

Granted and Opinion Filed March 27, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00795-CV

IN THE INTEREST OF K.K.W., A MINOR CHILD

**On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-04-12034-R**

**MEMORANDUM OPINION ON
MOTION TO DECREASE AMOUNT OF SECURITY**

**Before Chief Justice Wright, Justice Evans, and Justice Brown
Opinion by Chief Justice Wright**

Before the Court is appellant's emergency motion to decrease amount of security. The underlying judgment awards appellees their attorney's fees through trial, court costs, declaratory relief, and conditional appellate attorney's fees. The trial court ordered security set at the amount of costs plus the award of conditional appellate attorney's fees. We agree with appellant that the amount of security ordered is excessive. We grant the motion and modify the trial court's August 24, 2016 order for security bond to reduce the amount of security to \$100,000.

Background

The underlying proceeding was brought as a declaratory judgment action by appellee K.L.W. seeking construction and interpretation of his son's trust, the K.K.W. Trust, and the Final Decree of Divorce between K.L.W. and appellant K.B.W. K.B.W. is the child's mother, K.L.W. is the child's father, and appellee John McReynolds is the Trustee of the child's trust. Mother and

Father are co-settlors of the trust and their son is the Trust's beneficiary. Father brought the underlying declaratory judgment action because he and Mother disagreed on the appropriateness of the expenses that Mother was presenting to the Trustee for payment. Mother asserted counterclaims against Father and a third-party petition against the Trustee. She sought a declaratory judgment, removal of the Trustee, and reformation of the Trust and asserted claims of fraud in the inducement, knowing participation in breaches of fiduciary duties, breach of contract, and fraud.

I. The Judgment

The trial court granted summary judgment in favor of Father as to all of Mother's claims. The trial court also granted Father's claims for declaratory relief and declared the following as a matter of law (1) only the Trust sets forth the terms of the obligation of the Trustee to pay the expenses of the beneficiary, (2) the Trust was not amended or altered by the Final Decree of Divorce, and (3) the Trustee is not required under the terms of the Trust to pay all of the expenses of the beneficiary. The only claims remaining at trial were each party's claims for attorney's fees and costs.

The trial court's final judgment incorporates the interlocutory summary judgment orders, awards no compensatory damages, and awards \$453,866.52 in attorney's fees to Father, \$578,115.62 in attorney's fees to the Trustee, court costs, and the declaratory relief outlined above regarding the Trust. The judgment also awards \$200,000 in conditional appellate attorney's fees to Father and \$145,000 in conditional appellate attorney's fees to the Trustee.

II. The Order on Security, Injunction, and Turnover Order

In their post-judgment motions, Father and the Trustee asked the trial court to set an amount of security pursuant to Rule 24.2, enter an injunction to prevent Mother from dissipating or transferring assets to avoid satisfaction of the judgment, and to appoint a receiver and order Mother

to turnover her nonexempt property. The trial court granted all relief requested by Father and the Trustee. Mother now seeks review of the Order on Security.

A. Order on Security

Regarding the security amount, Father conceded that the attorney's fees awarded in the final judgment through trial should not be included in the amount of security because they are not compensatory damages. Father asked, instead, for security to include the costs of \$71,475.27 plus additional security to be ordered under Rule 24.2(a)(3) because the judgment included declaratory relief and security was needed to protect him against loss or damage the appeal might cause. Father argued that the security necessary to provide that protection was the costs plus the amount of conditional appellate attorney's fees awarded to Father and the Trustee. In his motion, Father asked for a bond totaling \$416,475.27, which was the sum of the \$71,475.27 costs awarded, \$200,000 in conditional appellate fees awarded to Father, and \$145,000 in conditional appellate fees awarded to the Trustee. At the hearing on the motion, however, Father's attorney told the court that the judgment included only \$130,000 in conditional appellate fees for the Trustee and, as a result, requested that the bond be set at \$401,475.27 (i.e., \$15,000 less than originally requested reflecting the \$130,000 rather than \$145,000 fees to the Trustee). The "Order for Security Bond" set the bond at the amount requested at the hearing — \$401,475.00 — to suspend enforcement of the Final Judgment.

B. The Turnover Order and Receiver Appointment

Father and the Trustee also sought a turnover order and appointment of a receiver, arguing that Mother owns non-exempt assets that cannot be readily attached or levied on by ordinary legal process. They asserted that the nonexempt property consisted of funds held in the K.B.W. Trust to which Mother had the right to distribution when she reached the age of forty and has the right to future distribution when she reaches the ages of fifty and sixty years old. Mother was forty-

three at the time of the judgment. The K.B.W. Trust is not the trust that was the subject of the declaratory judgment action. The trial court granted the application for turnover order and appointment of receiver.

C. The Injunction

Father also sought and obtained a post judgment injunction enjoining Mother from engaging in certain, delineated acts to avoid satisfaction of the Final Judgment, including dissipating, hiding or secreting, or transferring assets under Mother's custody or control, and selling, transferring, assigning, mortgaging, encumbering, or in any other manner alienating any of Mother's real or personal property under her custody or control. Mother was not enjoined from using, transferring, conveying, or dissipating assets "in the normal course of her business." The court found good cause to grant the injunction because Mother "is likely to dissipate her estate." The court reached that conclusion based on evidence presented in support of the turnover order. Namely, evidence that Mother has access to funds from her own trust (the K.B.W. Trust) that could be dissipated without an injunction.

III. The Parties Arguments Regarding Security

Mother maintains that the amount of security is excessive and asks this Court to reduce the amount of security. Her argument is simple – this is a money judgment and security on a money judgment may not exceed the amount of compensatory damages awarded (\$0.00), plus costs (\$71,475.27), plus interest on those costs for the estimated duration of the appeal. Mother suggests a maximum amount of \$100,000 for security.

Father and the Trustee contend the motion to decrease security should be denied because the judgment is not a money judgment but is a declaratory judgment subject to Rule 24.2(a)(3) and, therefore, the security ordered must adequately protect Father against loss or damage that the appeal might cause. *See* TEX. R. APP. P. 24.2(a)(3). Father and the Trustee maintain that security

in the amount of \$401,475.00 is necessary to protect them against loss or damage the appeal might cause because the amount of the potential loss or damage from an appeal is the conditional appellate fees plus the costs awarded for a total of \$401,475, and that amount is “supported by the evidence and related to an amount in this case.” Father’s counsel specifically asked the trial court to calculate the security as follows:

Okay. What we've done as far as calculate what is the cost to secure the costs that they may incur is the conditional attorney's fees award that you granted in this case.

And so that \$200,000 was the figure for petitioner. And the figure for the trustee was \$130,000. And so those would be posted as security. And if you add that together with the cost, that's a total of \$401,475.27.

The Court set security at the amount requested rounded to the nearest dollar.

Mother maintains that no security is needed to protect the declaratory relief awarded to appellees because the final judgment does not enjoin or compel any activity by Mother and provides nothing that can be lost or damaged during the appeal. Mother argues the declaratory relief simply declared the terms of the Trust. Moreover, an injunction is in place that enjoins Mother from dissipating assets.

Applicable Law

Unless the law or the rules of appellate procedure provide otherwise, a judgment may be superseded and enforcement of the judgment suspended pending appeal. TEX. R. APP. P. 24.1(a). “The purpose of supersedeas is to preserve the status quo of the matters in litigation as they existed before the issuance of the judgment from which an appeal is taken.” *Devine v. Devine*, No. 07-15-00126-CV, 2015 WL 2437949, at *2 (Tex. App.—Amarillo May 20, 2015, no pet.) (citing *Smith v. Tex. Farmers Ins. Co.*, 82 S.W.3d 580, 585 (Tex. App.—San Antonio 2002, pet. denied)). Rule 24.1 sets out the requirements for suspending enforcement of a judgment pending appeal in civil cases. TEX. R. APP. P. 24.1. A supersedeas bond must be in the amount required by rule 24.2.

TEX. R. APP. P. 24.1(b)(1)(A). Under rule 24.2, the amount of the bond depends on the type of judgment. TEX. R. APP. P. 24.2(a).

Judgments for the recovery of money are subject to rule 24.2(a)(1), which provides that the amount of the bond, deposit, or security 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. TEX. R. APP. P. 24.2(a)(1). The security amount for a judgment that is for the recovery of money may not exceed the lesser of 50% of the judgment debtor's current net worth or 25 million dollars. TEX. R. APP. P. 24.2(a)(1)(A)–(B).

When the judgment is “for something other than money or an interest in real property,” the security “must adequately protect the judgment creditor against loss or damage that the appeal might cause.” TEX. R. APP. P. 24.2(a)(3). Rule 24.2(a)(3) is routinely applied to judgments that are declaratory or injunctive in nature. *E.g.*, *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 803, 808–09 (Tex. 2014) (Rule 24.2(a)(3) applied to permanent injunction prohibiting Board from revoking or treating as revoked teacher's certification); *El Caballero Ranch, Inc. v. Grace River Ranch, L.L.C.*, No. 04-16-00298-CV, – S.W.3d –, 2016 WL 4444400, at *5 (Tex. App.—San Antonio Aug. 24, 2016, no pet.) (Rule 24.2(a)(3) applied to final judgment declaring a valid, express easement); *Klein Ind. Sch. Dist. v. Fourteenth Court of Appeals*, 720 S.W.2d 87, 88 (Tex. 1986) (orig. proceeding) (because disputed portion of judgment is injunction, judgment debtor's entitlement to supersedeas bond is controlled by subsection pertaining to “other” judgments).

Rule 24.4 allows this Court to review the trial court's ruling on security, and permits us to increase or decrease the amount of the bond, require other changes to the order, or remand to the trial court for entry of findings of fact or taking of evidence. TEX. R. APP. P. 24.4. This Court reviews a trial court's ruling under rule 24.2(a)(3) for an abuse of discretion. *Hydroscience Techs., Inc. v. Hydroscience, Inc.*, 358 S.W.3d 759, 760–61 (Tex. App.—Dallas 2011, no pet.) (citing TEX.

R. APP. P. 24.4(a)(5) and *EnviroPower, L.L.C. v. Bear, Stearns & Co.*, 265 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)). “A trial court abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case, or when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles.” *Devine*, 2015 WL 2437949, at *2 (citing *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011)).

Application of Law to Facts

The judgment includes no compensatory damages, and attorney’s fees are generally not included in the amount of security because they are not damages or costs. *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 174, 176 (Tex. 2013) (“attorney’s fees incurred in the prosecution or defense of a claim are not compensatory damages” and are not court costs “for purposes of suspending enforcement of a money judgment”). If this were only a money judgment, then the security is excessive because it exceeds the amount of costs plus interest on those costs for the estimated duration of the appeal. *See* TEX. R. APP. P. 24.2(a)(1).

But there is also a declaratory component of the judgment and, therefore, the judgment is partially a judgment for something other than money or an interest in property. Under Rule 24.2(a)(3), the amount of security to suspend enforcement of declaratory relief “must adequately protect the judgment creditor against loss or damage the appeal might cause.” TEX. R. APP. P. 24.2(a)(3). The additional security awarded to suspend enforcement of the declaratory relief consists solely of conditional appellate fees awarded in the judgment. Such fees are not properly included as security and are excessive as a matter of law. The reasons are simple.

First, a court is prohibited from requiring a party to post bond for conditional appellate fees. *Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, no writ) (party “cannot be compelled to post a supersedeas bond that includes” a conditional award of

appellate attorney's fees). The judgment creditor cannot yet execute upon the portion of judgment awarding conditional appellate fees and, therefore, judgment debtor "should not be required to supersede that portion while her appeal remains pending before this Court." *Id.*; *see also Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc.*, 843 S.W.2d 734, 736 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("A judgment for attorney's fees that might accrue in a later proceeding is beyond the control of the trial court's authority"). Here, appellees are not yet entitled to the appellate fees because they are conditioned on a future event – Mother losing on appeal. The trial court, therefore, abused its discretion by including the conditional appellate fees in the security amount. *See In re Christensen*, No. 01-16-00893-CV, 2017 WL 1485574, at * 3, 5 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, orig. proceeding) (mem. op.) (abuse of discretion to require payment of appellate attorney's fees into registry of the court and as part of security amount "because the appellate attorney's fees will not be payable to Christina, 'if at all,' until the appellate proceedings are final"); *Halleman v. Halleman*, No. 02-11-00238-CV, 2011 WL 5247882, * 5 (Tex. App.—Fort Worth Nov. 3, 2011, orig. proceeding) (mem. op.) (conditionally granting writ for trial court to vacate order requiring judgment debtor to deposit amount of conditional appellate fees awarded into the registry of the court as security for the appeal).

Second, because recovery of conditional appellate fees are conditioned on a future event that may or may not occur, such fees are not a loss or damage that an appeal might cause and, therefore, are not properly included in the amount of security to suspend enforcement of a declaratory judgment. Here, if Mother prevails on appeal, then appellees would have no right to collect those fees from Mother. If Mother does not prevail on appeal, then appellees are presumably entitled to recover those fees to the extent those awards are unchallenged or affirmed on appeal. Appellees presented no evidence, however, that Mother would be unable to pay the conditional appellate fees in the future and, therefore, there is no evidence to support their

argument that they are at risk of losing those fees without including the fees in the security amount. Instead, appellees argue that Mother should be required to post security on the conditional appellate fees because Mother has access to her own trust fund and, thus, has funds available to post as security on those awards. Appellees presented no evidence, however, that Mother's use of money she is legally permitted to access and spend in the regular course of business would somehow leave them with no ability to collect from her in the future. Indeed, the record shows that Mother will have access to additional amounts in excess of the award of conditional appellate fees through the corpus of her trust when she turns fifty years old. Either way, the trial court abused its discretion to the extent it considered Mother's ability or inability to pay the conditional appellate fees in the future when it set the amount of security. *See, e.g., Halleman*, 2011 WL 5247882 at * 5 (court could not require judgment debtor to post conditional appellate fees as security even though the evidence showed he could not currently pay the amount of the fees "because the attorney's fees will not be payable to RPI, if at all, until this court renders a judgment in the appeal").

Finally, conditional appellate fees are attorney's fees, albeit fees not yet earned, and attorney's fees incurred in the prosecution or defense of a claim may not be included in the amount of security ordered by a trial court. *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d at 176. Simply put, the trial court was prohibited from including conditional appellate fees in the security amount.

Appellees' attempt to characterize the security amount as something other than security for the conditional appellate fees is also unavailing. We disagree with appellees' contention that the trial court could pick any reasonable number for the security amount as long as it was less than 50% of Mother's net worth. The 50% of net worth limit applies to money judgments, and appellees maintain that this judgment is not for the recovery of money. TEX. R. APP. P. 24.2(a)(1)(A).

Instead, they argue that the additional security is to suspend execution of the declaratory judgment and is proper under Rule 24.2(a)(3). Under that rule, the trial court was charged with determining a security amount that could adequately protect appellees against loss of damage that the appeal might cause them in relation to the declaratory judgment. But there is no evidence in the record showing that the appeal will harm appellees in any way as to the declaratory judgment. The declaratory relief in the judgment does not require Mother to take any action or enjoin Mother from certain actions such that suspending enforcement of that part of the judgment would somehow harm Father or the Trustee. On the contrary, no changes were made to the Trust or its operations. All parties must simply continue acting under the Trust as they always have. No security is needed to protect appellees from any harm an appeal may cause in relation to the declaratory relief.

Conclusion

The judgment at issue is for fees through trial (\$1,031,982.10), costs (\$71,475.27), declaratory judgment, and conditional appellate attorney's fees (\$345,000). The parties agree that the award of \$1,031,982.10 in pre-judgment attorney's fees does not constitute compensatory damages and, therefore, is not required to be superseded and should not be part of the amount of security. The trial court set the amount of security at \$401,475.00 per appellees' request that the bond cover the costs awarded and \$330,000 of the conditional appellate attorney's fees awarded. The trial court abused its discretion by setting security at \$401,475.00 because, as discussed above, a judgment debtor such as Mother may not be required to post security on the amount of conditional appellate fees, and appellees presented no evidence that \$330,000 of the supersedeas bond was necessary to protect them from harm that could be caused by the appeal.

On this record, the evidence supports only security in the amount of the costs awarded (\$71,475.27) plus the amount of interest on those costs for the estimated duration of the appeal.

TEX. R. APP. P. 24.2(a)1(1); *In re Corral-Lerma*, 451 S.W.3d 385, 387–88 (Tex. 2014) (orig. proceeding) (disapproving of cases holding that security amount must include interest on attorney’s fees or any other category of a judgment not required to be included in the security amount). The post judgment interest rate has stood at 5% at all times relevant to this appeal.¹ Post judgment interest compounds annually. TEX. FIN. CODE § 304.006. This case is set for oral argument April 24, 2018 and will, therefore, likely be concluded within three years of the date it was filed. The amount of costs plus three years of interest compounded annually is \$82,741.56. Mother, however, suggests that \$100,000 is a proper security amount. Although that amount is more than the amount of costs plus interest for the estimated duration of this appeal, it is the amount appellant offered to pay and is within a range that would also cover interest should either party seek review from the Texas Supreme Court.

Accordingly, we modify the trial court’s August 24, 2016 Order for Security Bond to reduce the amount of security to \$100,000. We affirm the order in all other respects

/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE

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¹ See <http://occc.texas.gov/publications/interest-rates> and <http://occc.texas.gov/sites/default/files/uploads/interest/judgement-rate-summary.pdf>