UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

PAUL HARD, spouse and next best friend of CHARLES DAVID FANCHER, deceased; Plaintiff, v. LUTHER JOHNSON STRANGE III in his official capacity as Attorney General of the State of Alabama, Defendants, and PAT FANCHER; RICHARD I. LOHR, II, in his official capacity as administrator of the estate of CHARLES DAVID FANCHER; Intervenor-Defendants.	Civil Action No. 2:13-cv-922-WKW

OPPOSITION TO REQUEST FOR INJUNCTION, RESTRAINING ORDER, EQUITABLE RELIEF, OR EXTRAORDINARY RELIEF PENDING APPEAL

I. INTRODUCTION

Plaintiff Paul Hard brought this case because the marriage laws of Alabama unconstitutionally prohibited recognition of his marriage to his late husband, David Fancher. (Doc. # 1.) Specifically, Plaintiff sought to be listed as the surviving spouse on David Fancher's death certificate issued by the State of Alabama. Id.

During the pendency of this suit, a separate wrongful death action brought on behalf of the estate of David Fancher resulted in a monetary settlement. (Doc. # 79.) Under Alabama law, the first $100,000 of that settlement plus half of the remainder belong to the surviving spouse of the decedent, with the other portion distributed according to the intestacy statute to the

decedent's other heirs (here, Intervenor-Defendant Pat Fancher). Id. No one—including Intervenor-Defendant—disputes the operation of this distribution scheme under Alabama law, which is not at issue in this or any other litigation.

On January 23, 2015, Judge Callie V.S. Granade found Alabama's laws prohibiting same-sex marriage and recognition of same-sex marriages performed legally in other states to be unconstitutional. On February 9, 2015, as a result of Judge Granade's decision, Alabama recognized Plaintiff as the surviving spouse of David Fancher when the Alabama State Registrar of Vital Statistics issued an amended death certificate to Plaintiff, listing him as the surviving spouse and officially recognizing his marriage to Mr. Fancher. (Doc. # 80-1.) On March 23, 2015, Richard Lohr, the executor of Mr. Fancher's estate, moved to intervene in this case for the limited purpose of depositing the spousal share of the wrongful death settlement into the Court's registry. (Doc. # 74.) The following day, without briefing or argument, this Court granted that motion, accepted the funds, and *sua sponte* stayed the case pending the outcome of the appeal in Obergefell v. Hodges, 135 S. Ct. 1039 (2015). (Doc. # 75.)

The United States Supreme Court handed down its decision in Obergefell on June 26, 2015, legalizing same-sex marriage nationwide and requiring all states to recognize same-sex marriages that had been previously licensed and solemnized out of state. Obergefell v. Hodges, 576 U. S. __ (2015). That decision leaves no room for doubt that Plaintiff is the surviving spouse of Mr. Fancher, because any refusal to recognize his marriage has been found to be unconstitutional, and he is therefore entitled, by normal operation of law, to the spousal share held in the Court's registry.

This Court dismissed this suit as moot and closed the case, recognizing that, in light of Obergefell, Alabama's discriminatory marriage laws are unconstitutional and Alabama must

recognize Plaintiff as the surviving spouse of the late Mr. Fancher, as is now reflected on the decedent's state-issued death certificate. (Doc. # 89, 97.) On July 29, 2015, in a merely ministerial action, the Court instructed that the funds held in the Court's registry be released to Plaintiff. (Doc. # 96.) The Court's distribution of the funds was not based on any substantive decision or ruling on any of the claims or defenses brought as a part of this lawsuit. It was merely a function of the undisputed operation of Alabama law with respect to wrongful death proceeds.

Now, three weeks after the funds were ordered released to Plaintiff and the case was closed, Intervenor-Defendant Pat Fancher has filed a Request for Injunction, Restraining Order, Equitable Relief, or Extraordinary Relief Pending Appeal. (Doc. # 99.) This request is both untimely and meritless. This case is now closed, its claims having been definitively resolved by Obergefell. A request that the Court belatedly freeze or claw back funds distributed pursuant to the normal operation of Alabama law following the recognition of Plaintiff's marriage to Mr. Fancher is totally misplaced, and should be denied. There is no order with respect to the funds that can be stayed. Likewise, the request that Plaintiff, as appellee, should post a bond is nonsensical and unsupported by precedent or law. While appellants sometimes are required to post a bond in order to secure a stay of a judgment pending appeal, Plaintiff is not the appellant here. There is no rule or law that requires an appellee post a bond pending appeal to secure the appellant's interests. The request that Plaintiff-Appellee post a bond should be denied, as it is unsupported, unjustified, and unauthorized.

II. ARGUMENT

Defendant-Intervenor purports to make her request for relief to this Court pursuant to Fed. R. App. P. 8(a)(1). Id. at 2. However, this is not an appropriate basis for the relief she

requests. The Federal Rules of Appellate Procedure do not govern this District Court, let alone authorize it to provide the relief requested. Moreover, Intervenor-Defendant misunderstands the substance of the rule itself. Fed. R. App. P. 8(a)(1) provides that, under ordinary circumstances, a party wishing to stay a decision of the district court pending appeal must first make such motion in the district court under the relevant and applicable Federal Rule of Civil Procedure, i.e., Fed. R. Civ. P. 62. Fed. R. App. P. 8(a)(1) is not an independent basis for or source of relief. Rather, the forms of relief listed in Fed. R. App. P. 8(a)(1)(A)-(C) refer back to Fed. R. Civ. P. 62. See United States v. Dist. Council of New York City and Vicinity of United Bhd. of Carpenters and Joiners of Am., No. 90 Civ. 5722, 2009 WL 2523882, at *1 (S.D.N.Y. Aug. 17, 2009). Other than referencing Fed. R. App. P. 8(a)(1)—which plainly does not apply in the district court—Intervenor-Defendant does not cite *any* rule or authority that authorizes or supports this Court granting the extraordinary relief she seeks. For this reason alone, her request should be denied. In any event, Intervernor-Defendant is not entitled to any of the forms of extraordinary relief she seeks as explained below.

Intervenor-Defendant first seeks "a stay of the judgment or order pending appeal, which stay would have the effect of postponing payment of the amount in question if it has not already been paid, or returning the payment if it has been paid, pending the outcome of this appeal." Doc. # 99 at 2. Intervenor-Defendant has failed to identify any rule or law that authorizes the imposition of such a stay and confers on this Court the power to require the return of the funds by the Plaintiff who the Court determined to be the prevailing party. Moreover, there is no order of this Court with respect to the funds that can be stayed as the funds have already been distributed to Plaintiff-Appellee. As such, the request should be denied.

Next, Intervenor-Defendant asks this Court to "issue an order requiring Appellee to post a supersedeas bond to ensure that the funds in question will be intact for repayment to Appellant if Appellant is successful in this appeal." Id. Other than a reference to the inapplicable appellate rule, Intervenor-Defendant fails to cite any authority in support of her request. Moreover, the request turns the rule on its head by losing sight of its purpose. Intervenor-Defendant is now the *appellant*. While Fed. R. Civ. P. 62(d) does provide for the stay of a judgment pending appeal, the rule by its plain terms indicates that an *appellant* may secure a stay pending appeal by posting a supersedeas bond, not the appellee. Id. ("If an appeal is taken, the appellant may obtain a stay by supersedeas bond."). A supersedeas bond is meant to protect the appellee, who has already prevailed on the merits of their case, not the appellant. See, e.g., Bank of New York Mellon v. Worth, No. 3:13-cv-1489, 2015 WL 1780719, at *2 (D. Conn. Apr. 20, 2015) (noting that supersedeas bond is meant to protect the appellee); In re Rose's Stores, Inc., 223 B.R. 487, 488-89 (E.D.N.C. 1998) (noting that "the appellant who is moving for the stay is the party obligated to post a bond, not the appellee" and declining to maintain appellee's previously posted bond pending appeal); United States v. O'Callaghan, 805 F. Supp. 2d 1321, 1324-26 (M.D. Fla. 2011) ("A supersedeas bond serves to fully secure a judgment during an appeal and to compensate the judgment creditor in the event of loss caused by the stay."); Warhurst v. One Twenty Foot Bertran, No. 14–00245–N, 2015 WL 1885103, at *1 (S.D. Ala. Apr. 24, 2015) ("The purpose of the supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal." (citing Prudential Ins. Co. of Am. v. Boyd, 781 F.2d 1494, 1498 (11th Cir.1986))). Intervenor-Defendant does not cite any case—and Plaintiff knows of none—where the prevailing *appellee* has been required to post a supersedeas bond in an effort to protect the interests of the appellant.

Intervenor-Defendant also requests that this Court enter an injunction requiring Plaintiff, as appellee, to place the funds distributed to him into an escrow account or otherwise preserve the funds pending appeal. Again, other than the inapplicable appellate rule, Intervenor-Defendant offers no authority for this request. Even should the request arise under Fed. R. Civ. P. 62(c), such reliance is misplaced. Fed. R. Civ. P. 62(c) provides that "[w]hile an appeal is pending from . . . [a] final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Id. Again, by its plain language, the Rule does not apply to this case because the final judgment here did not grant, dissolve, or deny an injunction.

Even if Fed. R. Civ. P. 62(c) did apply here—which it does not—Intervenor-Defendant has failed to show that an injunction or stay should issue. Indeed, Intervenor-Defendant makes no attempt to do so whatsoever. "A stay under Rule 62(c) is considered 'extraordinary relief' for which the moving party bears a 'heavy burden.'" Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996) (quoting Winston–Salem/Forsyth Cty. Bd. of Educ. v. Scott, 404 U.S. 1221, 1231 (1971)); see also Strawser v. Strange, No. 14–0424–CG–C, 2015 WL 1186326, at *1 (S.D. Ala. Mar. 16, 2015) (citing Nken v. Holder, 556 U.S. 418, 433 (2009)); Warhurst, 2015 WL 1885103 at *1. Where an appellant requests a stay pending appeal, a stay may only issue where the appellant has carried her heavy burden as to the four following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken, 556 U.S. at 434; see also Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Intervenor-Defendant has failed to even address—let alone meet—her heavy burden as to any of these factors. In particular, as to the "most important" first factor, Garcia-Mir, 781 F.2d at 1453, she has not shown that she is likely to succeed on the merits of her appeal. In fact, this Court has already considered her arguments on the merits and rejected them. (Doc. # 95.) Nor has Intervenor-Defendant shown that she will be irreparably injured absent a stay. She merely baldly asserts that, should she prevail on the merits of her appeal, there is a "very real possibility that Plaintiff/Appellee could dissipate these funds, invest them unwisely, shelter them, or otherwise make them unavailable," Doc. # 99 at 2, and that her "interest in those funds are greatly at risk," id. at 3. This is nothing more than conclusory speculation. Moreover, she offers no evidence to support a conclusion that in the unlikely event she prevails on appeal that Plaintiff would be unable to pay a judgment in her favor.

Lastly, Intervenor-Defendant suggests that in the event relief is not available under Fed. R. App. P. 8—which it is not—this Court should provide "equitable relief or extraordinary relief" as it sees fit. Intervenor-Defendant does not describe what such relief would entail or from what rule or law it would appropriately spring. This is reason enough to deny the request. Moreover, this Court lacks jurisdiction to provide such generalized equitable relief outside of Fed. R. Civ. P. 62, whether under Fed. R. Civ. P. 65 (governing injunctions and restraining orders), or elsewhere, because the filing of a notice of appeal divests this Court of jurisdiction over the case. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Intervenor-Defendant's requested relief does not fall within any of the exceptions to the general rule that a notice of appeal divests this Court of jurisdiction.

Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc., 895 F.2d 712, 713 (11th Cir. 1990).

III. CONCLUSION

For the foregoing reasons, Intervenor-Defendant's Request for Injunction, Restraining Order, Equitable Relief, or Extraordinary Relief Pending Appeal should be denied in its entirety.

DATED: September 1, 2015

Respectfully submitted,

SOUTHERN POVERTY LAW CENTER

By: /s/ *Samuel Wolfe*

Samuel Wolfe (ASB-2945-E63W)
David C. Dinielli* (California Bar No. 177904)

400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481
david.dinielli@splcenter.org
sam.wolfe@splcenter.org
**Admitted pro hac vice*

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of September, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

David Bryson Byrne, Jr., Esq.
Office of the Governor
State Capitol
600 Dexter Avenue
Suite NB-05
Montgomery, AL 36130

James William Davis, Esq.
Laura Elizabeth Howell, Esq.
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130

Matthew Kidd, Esq.
Foundation for Moral Law
1 Dexter Avenue
Montgomery, AL 36104

Richard D. Morrison
Beasley, Allen, Crow, Methvin,
Portis & Miles, P.C.
218 Commerce Street
Montgomery, AL 36104

/s/ *Samuel Wolfe*
Samuel Wolfe