

1998

Larry R. Vonwald v. Kevin Plumb : Petition for Rehearing

Utah Court of Appeals

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Dennis Poole; Attorney for Defendant and Appellee.

Larry R. Vonwald; Appellant Pro Se.

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UTAH COURT OF APPEALS

LARRY R. VONWALD,

Plaintiff/Appellant,

V.

Case No. 980278-CA

KEVIN PLUMB,

Defendant/Appellee.

PETITION FOR REHEARING

Appeal from final order of the Third Judicial District
Court, Salt Lake County, State of Utah
Hon. Glenn K. Iwasaki, Presiding

Larry R. VonWald
Appellant Pro Se
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Sandy, UT 84093
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**UTAH COURT OF APPEALS
BRIEF**

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FILED

Utah Court of Appeals

JUL 23 1998

Julia D'Alesandro
Clerk of the Court

UTAH COURT OF APPEALS

LARRY R. VONWALD,

Plaintiff/Appellant,

V.

Case No. 980278-CA

KEVIN PLUMB,

Defendant/Appellee.

PETITION FOR REHEARING

In its Memorandum Decision of July 9, 1998, the Court "upheld the trial court's determination that the \$5,500 supersedeas bond was to be credited towards payment of appellee's attorney fees, collection costs, and costs on the first appeal (totaling \$5,475.44), not towards the underlying judgment for \$4,064.90 plus interest. The holding appears to be the same in the present appeal, i.e., the supersedeas bond of \$6,700.00 is credited towards payment of appellee's attorney fees, collection costs, and costs on the second appeal, not towards the same underlying judgment for \$4,064.90 plus interest.

In the first appeal, payment was made without prior notice and hearing on the reasonableness and necessity of, and for, the attorneys fees, collection costs, and costs in the first appeal; no court order approved an award or payment of such fees and costs which the Court states

"total[ed] \$5,475.44."

In connection with the first appeal, looking to VonWald's EX PARTE APPLICATION FOR TRIAL COURT'S APPROVAL OF CASH SUPERSEDEAS BOND FOR \$5000.00 [see Exhibit 1] which mentions only the June 8, 1994, judgment for \$4064.90 to be superseded by the cash deposit of \$5500.00, the trial court's approval of August 30, 1994, [". . .the cash supersedeas bond in the amount of \$5500.00 deposited in this Court on August 11, 1994, is hereby in all things approved and allowed. . ."] (see Exhibit 2) has application only to the underlying judgment of June 8, 1994, for \$4064.90. It is the same with the cash supersedeas bond of \$6700.00 deposited pursuant to ORDER FOR SUPERSEDEAS BOND AND STAY OF PROCEEDINGS, dated September 18, 1996 [true copy, Exhibit 3, appended hereto], which provides specifically that [paragraph 2.] "conditioned upon such deposit [of \$6700.00], . . . and pursuant to the provisions of Rule 62 of the Utah Rules of Civil Procedure, all proceedings to collect that certain Order and Judgment entered on or about June 8, 1994 in the principal sum of \$4,064.90. . .are stayed pending appeal."

The supersedeas bond of \$6,700.00 again was credited towards payment of appellee's attorney fees, collection

costs, and costs on the appeal, not towards the underlying judgment for \$4,064.90 plus interest for which it was deposited.

In past proceedings and appeals herein, the trial court, as well as this Court, has steadfastly refused to consider and rule upon the Constitutional, Fourteenth Amendment due process and equal protection issues presented where the proceeds of supersedeas bonds specifically and explicitly deposited to cover an underlying judgment are paid and applied elsewhere and otherwise than to the payment of the underlying judgment.

This petition challenges, on Fourteenth Amendment due process and equal protection grounds, the holding of the Court that the proceeds of the supersedeas bonds deposited as aforesaid "[were] to be credited towards payment of appellee's attorney fees, [etc.], not towards the underlying judgment for \$4,064.90 plus interest."

Under Rule 62, Utah Rules of Civil Procedure, an appellant is granted the right, under sub-section (d), by giving a supersedeas bond, may obtain a stay, . . . effective when the supersedeas bond is approved by the court." Under sub-section (i)(2) "[u]pon motion and good cause shown, the court may permit a deposit of money in court or other

security to be given in lieu of giving a supersedeas bond under Subdivision (d)." Under sub-section (i)(4) "[a] surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action."

ISSUE: Did the Court's treatment of appellant's supersedeas bonds deny him a protected property interest as guaranteed by the Fourteenth Amendment where the Court ruled that the proceeds of the cash supersedeas bond(s) were not to be applied towards the underlying judgment, but to attorney fees and costs, and payment out was made pursuant to such ruling notwithstanding that said bonds unambiguously provided that they covered the underlying judgment.

ARGUMENT and AUTHORITY: "In general, the right to vindication through litigation, including the prosecution of an appeal, is a corollary of fundamental rights of citizenship." Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) "The (U.S. Supreme) Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." Logan v. Zimmerman Brush Co., 102

S.Ct. 1148 (1982)

It should be conceded that State law afforded appellant VonWald a protectible property interest in the right to file supersedeas bonds, and in the supersedeas bonds themselves, sufficient to trigger federal due process guarantees which include his right to have the bonds applied to the underlying judgment in accordance with the unambiguous terms of the bonds and the right to not have the court unilaterally and arbitrarily, and without process, divert and pay the proceeds away from the underlying judgment. "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government action regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 US at 331, 88 L.Ed.2d 662, 106 S.Ct. 662.

This as evidenced by the availability of the State law remedy of an appellant providing supersedeas which in itself is a recognition by the State of a protected interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561-1562, 56 L.Ed.2d 30 (1978). Further indication of the State's recognition of the importance of an appellant's right to supersedeas is Utah's decisional law, e.g., U-M Investments v. Ray, 701 P.2d 1061 (Utah

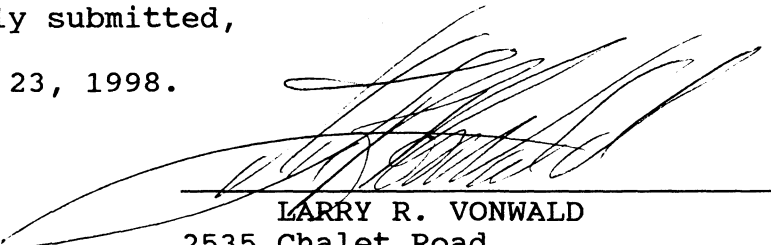
1985), and the requirements of the rule itself, e.g., "Upon motion and good cause shown, the court may.. .", sub-section (i)(2); ". . .the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action." sub-section (i)(4); "The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order." Sub-section (i)(j).

The hallmark of property [property interest] is an individual entitlement grounded in state law, which cannot be removed except for cause. [See discussion of cause in a way relating to the filing of a supersedeas bond under headnote [5] and [6], pp. 1416-1417, Scott v. Greenville County, 716 F.2d 1409.] Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." (citations omitted) Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982).

CONCLUSION: Under the facts and law presented, appellant's due process and equal protection rights guaranteed under the Fourteenth Amendment are violated. Wherefore appellant requests relief as prayed for in his motion to reverse filed herein.

Respectfully submitted,

DATED July 23, 1998.

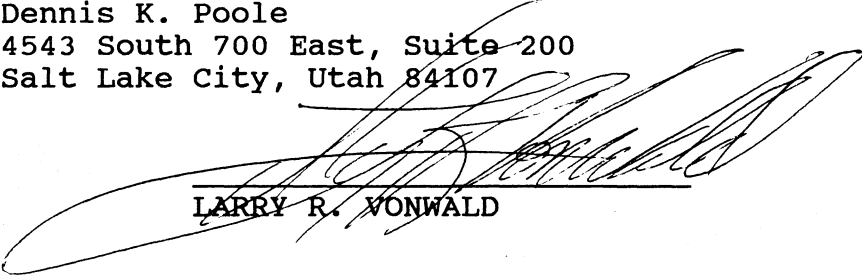


LARRY R. VONWALD
2535 Chalet Road
Sandy, Utah 84093
(801) 942 1720

CERTIFICATE OF SERVICE

On July 23, 1998, two true copies mailed as follows:

Dennis K. Poole
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107



LARRY R. VONWALD

LARRY R. VONWALD, Plaintiff-Appellant
2635 Chalet Road
Sandy, Utah 84093
Telephone 801 942 1720

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LARRY R. VONWALD,
Plaintiff-Appellant,
V.

EX PARTE APPLICATION FOR
TRIAL COURT'S APPROVAL OF CASH
SUPERSEDES BOND FOR \$5000.00

KEVIN PLUMB,
Defendant-Appellee.

Case # 930905795

Sup. Ct. # 94 0346

Whereas, on July 7, 1994, plaintiff-appellant perfected his appeal to the Utah Supreme Court from the final order of the Honorable Glenn K. Iwasaki entered in this matter on June 8, 1994, said final order including money judgment therein in favor of defendant and against plaintiff for the sum of \$4,064.90; and

Whereas, on August 11, 1994, plaintiff deposited with the clerk of said Court a cash supersedeas bond in the sum of \$5000.00 and obtained a receipt therefore which is attached hereto, said supersedeas bond deposited in accordance with the provisions of Rule 62, Utah Rules of Civil Procedure.


Whereas, defendant threatens execution sale of certain personal property on August 30, 1994 pursuant to execution issued out of the above Court on July 29, 1994 a copy of which is appended hereto with constable's notice of sale.

WHEREFORE, plaintiff herewith moves the Court for an order approving said supersedeas bond pursuant to Rule 62(d), Utah Rules

Exh 1

of Civil Procedure.

DATED August 26, 1994.



LARRY R. VONWALD

94169003
500-

LARRY R. VONWALD, Plaintiff-Appellant
2635 Chalet Road
Sandy, Utah 84093
Telephone 801 942 1720

IN THE THIRD JUDICIAL DISTRICT COURT OF *San Juan B. Hanks*
SALT LAKE COUNTY
STATE OF UTAH

LARRY R. VONWALD,

Plaintiff-Appellant,

V.

KEVIN PLUMB,

Defendant-Appellee.

TRIAL COURT'S APPROVAL OF CASH
SUPERSEDES BOND FOR ~~\$5000.00~~
75500.00

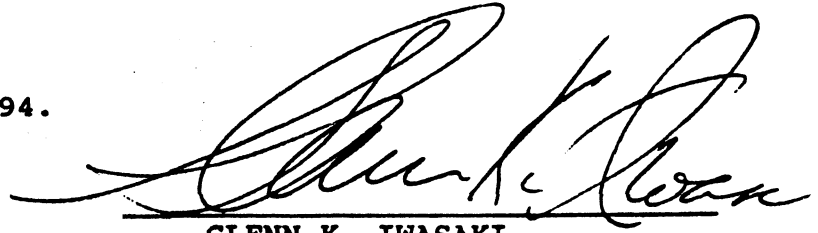
Case # 930905795

Sup. Ct. # 94 0346

Upon application of the plaintiff, good cause appearing for
the approval of cash supersedeas bond in the sum of ~~\$5000.00~~ *75500 = OK* filed
in the above cause, it is hereby

ORDERED that the cash supersedeas bond in the amount of
~~\$5000.00~~ *75500.00* deposited in this Court on August 11, 1994, is hereby in
all things approved and allowed such approval being in accordance
with and to have the effect mentioned in Rule 62(d), Utah Rules of
Civil Procedure. *80th*

DATED August *20th* 26, 1994.



GLENN K. IWASAKI
DISTRICT COURT JUDGE

ICED
OF AND IN THE
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
DATE: *10-27-96*
D. G. Ellis

DENNIS K. POOLE (2625)
ANDREA NUFFER (6623)
DENNIS K. POOLE & ASSOCIATES, P.C.
Attorneys for Defendant
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Salt Lake City, Utah 84107
Telephone: (801) 263-3344
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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LARRY R. VONWALD,	:	ORDER FOR SUPERSEDEAS BOND
	:	AND STAY OF PROCEEDINGS
Plaintiff,	:	
-vs-	:	
	:	CIVIL NO. 930905795
KEVIN PLUMB,	:	
	:	JUDGE GLENN K. IWASAKI
Defendant.	:	

THE PLAINTIFF LARRY R. VONWALD, by and through his attorney Larry L. Whyte having orally requested the Court to set the amount of a cash supersedeas bond by telephonic hearing on the 19th day of September, 1996, and the Defendant Kevin Plumb being represented by his attorney Dennis K. Poole who participated in such telephonic hearing, and the Court having heard the representations of counsel, and for good cause appearing

IT IS HEREBY ORDERED as follows:

1. That Plaintiff may deposit a cash bond with the Clerk of the Third District Court, Salt Lake County, State of Utah, in the amount of \$6,700.

2. Conditioned upon such deposit and the presentation of evidence of the same to Defendant's counsel, and pursuant to the provisions of Rule 62 of the Utah Rules of Civil Procedure, all

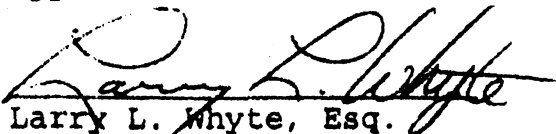
proceedings to collect that certain Order and Judgment entered on or about June 8, 1994 in the principal sum of \$4,064.90 (together with interest and other relief as provided therein) entered in favor of the Defendant and against the Plaintiff, including the enforcement of executions, a sheriff's sale scheduled for this date and continued until September 23, 1996, and any other collection proceedings, are stayed pending appeal.

ORDER dated this 19th day of September, 1996.

BY THE COURT


JUDGE GLENN K. IWASAKI

Approved as to Form:


Larry L. Whyte, Esq.
Attorney for the Plaintiff