

Order filed July 9, 2020



In The
Eleventh Court of Appeals

No. 11-16-00177-CV

**KERWIN STEPHENS; THUNDERBIRD OIL & GAS, LLC;
THUNDERBIRD RESOURCES, LLC; THUNDERBIRD LAND
SERVICES, LLC; STEPHENS & MYERS, LLP; AND CHESTER
CARROLL, Appellants**

V.

**THREE FINGER BLACK SHALE PARTNERSHIP; TREK
RESOURCES, INC.; TIBURON LAND & CATTLE, L.P.; L.W.
HUNT RESOURCES, LLC; AND RICHARD RAUGHTON,
Appellees**

—and—

**L.W. HUNT RESOURCES, LLC AND RICHARD RAUGHTON,
INDIVIDUALLY AND AS SUCCESSOR IN INTEREST OF
ARAPAHO ENERGY, LLC, Cross-Appellants**

V.

**KERWIN STEPHENS, THUNDERBIRD OIL & GAS, LLC;
THUNDERBIRD RESOURCES, LLC; THUNDERBIRD LAND
SERVICES, LLC; STEPHENS & MYERS, LLP; AND CHESTER
CARROLL, Cross-Appellees**

**On Appeal from the 32nd District Court
Fisher County, Texas
Trial Court Cause No. DC-2013-0016**

O R D E R

On March 30, 2016, the trial court signed a final judgment for nearly \$50,000,000 against Kerwin Stephens; Thunderbird Resources, LLC; Thunderbird Oil & Gas, LLC; Thunderbird Land Services, LLC; and Stephens & Myers, LLP (collectively, Movants). To suspend enforcement of the judgment, Stephens and Thunderbird Resources were required to post a bond in the amount of \$6,303,359.98, which represented 50% of their combined net worths.¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (West 2015); TEX. R. APP. P. 24.2(a). On June 28, 2019, this court issued a judgment that reduced the liability of Stephens, Thunderbird Resources, Thunderbird Oil and Gas, and Thunderbird Land for compensatory damages to approximately \$1.6 million and alleviated Stephens & Myers of any liability. Five petitions for review of our judgment and related opinion are pending before the Texas Supreme Court.

On March 18, 2020, Movants filed in the trial court a motion to modify the supersedeas. Movants specifically requested that the trial court (1) lower the amount of supersedeas to approximately \$1.67 million based on this court's June 28, 2019 judgment or (2) allow Movants to post land with a value of over \$2.77 million as alternate security. After an evidentiary hearing, the trial court denied the motion.

¹Stephens claimed that his net worth was \$12,411,315, and Thunderbird Resources claimed that its net worth was \$195,404.95. Although the plaintiffs did not agree that these values were correct, they agreed to the amount of required supersedeas.

Movants then filed in this court a third motion to review the required supersedeas under Rule 24.4 of the Texas Rules of Appellate Procedure.² Movants contend that the trial court erred when it refused to lower Movants' supersedeas obligations to \$1.67 million based on this court's June 28, 2019 judgment or to otherwise alleviate the current supersedeas burden by allowing alternate security or by finding that each movant has a negative net worth under the trial court's March 30, 2016 judgment. Movants request that we order (1) that Stephens only is required to post a supersedeas bond in the amount of \$1.67 million, (2) that Stephens may post alternate security (preferably at \$1.67 million but, alternatively, at \$6.3 million), or (3) that Movants post security based on their net worth in light of their liabilities under either the trial court's March 30, 2016 judgment or this court's June 28, 2019 judgment.

Unless the law or the Texas Rules of Appellate Procedure provide otherwise, a judgment debtor is entitled to supersede a judgment in order to defer payment while it pursues an appeal. *Miga v. Jensen*, 299 S.W.3d 98, 100 (Tex. 2009). A judgment may be superseded by means that include posting a bond or providing "alternate security." TEX. R. APP. P. 24.1(a)(1). The amount of the bond for a money judgment must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. CIV. PRAC. & REM. § 52.006(a); TEX. R. APP. P. 24.2(a). The amount, however, may not

²In both of their previous motions to review, Movants requested that this court (1) stay execution of the trial court's March 30, 2016 judgment to allow Stephens time to complete the sale of certain real property or to obtain a bond, (2) order that abstracts be lifted as to the specific properties necessary to complete the transactions, and (3) either accept alternate security or order the trial court to accept alternate security. We denied the first motion for review on October 27, 2016. On March 23, 2017, we granted, in part, the second motion for review and held that the trial court abused its discretion when it refused to enter an order to subordinate the judgment liens or release the abstracts of judgment on certain property as necessary to permit Movants to supersede the judgment while, at the same time, protecting the judgment creditors. However, we "adhere[d] to our previous ruling that the trial court did not abuse its discretion when it refused to suspend the judgment based upon alternate security."

exceed the lesser of 50% of the judgment debtor's current net worth or \$25,000,000. CIV. PRAC. & REM. § 52.006(b); TEX. R. APP. P. 24.2(a)(1).

On the motion of a party, we may review the trial court's postjudgment rulings that pertain to supersedeas, including a review of the "sufficiency or excessiveness of the amount of security" and the "type of security." TEX. R. APP. P. 24.4(a)(1), (3). We review the trial court's ruling for an abuse of discretion. *See Haedge v. Cent. Tex. Cattlemen's Assoc.*, No. 19-0595, 2020 WL 3477057, at *2 (Tex. June 26, 2020) (per curiam); *In re Smith*, 192 S.W.3d 564, 570 (Tex. 2006). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner without reference to guiding rules and principles. *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011). In our review, we "defer 'to the trial court's factual determinations if they are supported by evidence,' but review legal determinations de novo." *Haedge*, 2020 WL 3477057, at *2 (quoting *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011)).

Movants first assert that their liability under this court's June 28, 2019 judgment is a "changed circumstance" that requires the reduction of the supersedeas amount. However, the purpose of the supersedeas in this case is to prevent the enforcement of the trial court's March 30, 2016 final judgment while that judgment is appealed. *See* TEX. R. APP. P. 25.1(h) (providing that judgment may be enforced on appeal unless it is superseded in accordance with Rule 24 of the Texas Rules of Appellate Procedure or the appellant is entitled to supersede the judgment without security by filing a notice of appeal); *Alpert v. Riley*, 274 S.W.3d 277, 297 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (holding that the purpose of supersedeas is to preserve "the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken" (quoting *In re Tarrant Cty.*, 16 S.W.3d 914, 918 (Tex. App.—Fort Worth 2000, orig. proceeding))). In contrast, this court's June 28, 2019 judgment is not final while the

five petitions for review are pending before the Texas Supreme Court. *See In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (orig. proceeding) (per curiam) (holding that party could not be held in contempt for the violation of an injunction “until all appeals relating to the judgment were exhausted and a mandate enforcing the injunction was issued”). Rather, our June 28, 2019 judgment is not final and is not enforceable until we issue a mandate. *See* TEX. R. APP. P. 51.1(b) (“When the trial court clerk receives the mandate, the appellate court’s judgment must be enforced.”).

There is no need to supersede our June 28, 2019 judgment until that judgment becomes final and enforceable *See* ELAINE A. CARLSON, *Reshuffling the Deck: Enforcing and Superseding Civil Judgments on Appeal after House Bill 4*, 46 S. TEX. L.R. 1035, 1106 (2005) (“[T]he trial court judgment should remain the operative judgment until the appellate process is complete and a judgment is entered by the appellate court and the appellate court issues its mandate requiring recognition and enforcement of its judgment.”). Therefore, the amount of Movants’ liability under our June 28, 2019 judgment is not a changed circumstance that justifies a reduction in the amount required to supersede the trial court’s final judgment. *See id.* at 1105. (“[T]here is no authority that empowers the trial court to order an increase or decrease in appellate security premised upon an appellate court judgment when that judgment is subject to further appellate review, and no mandate has issued.”).

Movants also contend that the trial court abused its discretion when it refused to reduce the amount of the required supersedeas because Stephens is now forced to use exempt assets to pay the costs of the bond. Movants specifically assert that their right to a meaningful appeal is affected if Stephens is required to choose between the continuation of the appeal and the preservation of exempt assets.

The current rules and statutory provisions related to supersedeas are “protective of debtors consistent with deep, populist Texas traditions” and “respect[] the importance of the right to a meaningful appeal.” *In re Longview Energy Co.*,

464 S.W.3d 353, 359 (Tex. 2015). Therefore, upon a showing that posting the required security is likely to cause the judgment debtor substantial economic harm, the amount of the supersedeas must be lowered to an amount that will not cause harm. CIV. PRAC. & REM. § 52.006(c); TEX. R. APP. P. 24.2(b). Whether the judgment debtor is likely to suffer substantial harm is a question of fact, *McCullough v. Scarbrough Medlin & Assocs.*, 362 S.W.3d 847, 849 (Tex. App.—Dallas 2012, op. on motion [mand. denied]), on which the judgment debtor has the burden of proof, *O.C.T.G., L.L.P. v. Laguna Tubular Prods. Corp.*, 525 S.W.3d 822, 831 (Tex. App.—Houston [14th Dist.] 2017, op. on motion [mand. denied]).

“[S]ubstantial economic harm” means “something less than ‘irreparable harm.’” *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 916 (Tex. App.—Houston [14th Dist.] 2005, order). The inquiry focuses on whether the judgment debtor has the ability to meet the supersedeas requirement and whether doing so is likely to cause substantial economic harm. *Id.* at 917. This inquiry is specific to the facts and circumstances of the case. *Id.* Factors that can be considered include: (1) the cost of obtaining the bond, (2) the availability of sufficient assets to cover that cost, (3) the availability of other sources from which the judgment debtor could secure funds to obtain the bond, (4) the judgment debtor’s ability to borrow the funds, (5) the impact on the judgment debtor arising from the sale of assets sufficient to obtain the bond, and (6) the likelihood that selling assets to obtain the bond will result in the insolvency of the judgment debtor. *See id.*; *Taj v. Highlander Cmty. Servs. & Invests., LLC*, No. 05-19-01172-CV, 2019 WL 6522189, at *1 (Tex. App.—Dallas Dec. 4, 2019, mem. op. on motion).

When the amount of supersedeas was set on April 5, 2017, Stephens represented that his net worth was \$12.4 million. At the hearing on the motion to modify supersedeas, Scott Barnes testified that Stephens’s net worth as of December 31, 2019 was \$12.1 million. Barnes also testified that the COVID-19

pandemic and the collapse in oil and gas prices had caused the value of Stephens's stock holdings to decrease by \$138,000 since December 31, 2019, and had negatively impacted the value of Stephens's real estate and oil and gas interests. Barnes, however, had not obtained new appraisals of the value of Stephens's real estate and oil and gas interests.

Stephens testified that the "cash position" in any bank account under either his or his entities' names was approximately \$70,000. According to Stephens, he has paid in excess of \$1 million to maintain the supersedeas bond. The costs to maintain the supersedeas bond between June 2020 and June 2021 were surety fees of \$221,000 and a bond premium of \$64,000. To pay these amounts, Stephens withdrew \$300,000 from an Individual Retirement Account. However, if the amount of supersedeas were reduced, the bank would return \$110,000 of the surety fees. According to Stephens, if the current supersedeas amount is maintained beyond June 2021, he will be required to use additional exempt property to pay the surety fees and the bond premium.

Stephens testified that he had "other property" that he could sell but that that property was "encumbered by abstract of judgment liens or liens in favor of the bank in Oklahoma." Stephens did not testify as to the value of this property or the amount of the liens. Stephens was also very specific that he was not testifying about property that was held in his wife's name. Although a divorce proceeding between Stephens and his wife has been pending for over five years, Stephens offered no evidence about the status of the division of the marital property, whether he had a community property interest in any property held in his wife's name, or whether any property in his wife's name was available to pay the supersedeas costs. Further, Stephens's projection about his financial condition at the time that any additional surety fees and bond premiums might be due was speculative, at best. On this record, we cannot conclude that the trial court abused its discretion when it determined that Movants

failed to establish that Stephens was likely to suffer substantial economic harm if the amount of the required supersedeas was not reduced.

Alternatively, Movants contend that the amount of the judgment liability in either the trial court's March 30, 2016 judgment or in this court's June 28, 2019 judgment should be included in the calculation of each Movant's current net worth and that the supersedeas amount should be reduced accordingly. "Net worth is calculated as the difference between total assets and total liabilities as determined by generally accepted accounting principles." *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, op. on motion). The trial court is not required to include the contingent money judgment that is sought to be superseded in the net worth calculation for purposes of setting the amount of supersedeas. *See O.C.T.G.*, 525 S.W.3d at 830–31; *Bus. Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 188 (Tex. App.—El Paso 2012, op. on motion [mand. denied]) (per curiam); *McCullough*, 362 S.W.3d at 849. Therefore, the trial court did not abuse its discretion when it did not include either the March 30, 2016 judgment liability or the June 28, 2019 judgment liability in its determination of the required amount of supersedeas.

Finally, Movants assert that, regardless of whether the supersedeas amount is reduced, the trial court erred when it denied Movants' request to post real property as alternate security. Movants recognize that they raised this argument in their first two motions to review and assert that "[a]fter these many years, alternate security remains the best means for supersedeas under the revised June 28, 2019 judgment."

In certain instances, the general rule that requires bond or other security may effectively deny an appellant the right to appeal. *O.C.T.G.*, 525 S.W.3d at 831 (citing *Isern v. Ninth Court of Appeals*, 925 S.W.2d 604, 606 (Tex. 1996) (orig. proceeding)). "To guard against that possibility and yet protect the judgment creditor's right to collect its judgment, the supreme court amended the appellate

rules to provide for reduced or alternate security.” *Id.* Movants, as the parties seeking alternate security, had the burden to prove the “substantial economic harm to debtor” and “no substantial impairment to creditor” requirements imposed by Rule 24.2(b). *Id.*

The trial court found that Movants failed to prove substantial economic harm. As set out above, on this record, we cannot conclude that the trial court abused its discretion when it made this determination. Further, Movants have raised no new arguments that would require the trial court to reconsider its prior rulings that alternate security is not appropriate in this case or that would cause this court to revisit its prior determinations that the trial court did not abuse its discretion when it denied Movants’ requests to be allowed to post alternate security.

We deny Movants’ third motion for review pursuant to Rule 24.4 of the Texas Rules of Appellate Procedure.

PER CURIAM

July 9, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.³

Willson, J., not participating.

³Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.