No. 08-1026

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT SNYDER,

Plaintiff/Appellee,

vs.

WESTBORO BAPTIST CHURCH, INC., et al.,

Defendants/Appellants,

Appeal from the District of Maryland
Trial Court Judge: Honorable Robert D. Bennett
District Court Docket Number 06-CV-1389

PLAINTIFF'S/APPELLEE'S RESPONSE TO DEFENDANTS'/APPELLANTS' MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL

Plaintiff/Appellee, Albert Snyder, by and through counsel, files the within Response to Defendants'/Appellants' Motion for Stay of Execution of Judgment Pending Appeal.

1. Through Motion made pursuant to Rules 8 and 27 of the Federal Rules of Appellate Procedure and this Court's Local Rules 8 and 27(a)-(f), Defendants/Appellants seek to obtain a stay of execution of the verdict and judgment rendered against them pending resolution of their appeal. Defendants/Appellants have alleged in their Motion that a stay pending appeal is appropriate and that the cash bond amounts set by the district court in its Order dated April 4, 2008 are prohibitive.

2. Plaintiff/Appellee opposes a stay of execution of the verdict and judgment rendered by the district court.

3. By Order dated April 4, 2008, the district court appropriately imposed the payment of a cash bond by Shirley L. Phelps-Roper ("Phelps-Roper") in the amount of $125,000 and by Rebekah A. Phelps-Davis ("Phelps-Davis") in the amount of $100,000. In fact, a higher cash bond would have been equally appropriate. In any event, Appellants/Defendants had their opportunity to present evidence to the district court concerning the appropriate amount of a cash bond, and after hearing evidence concerning Appellants'/Defendants' ability to post a cash bond, the district court acted within its discretion and granted Appellants/Defendants the majority of the relief that was requested.[1]

4. Although Appellants/Defendants allege that the amounts of the cash bonds imposed upon them by the district court are prohibitive, the amounts set by the trial court are a mere fraction of the amount allowed by law. D. Md. Loc. Civ. R. 110(a) provides that the amount of a supersedeas bond filed to stay execution of a money judgment pending appeal shall be 120% of the amount of the judgment plus an additional $500 to cover costs on appeal. The amount of the cash bond imposed by the district court against Phelps-Roper equates to only 2% of the amount allowable under law and only 1.6% of the amount allowable under law against Phelps-Davis. The district court has already provided meaningful and material relief in the form of significantly reduced cash bond amounts to Appellants/Defendants and Appellants'/Defendants' Motion requesting additional relief should be denied.

[1] Appellants/Defendants publicly pronounced that they will not pay any of the judgment. Not surprisingly, the district court required Appellants/Defendants to post a modest cash bond.

5. Appellants/Defendants reference the transcript from the district court hearing held on April 3, 2008 to support their position that the bond amount is prohibitive and unreasonable.

(a) Specifically, Phelps-Roper has alleged that the district court, in computing the amount of the cash bond, included "her half of the equity in the home she and her husband own and where they live with, raise and care for their nine children." Although Phelps-Roper alleges that she cares for her nine children at her home, she continues to travel to stage demonstrations across the country. Phelps-Roper was in New York City on at least two dates, April 18, 2008[2] and April 20, 2008[3], to demonstrate against the visit of Pope Benedict XVI to the United States. Phelps-Roper was also present in Virginia, the District of Columbia and various parts of the state of Maryland on May 6, 2008 to stage so called religious protests. Phelps-Roper and her group also have plans to travel to Hawaii in May, 2008 and plans to travel to China over more than a two week period in August, 2008 to protest the Beijing 2008 Olympic Games. Appellants/Defendants clearly maintain the financial resources to travel the entire world and to plan extended stays in the locations in which they stage their protests.[4] Although they have professed a dedication to their homes and to their children in an attempt to avoid their obligations under the district court's Order for cash bonds, Appellants/Defendants spend great amounts of time away from their homes and their children. Appellants/Defendants have repeatedly demonstrated an earnest capacity for securing the funds necessary to meet their purported travel obligations, yet they refuse to acknowledge and, in fact,

[2] http://www.youtube.com/watch?v=GvyUDS5fTII&feature=related
[3] http://www.youtube.com/watch?v=-NssVbwlTdU&feature=related
[4] Undoubtedly, Appellants/Defendants will claim that they have a right to protest. Assuming *arguendo* that they do have a right to travel the world and harass grieving families, they also have an obligation to post a modest bond and their disingenuous cries of poverty must be summarily dismissed.

purposefully obviate, their legal obligations to the Court. Certainly, Defendants have not carried their burden.

(b) Appellants'/Defendants contend that the high profile verdict in this case "(coupled with the unpopular nature of defendants' religious message) makes it unlikely that either defendant would be able to secure a loan against the equities in their homestead, which would be the only way these defendants could even hope to try to raise the amount of cash required by the trial court." Appellants/Defendants have not provided even a modicum of evidence that they have made an attempt to secure a loan or even that they have acted in good faith in investigating their options under their obligations to the Court. Appellants'/Defendants' allegations that securing a loan is "unlikely" are simply excuses offered by Appellants/Defendants to avoid complying with the district court's Order.

6. When a party seeking a stay makes application to an appellate court following the denial of a similar motion by a district court, the burden of persuasion on the moving party is substantially greater than it was before the district court. Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970). Additionally, the Fourth Circuit, in Long, defined the four factors that *must* be met in order for Defendants' motion for stay to succeed: (1) that defendant will likely prevail on the merits of the appeal; (2) that defendant will suffer irreparable injury if the stay is denied; (3) that other parties will not be substantially harmed by the stay; and (4) that the public interest will be served by granting the stay. Appellants/Defendants have addressed each factor in their Motion, but have substantiated none with the requisite evidentiary support. Put differently, Appellants/Defendants have failed to carry their burden.

(a) Likelihood of success on appeal. Defendants/Appellants have alleged that the verdict is of a questionable nature and a stay pending appeal is appropriate. The court in Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921 (1958) has held that the question it must ask itself under this prong of the test is whether the petitioner has made a *strong* showing that it is likely to prevail on the merits of its appeal. Id. at 925. (Emphasis added.) Although they are required to make a *strong* showing, Appellants/Defendants have provided excerpts of newspaper reporters' accountings of a speech given at the University of Kansas by Chief Justice of the United States Supreme Court to support their contentions that their likelihood of success on appeal is great. Newspaper articles and newspaper reporters' versions of a Supreme Court Justice's comments in a speech given at a university cannot qualify as the type of evidentiary support the Fourth Circuit envisioned when it placed a "substantially greater" burden of persuasion on the moving party when making application to an appellate court following the denial of a similar motion by a district court. Long at 979. Appellants/Defendants have not made the *strong* showing envisioned by the Fourth Circuit in Virginia Petroleum Jobbers Assn.

(b) Irreparable Harm. Appellants/Defendants must provide evidence that they will be irreparably harmed if the requested stay is denied. Appellants/Defendants have raised two issues under this prong of the test, one of which is irrelevant. The issue before this Court is not whether "a loss of First Amendment freedoms" constitutes irreparable injury, but whether or not this Court's denial of a stay of execution will create irreparable injury to Appellants/Defendants. Again, Appellants/Defendants are required to meet a "substantially greater" burden of persuasion when making application to an appellate

court following the denial of a similar motion by a district court. Long at 979. Appellants/Defendants indicate in their Motion that "[f]orcing these defendants to respond to aid in execution proceedings, while prosecuting this appeal with all of its substantial issues, would be financially burdensome."[5] The Fourth Circuit in Virginia Petroleum Jobbers Assn. has held that the question it must consider under this prong of the test is

> whether or not the petitioner has shown that without such relief, it will be irreparably injured. The key word in this consideration is irreparable. *Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.* The possibility that 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.
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> Virginia Petroleum Jobbers Assn. at 925. (Emphasis added.)

Appellants/Defendants have made vague allegations that that they would suffer financial harm and that executing on the judgment against them would place them in financial peril. Although Appellants/Defendants have offered these explanations, they have provided no evidentiary support and have failed to meet the burden placed upon them by moving for the extraordinary relief a stay of execution provides.

(c) Other parties will not be substantially harmed by the stay.

Defendants/Appellants are also *required* under Long to present evidence that other parties will not be substantially harmed by the stay if it is granted by this Court. Defendants/Appellants have put forth their assertions, with no evidentiary support, that

[5] Appellants/Defendants' sister is acting as their counsel and, presumably, Appellants/Defendants are not facing any financial burden at all.

Plaintiff/Appellee will not be harmed because Defendants'/Appellants' intend to maintain any property they own in status quo. Defendants/Appellants have not addressed, and certainly have not disproved, the obvious and substantial emotional and psychological harm that further delays to closure of this matter will render upon Plaintiff/Appellee. Defendants/Appellants have once again failed to meet the "substantially greater" burden of persuasion placed upon them by virtue of making application to this Court following the denial of a similar motion by the district court. Long at 979.

(d) Public Interest. Finally, Defendants/Appellants are *required* to satisfy the fourth factor under Long that the public interest will be served by granting the stay they have requested. Defendants/Appellants have, once again, failed to meet this requirement. Defendants/Appellants have only offered their opinions that the issue for this Court to consider is "whether it is in the public's interest to allow two church members, mothers, of a modest living, to have their few assets seized and garnished while this Court reviews significant first-impression constitutional issues in the context of a runaway verdict." Defendants'/Appellants' presumption that the verdict is a "runaway verdict" is meaningless and unsupportive of any argument that granting a stay would best serve the public interest. Once again, Defendants/Appellants have failed to meet the "substantially greater" burden of persuasion placed upon them by the Long court. Simply put, the best interests of the public will be served by allowing a party to execute on the judgment to which he is entitled as a matter of law when the moving party fails to meet its burden to prove otherwise.

7. Defendants/Appellants allege that the size of the cash bonds set against them are prohibitive and that a stay without a bond is appropriate. As indicated above, the amounts set by the trial court are a mere fraction of the amount allowed by law. D. Md. Loc. Civ. R. 110(a) provides that the amount of a supersedeas bond filed to stay execution of a money judgment pending appeal shall be 120% of the amount of the judgment plus an additional $500 to cover costs on appeal. The amount of the cash bond imposed by the district court against Phelps-Roper equates to only 2% of the amount allowable under law and only 1.6% of the amount allowable under law against Phelps-Davis. The district court has already provided meaningful and material relief in the form of significantly reduced cash bond amounts to Appellants/Defendants. Appellants'/Defendants' Motion requesting additional relief should be denied.

In light of Appellants'/Defendants' failure to make the required legal showing that their request for relief should be granted and in consideration of the generous allowances already made to Appellants/Defendants in the calculation of the amount of the bonds, the Appellants'/Defendants' Motion for Stay of Execution of Judgment Pending Appeal should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this date true and correct copies of Plaintiff's Response are being served in the following manner:

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Date: May 8, 2008