IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

PAUL HARD,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	**Civil Action No.: 2:13-CV-922-WKW-SRW**
	)	
LUTHER STRANGE, et al.	)	
	)	
Defendant.	)	
	)	
	)	
	)	

Intervening Defendant's Reply In Regard to Her Request

For Injunctive or Other Relief Pending Appeal

Comes now Intervenor Defendant Fancher with the following reply to Plaintiff/ Appellee's response to her first request for relief pending appeal and files this document to aid the Middle District in making an informed decision upon her first request for relief pending appeal (Doc. 99).

In his response, Plaintiff argues that a supersedeas bond is not appropriate and that a stay or injunctive relief is improper. Plaintiff's counsel attempts to expose weaknesses in Intervenor Defendant's request for relief where there are none. By offering a number of potential directions Intervenor Defendant believed her request for relief was not only appropriate, but flexible and amicable. In short, by citing to a potential bond, injunction, stay, order of restraint, allocating the funds in an escrow account, or another form of equitable or extraordinary relief as the Court may

see fit Intervenor Defendant was making every effort to be courteous to Plaintiff Hard and flexible toward the Court.

Contrary to Plaintiff's response, Intervenor Defendant/ Appellant did not argue that Rule 8 grants independent relief and in fact Intervenor Defendant asked only for an injunction, restraining order, bond, or some form of equitable or extraordinary relief as the Middle District might find appropriate under the circumstances. But while Rule 8 may not grant independent relief, it provides in relevant part "A party must ordinarily move first in the district court for the following relief: a stay of the judgment or order of a district court pending appeal; approval of a supersedeas bond; or an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." Intervenor Defendant is clearly bound by FRAP 8 to attempt to first seek these forms of relief with the District Court. If opposing counsel insists on continuing to raise issue with FRAP Rule 8 Intervenor Defendant would ask Plaintiff's counsel to point toward a rule which more directly applies.

Finally, Plaintiff/Appellee argues that Intervening Defendant/Appellant's request for relief was untimely. (Doc.105 at 3). However, Plaintiff has not cited one statute or case which explains why Intervenor Defendant's request for relief should be considered in any way untimely. On the contrary, Intervenor Defendant filed her request for relief within minutes of her notice of appeal, which itself was a timely filing according to FRAP R. 4.

Next, Plaintiff takes issue with the potential bond. A supersedeas bond is normally conceived in terms of a defendant appealing a money judgment and therefore being required to post bond to guarantee that the money will be there if the judgment is ultimately affirmed. However, the posture of this case is irregular. Plaintiff argues that, "[a] supersedeas bond is meant to protect the appellee, who has already prevailed on the merits of their case, not the

appellant." Indeed, Plaintiff is correct that this is the normal posture prior to issuance of a bond. But while a bond may typically go toward protecting an appellee who prevailed on the merits of the case below, no such ruling has taken place in this action. Instead, the Defendant Attorney General motioned for voluntary dismissal and the Middle District agreed. The irregular posture of this case lends the Court to consider a spectrum of options for safeguarding the disputed funds and for this reason Intervenor Defendant referenced a supersedeas bond in her request for relief. If the Court believes a supersedeas bond is not the appropriate remedy because of a technical application of the rules, then Intervenor Defendant/Appellant respectfully asks the Court to fashion equitable relief and/or extraordinary relief that will accomplish the same purpose.

Next Plaintiff/ Appellee argues against Intervenor Defendant's requests for potential stay or injunctive relief would not be appropriate. As Plaintiff and Defendant's responses point out, the factors for a court's consideration in both a stay and injunctive relief are similar if not identical and Plaintiff argued against them both in concert.[1] Intervenor Defendant/Appellee offers the following support for the District Court's consideration of these forms of relief:

Legal Standard

A preliminary injunction is appropriate if the movant demonstrates: "(1) a substantial likelihood of success on the merits; (2) that the preliminary injunction is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and (4) that the preliminary injunction would not be averse to the public interest." *Chavez v. Fla. SP Warden*, 742 F.3d 1267 (11th Cir. 2014) (quoting *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1034–35 (11th Cir. 2001)).

[1] See *Defendant's Response*, (Doc. 106 quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); see also *Plaintiff's Response*, (Doc. 105 quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

Argument

1. There is a substantial likelihood of success.

Ms. Fancher has a substantial likelihood of success on appeal. In 2011 same-gender marriage was lawfully considered an unrecognized legal act in Alabama as well as in the majority of the states in the union. The question in this case however is that since there has been a change in the Supreme Court's stance on the issue of marriage, what effect will that change have upon an alleged marriage from earlier year. The Southern Poverty Law Center, on behalf of Plaintiff/Appellee Paul Hard, says concerning the likelihood of prevailing on the merits, "In fact, this Court has already considered her arguments on the merits and rejected them." (Doc. 95). In fact, this Court has never addressed the issue of retroactivity raised by Fancher in this case, nor, to our knowledge, has the issue ever been addressed by any court dealing with same-sex marriage.

Plaintiff's response might be considered further misleading when he says, "[t]he 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)." (Doc. 105 emphasis added). Clearly that case stands to govern what marriages are to be recognized by states moving forward, but the entire matter that has been at issue in this case since the *Obergefell* decision is what effect, if any, that opinion has upon marriages conceived, solemnized, and having ended years before *Obergefell*. Being a new and developing area of law, courts have not duly considered this issue. Furthermore, the *Windsor* opinion suggests that the right to have 2011 same-gender marriage recognized by a foreign state is skeptical at best. (See *U.S. v. Windsor*, S.Ct. 2675, 2691 (2013) stating, "Each state as a sovereign has a rightful and

legitimate concern in the marital status of persons domiciled within its borders") (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). In fact, the Court in that case critiques attempts by any governmental entity beside the states themselves in determining its own marriage laws. *Id.* Further even, the Court in *Obergefell* speaks to the reality that its precedent from earlier opinions dealt with the right to marriage in only the heterosexual context. See *Obergefell v. Hodges*, 576 U. S. __ (2015) (stating, "[i]t cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners.") This points again toward the application of same-gender marriage rights beginning on the date that the *Obergefell* decision became final, not before. Therefore, Intervenor Defendant does indeed have a substantial likelihood of success on the merits of her cause for appeal. And as Plaintiff's counsel points out in its response, this factor has been recognized as the "most important" (Doc. 105 at 6) (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

2. The threat of irreparable injury.

Furthermore, Plaintiff's counsel accuses Intervenor Defendant of being conclusory in that in her request for relief Intervenor Defendant stated that without the District Court's intervention there is a, " 'very real possibility that Plaintiff/Appellee could dissipate these funds, invest them unwisely, shelter them, or otherwise make them unavailable'." (Doc. 105). Intervenor Defendant does not see this as conclusory, but as common sense. Indeed, the aforementioned potential uses of the funds are likely, especially given the potential for Plaintiff to incur an unfavorable result on appeal.

3. The threatened injury outweighs the harm that an action by this Court would cause the other litigant.

The injunction or stay sought in this case is necessary to protect the interests of a party before the Middle District. Following the July 29 order of this Court concerning the wrongful death proceeds (Doc. 96), Plaintiff Hard has presumably had access to the entire disputed sum of $552,956.69. As it is now, Plaintiff/ Appellee has access to the entire disputed amount. Without a favorable legal opinion on the merits of Plaintiff's claim to the disputed funds, such exclusive access is wholly unjust.

Moreover, Plaintiff and Defendant can soon expect a legal opinion from the Court of Appeals for the Eleventh Circuit clarifying this complex area jurisprudence and rendering exclusive access to the disputed funds as that court see fit. If the decision rendered by the Court of Appeals for the Eleventh Circuit is favorable to Plaintiff/Appellee then Mr. Hard will soon have exclusive access to the funds with an opinion supporting that direction and it is inconceivable that a brief period in between the District Court's dismissal and the Court of Appeals' would cause Plaintiff Hard much if any hardship. If, on the other hand, Ms. Fancher's appeal is successful, the threatened harm of allowing Plaintiff unrestricted access to the funds during the course the appeal is plainly outweighed by the threatened harm to Appellant Fancher, at which point securing said funds might prove extremely difficult or even impossible.

Thus, if entered, whatever inconvenience injunctive relief or stay may present for Plaintiff Hard it is duly outweighed by the threat of irreparable harm to the opposing party, Ms. Fancher.

4. That the preliminary injunction would not be averse to the public interest.

No public interest would be harmed if the funds were safeguarded until this appeal is decided and apparently Plaintiff did not believe that the fourth factor under these tests should be contested as he did not address the fourth factor in his response. Indeed, Intervenor Defendant/

Appellant agrees that it would be difficult to imagine what if any public policy interest might be affected should the District Court make an effort to safeguard the contested funds.

Conclusion

Intervenor Defendant remains flexible and amicable to any of the proposed methods set out in her first request for relief on appeal (Doc. 99) as well as to other proposed methods by opposing counsel or this Court of providing assurances that the contested funds at issue in this case might be safeguarded as the action moves forward. Ms. Fancher also remains in her belief that without any action taken by the Middle District to safe guard the disputed funds, her interests may be severely damaged. Instead, she prays this Court will intervene with injunctive or other grounds of relief to maintain the status quo on appeal. Intervenor Defendant is of the opinion that if the District Court grants Intervenor's request, Plaintiff Hard's interests are not at risk in any significant way whatsoever. If Plaintiff prevails on appeal then Plaintiff will have the same authority over the disputed funds that he currently has with only a brief pause; a pause which would undoubtedly demonstrate an effort by this Court to achieve fairness toward both parties.

WHEREFORE, premises considered, Intervenor Defendant humbly asks this Court to take action on behalf of Ms. Fancher to protect her interest in these reasonably contested funds while a novel and new issue of jurisprudence is sorted out on appeal.

Respectfully submitted this 3rd day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system by which copies of said motion are served upon each party registered in the case, including Plaintiff's counsel:

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This 3rd day of September 2015.

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