

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter has come before the Court, en banc, on its own motion, for consideration of amendments to Rule 8 of the Mississippi Rules of Appellate Procedure. Having considered the matter, the Court finds that the interest of the fair and efficient administration of justice will be served by the adoption of the proposed amendments as set forth in Exhibit "A" hereto.

IT IS THEREFORE ORDERED that Rule 8 of the Mississippi Rules of Appellate Procedure be and the same is amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Second Series, (Mississippi Edition)*.

SO ORDERED, this the 24th day of April, 2001.

/s/ Edwin Lloyd Pittman

EDWIN LLOYD PITTMAN, CHIEF JUSTICE, FOR THE COURT

McRAE, P.J., AND DIAZ AND EASLEY, JJ. WOULD DENY

Exhibit "A" to Order

RULE 8. STAY OR INJUNCTION PENDING APPEAL

(a) Stay by Clerk's Approval of Supersedeas Bond. The appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125 percent of the amount of the judgment appealed from, conditioned that the appellant will satisfy the judgment complained of and also such final judgment as may be made in the case. The clerk of the trial court shall approve any such bond and the approval of the supersedeas bond by the clerk shall constitute a stay of the judgment. In the event the clerk declines to approve the bond, or the clerk's approval is contested, or the appellant seeks a stay on any basis other than compliance with this subdivision, the requirements of Rule 8(b) apply.

(b) Other Stays Must Ordinarily Be Sought in the First Instance From the Trial Court.

(1) Application for a stay of the judgment or the order of a trial court pending appeal or for approval or

disapproval of a contested supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court. The court shall require the giving of security by the appellant in such form and in such sum as the court deems proper, and for good cause shown may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a). ~~The ruling of the trial court on the motion shall be reviewable by the Supreme Court or the Court of Appeals.~~

(2) However, a bond or equivalent security required on any money judgment entered in whole or in part on account of punitive damages shall, as to the punitive damages portion of the judgment only, be the lower of:

(a) 125 percent of the total amount of punitive damages, or

(b) ten percent of the net worth of the defendant seeking appeal as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31, of the year prior to the entry of the judgment for punitive damages.

(c) Absent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed \$100,000,000.

(3) To qualify for reduction of bond or equivalent security under subpart (b)(2)(b), there must be a good and sufficient showing that the imposition of a supersedeas bond of 125% of the full judgment appealed from would place that appellant in a condition of insolvency or would otherwise substantially threaten its future financial viability.

(4) When the appellant is allowed the benefit of a reduction in bond or equivalent security under subpart (b)(2)(b) or (c), the court may require submission of such reports or evidence to the court and to opposing parties as will allow them to be properly informed of the financial condition of the appellant during the period of supersedeas. If at any time after notice and hearing, the court finds that an appellant who has posted a bond or equivalent security for less than 125 percent of the full amount of the judgment has taken actions that affect the financial ability of the appellant to respond to the judgment, or has taken other actions with the intent to avoid the judgment, the court shall increase the bond or equivalent security to the full 125 percent of the judgment. If the appellant does not post the additional bond required by the court, the stay shall be revoked.

(5) If a hearing is necessary for issues arising under subpart (b), the judgment shall be stayed during such hearing and for ten days following the trial court's ruling. The ruling of the trial court on motions filed under this subpart (b) shall be reviewable by the Supreme Court or the Court of Appeals.

(c) Motion to Stay or Vacate Stay in Supreme Court. A motion for such relief may be made to the Supreme Court (or to the Court of Appeals in cases assigned by the Supreme Court to the Court of Appeals) but the motion shall show that the application to the trial court for relief sought is not practicable, or that the trial court has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements. The applicant shall file an original and four (4) copies of the motion for stay and, if the motion is opposed, shall attach legible copies of the documents listed below. If the applicant asserts that time does not permit the filing of a written motion, applicant shall deliver to the

clerk five (5) legible copies of each of the listed documents as soon as possible. If any listed document cannot be attached or delivered, a statement of the reason for the omission shall be substituted. The documents required are:

- (1) the application to the trial court for a stay;
- (2) each brief or memorandum of authorities filed by a party to the application in the trial court;
- (3) the opinion giving the reasons advanced by the trial court for denying relief;
- (4) the trial court order or judgment denying relief.

Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the Supreme Court and will be considered by a panel of the Supreme Court or the Court of Appeals. In emergency cases the application may be considered by a single justice or judge of the appropriate appellate court, and the applicant shall file the motion with the clerk of the Supreme Court in writing as promptly as possible.

(d) Stay May Be Conditioned Upon the Giving of a Bond; Proceedings Against Sureties. Relief available in the Supreme Court or the Court of Appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If the security is given in the form of a bond or stipulation or undertaking with one or more sureties, each surety submits itself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as its agent upon whom any papers affecting its liability on the bond or undertaking may be served. The surety's liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and notice of the motion may be served upon the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

[Adopted to govern matters filed on or after January 1, 1995; amended April 26, 2001]

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 8 replaced Miss.Sup.Ct.R. 8, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXV-XXXVII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 8(a) is based on Miss. Code Ann. § 11-51-31 (Supp. 1994) and Ala. R. App. P. 8(a). It provides for a stay of a money judgment pending appeal upon approval of a supersedeas bond by the clerk of the trial court. In a case involving only a money judgment, the appellant can obtain a stay by posting a bond approved by the clerk. A form for a supersedeas bond is found in Form 5 in the Appendix of Forms.

All matters concerning stays are to be resolved in the first instance by the trial court, if possible.

If the trial court clerk declines to approve the bond, the appellant must apply to the trial court for approval under Rule 8(b). If the clerk approves the bond and the appellee contests it for any reason, the appellee must file a motion with the trial court for disapproval of the bond and to vacate the stay. If the appellant

seeks a stay on any basis other than by posting a 125 percent bond to supersede a money judgment, the appellant must apply to the trial court for a stay. In determining whether to grant a stay, the trial court should endeavor to protect the prevailing party. The purpose of a supersedeas bond is to preserve the status quo while protecting the judgment creditor's rights pending appeal.

The trial court may grant or deny a stay upon such terms as to bond or otherwise as it considers proper for the security of the adverse party. It may approve security in the form of a cash or property bond. See M.R.C.P. 62.

While the trial court may not require a bond greater than 125 percent to supersede a money judgment, the court may, in appropriate cases, approve a supersedeas bond of less than 125 percent of the money judgment. See *Henry v. First National Bank*, 424 F. Supp. 633, 639 (N.D. Miss.), aff'd 595 F. 2d 291, 305 (5th Cir. 1979). If an appellant seeks relief from the full bond requirement, the trial court must, upon notice and hearing find that good cause justifies a departure from the usual bond requirements. At the hearing, the burden to provide a secure alternative to the required bond rests on the judgment debtor. Before the trial court can grant a reduced bond, there must be an objective demonstration that the appellant's financial strength and ability to respond will remain undiluted during the pendency of the appeal. A record sufficient to allow review should be made. The maximum bond in a contempt case is set by statute, Miss. Code Ann. § 11-51-11 (Supp. 1994). When the judgment is not a money judgment, the court may, but is not required to, follow the practice of statutes supplanted by this rule, e.g., now-repealed Miss. Code Ann. § 11-51-35 (Supp. 1986) (double one year's rent to stay execution of a writ of possession in ejectment); § 11-51-39 (Supp. 1986) (double value of real estate to be surrendered); now-repealed § 11-51-41 (1972) (double value of real estate or charges on real estate).

Under Miss. Code Ann. § 11-51-101 (Supp. 1994), certain parties, including the state, counties, municipalities, public officers, state educational or charitable institutions, and federally-owned corporations are entitled to an automatic stay without posting bond or any action by the clerk of the trial court under this rule. Similarly, no additional action by the clerk of the trial court is required when the appellant has already posted a sufficient bond prior to judgment under statutes governing appeals by executors, administrators, and guardians, Miss. Code Ann. § 11-51-99 (Supp. 1994), or appeals in estate tax cases, Miss. Code Ann. § 27-9-47 (1994), or appeals from the State Tax Commission, Miss. Code Ann. § 27-35-163 (Supp. 1994).

Rule 8(c) and 8(d) are based on Fed. R. App. P. 8 and 5th Cir. R. 8.1.1. They set forth the procedure to be followed when an appellant or appellee contests the trial court's action on a stay.

[Amended, April 26, 2001.]