgment creditor during the appeal. *See Nelson, supra* 121 Nev. at 834–35, 122 P.3d at 1253; *see, e.g., Ries v. Olympian*, 103 Nev. 709, 711, 747 P.2d 910, 911 (1987) (suggesting that a discretionary stay could be appropriate when “the prevailing party retained title and possession of collateral far exceeding the amount of the judgment”). In this case, Plaintiffs supplied no evidence of alternative security to protect VHS’s judgment, nor did the District Court articulate any. Such failures demonstrate a manifest abuse of discretion in this case, leaving VHS completely unprotected while Plaintiffs are free to pursue their appeal.

This Court clarified its prior opinion of *McCulloch v. Jeakins*, 99 Nev. 122, 659 P.2d 302 (1983) which allowed for alternate security (other than a supersedeas bond), only in “unusual circumstances.” As to when a full supersedeas bond could be waived and/or alternate security substituted, this Court adopted a five factor analysis set forth by the *United States Seventh Circuit Court in Dillon v. City of Chicago*, 866 F.2d 902 (7th Cir. 1988). In general, those factors were applied with respect to the unique circumstances of each case and are: (1) the complexity of the collection process; (2) the amount of time 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 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 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. *See Nelson, supra* 121 Nev. at 835–36, 122 P.3d at 1254.

Unfortunately, the District Court conducted a cursory review of the *Nelson* factors (**Vol. VII, Exhibits “N” and “O”, pp. 758-786**), made incorrect findings based thereon, and manifestly abused its discretion by permitting Plaintiffs to proceed with their appeal, without posting any supersedeas bond or evidence that they possess the assets to pay the judgment if the judgment is sustained on appeal.

Taking each point in seriatim, the collection process is incredibly complicated. The Creecy Plaintiffs each reside in Ohio, and in two different counties. The Khosrof Plaintiff resides in Massachusetts. The Estate is a Nevada entity. A considerable effort has been and will continue to be needed to authenticate and obtain full faith and credit for the Nevada judgments in the respective jurisdictions, not to mention collection.

Second, the amount of time to obtain judgment after appeal is unknown at this time, however, as *Nelson* advised, when considering this factor, the time within which the case is scheduled to be on appeal needs to be factored. Plaintiffs filed their notice of appeal on June 14, 2022. After obtaining three extensions to file their brief, and VHS’s brief having been recently submitted, At the earliest, the case will not be fully submitted until March 27, 2023. It is likely, given the average time for

appeals to make their way through the appellate process, that an additional 6 months to 1 year from the submission of all briefing would a decision render, extending the execution of any judgment for nearly two years of obtaining same. Such a time period is extreme and endangers the viability of collection without some safeguard to guarantee payment.

Third, the degree of confidence that the Court has in the availability of funds to pay the judgment, is completely unknown. Plaintiffs' represented that they lacked funds necessary to travel to Nevada to testify at a judgment debtors' proceeding (**Vol. I, Exhibit "F", pp. 119-120; Vol. V, Exhibit "J", pp. 540:22-24; 546-547**), leading to the logical conclusion that they lack sufficient funds to pay the judgment. The District Court had no evidence before it of any available funds. The very purpose of the now flouted judgment debtors' examination was to ascertain Plaintiffs ability to pay. This factor weighs heavily in favor of VHS.

Fourth, the judgment debtors' ability to pay, is most definitely a question. As previously stated, if Plaintiffs are as destitute as Plaintiffs' counsel would have everyone believe, this factor weighs astonishingly high in VHS's favor.

Fifth, whether the judgment debtors' financial position is so precarious as to place other creditors at risk, is also an open question. For all of the reasons cited above, this factor weighs heavily in VHS's favor.

Given the above statutory and case authority, the supersedeas bond should be

posted by Plaintiffs for the amount of the judgment plus post-judgment interest to at least the date of the hearing on the Plaintiffs' motion to stay enforcement (February 14, 2023) in the amount of \$124,841.53.

III. CONCLUSION

Due to the absence of notice to VHS of an insufficient bond posting by Plaintiffs, the District Court's refusal to entertain any further proceedings pending the appeal of this matter, and the procedural posture of the appeal itself, the law obligates Plaintiffs to post a bond in the amount of the pending judgment now entered plus post judgment interest all totaling at least \$124,841.53 as security while the pending appeal is being briefed and decided.

DATED this 10th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2023, a true and correct copy of **RESPONDENT'S MOTION TO REQUIRE POSTING OF OR INCREASING AMOUNT OF SUPERSEDEAS BOND BY APPELLANTS** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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