Supreme Court No. 94199-8

Court of Appeals No. 73748-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRAND INSULATIONS, INC.,

Petitioner,

v.

ESTATE OF BARBARA BRANDES,

Respondent.

RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS (RAP 18.9(a))

Matthew P. Bergman
(WSBA No. 20894)
Kaitlin T. Wright
(WSBA No. 45241)
BERGMAN DRAPER OSLUND
821 2nd Avenue, Suite 2100
Seattle, WA 98104
(206) 957-9510

Leonard J. Feldman
(WSBA No. 20961)
PETERSON | WAMPOLD |
ROSATO | LUNA | KNOPP
1501 4th Avenue, Suite 2800
Seattle, WA 98101
(206-682)-6800

Attorneys for Respondent

Brand Insulations, Inc. ("Brand") has not posted a supersedeas bond as required. The trial court ordered Brand to do so—as required by RAP 8.1—on April 28, 2017. Brand then filed a motion to vacate the trial court's order, which this Court's Commissioner denied by Order dated May 11, 2107. Yet Brand still has failed to do anything to comply with that Order or RAP 8.1. Under these circumstances, sanctions are warranted. The Estate of Barbara Brandes ("Estate") therefore asks the Court to impose sanctions against Brand under RAP 18.9(a), to include conditioning Brand's right to participate in review proceedings upon compliance with RAP 8.1 and the Court's May 11, 2017 Order requiring Brand to post a supersedeas bond in the amount of $2,182,155.66.

Brand raises several arguments in opposition to the Estate's motion, all of which fail. First, Brand complains that the Estate failed to meet and confer with Brand prior to filing the subject motion. However, Brand fails to cite any Rule of Appellate Procedure that imposes a meet and confer requirement under these circumstances and, indeed, the Rules do not require that the parties meet and confer prior to filing a motion to enforce an appellate court's order. But even if the rules so required, the Estate's counsel informed Brand's counsel that a motion would be filed, giving Brand ample opportunity to cure its noncompliance with the Court's May 11, 2017 Order and RAP 8.1. As noted, Brand failed to do so.

Second, Brand claims there must be a showing of prejudice for the Court to award sanctions. That, too, is incorrect. The Rules of Appellate Procedure—including RAP 18.9(a) under which the Estate's motion is brought—do not condition sanctions upon the opposing party's ability to demonstrate prejudice resulting from failure to comply with the Rules or a Court order. Instead, the Rule provides in pertinent part as follows: "The appellate court on its own initiative or on motion of a party may order a party or counsel…to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order…" RAP 18.9(a).

However, even if a showing of prejudice were required, the prejudice here is manifest. A supersedeas bond ensures a judgment creditor's ability to protect his or her financial interests pending resolution of an appeal, in the case of appeal from a money judgment guaranteeing the debtor's ability to pay the full judgment. *Spahi v. Hughes-Nw., Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001), modified, 33 P.3d 84 (Wn. Ct. App. 2001) (citing *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sys.*, 105 Wn.2d 376, 378, 715 P.2d 1131 (1986)). Brand's current bond is over $1,000,000 less than the amount Brand will be required to pay if it is unsuccessful in its appeal. The bond amount that Brand is obligated to post pursuant to the Court's May 11, 2017 Order and RAP 8.1

assures that Brand will be able to satisfy the full judgment even if Brand were to file for bankruptcy protection during or after the appellate process. At present, the Estate is largely unprotected.

This concern, moreover, is not hypothetical. Just last year, the undersigned firm obtained a verdict against Kaiser Gypsum Company in the case of *Hoff v. Certainteed Corporation, et al*., No. 15CV23996, following a multi-week trial in Multnomah County Circuit Court in Oregon, in which verdict defendant Kaiser Gypsum was represented by Brand's current counsel. Shortly after the Notice of Appeal was filed in the *Hoff* case, but before supersedeas protection could be secured, Kaiser Gypsum filed for bankruptcy protection. Brand's assertion that there is no prejudice because "an increased bond will be filed prior to the date set for Department One's consideration of Brand's petition" simply underscores the extant prejudice created by Brand's persistent refusal to post an increased bond. Brand's Opp. at 3. Given Brand's continuing and intentional violation of the Court's May 11, 2017 Order and RAP 8.1, sanctions are appropriate.

Third, Brand claims that no good cause exists for increasing its supersedeas bond. This argument is both procedurally improper and substantively flawed. If Brand wanted to challenge the Court's May 11, 2017 Order denying Brand's Motion to Vacate, it was required to file a motion to modify. Brand did not do so. Nor did it seek a temporary stay.

Having failed to do so, Brand is not at liberty to defy the order simply because it thinks the order was incorrect. The Washington Supreme Court squarely rejected such an argument in *Deskins v. Waldt*, 81 Wn.2d 1, 499 P.2d 206 (1972), as follows:

> [W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court.

81 Wn.2d at 5; *see also State v. Breazeale*, 99 Wn. App. 400, 413, 994 P.2d 254 (2000), *aff'd in part, rev'd in part*, 144 Wn.2d 829, 31 P.3d 1155 (2001). Here too, regardless of whether the trial court's order and the Court's May 11, 2017 Order requiring Brand to post an increased supersedeas bond were correct, Brand must comply. It has refused to do so, warranting sanctions.

Brand's arguments regarding the merits of its Petition for Review are equally improper. Brand previously filed an unauthorized reply in support of its Petition for Review. The Estate filed a motion to strike that reply, and Brand agreed that it was improper and withdrew the reply brief. Yet in response to the Estate's Motion for Sanctions, Brand has lifted and repeated verbatim the same arguments asserted in its improper reply. *See* Brand's Reply in Support of Petition for Review at 1-2, 3-6. Brand's

continuing efforts to circumvent this Court's rules and the Orders issued herein is egregious. This is another reason to award sanctions under RAP 18.9(a). Additionally, under RAP 13.4(d)—which forbids a reply where, as here, an answer to a petition for review does not raise new issues—the Court should strike pages 5 – 9 of Brand's response brief.

Unfortunately, the Estate must respond to those arguments in the event that the Court considers them (which it should not). Those arguments, too, are erroneous. Brand presents a strawman in asserting that the Court of Appeals declined review of the denial of its motion for summary judgment based on the statute of repose solely because Brand failed to present evidence at trial that insulation was an improvement to real property. Rather, the Court of Appeals properly declined review of the dispositive motion on two distinct and independently sufficient grounds for dispensing with Brand's statute of repose argument. The appellate court first determined that review should be rejected on the basis that summary judgment orders are "not reviewable…after a trial on the merits" where denial of summary judgment was "'based on a determination that material facts are disputed and must be resolved by the trier of fact.'" Slip op. at 5-6, citing *Johnson v. Rothstein*. 52 Wn. App. 303, 303-04, 759 P.2d 471 (1988). While that basis alone was sufficient to support declining review, the appellate court also refused to review the issue because Brand had

waived the defense by failing to raise it *in any form* during the ensuing trial. Slip op. at 7-8. Brand neither presented evidence that insulation was an improvement to real property, nor offered evidence that the work Brand performed was itself part of an improvement to real property—nor did Brand request a jury instruction of any kind to enable it to argue the defense.

The Court of Appeals explicitly noted the existence of questions of material fact regarding application of the statute of repose, including "the purpose, necessity, and permanence of the insulation that Brand installed in the refinery," before appropriately concluding that the summary judgment order could not be appealed because it was followed by a trial. Slip op. at 7. RAP 2.2 and well-established case law clearly state that summary judgment orders cannot be appealed after a full trial on the merits. Slip op. at 6, citing *Johnson*, 52 Wn. App. at 303-04 and *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Brand still has not demonstrated that the Court of Appeals' decision regarding this (or any other) issue conflicts with Washington law or otherwise warrants this Court's review.

In sum, Brand's arguments in opposition to Respondent's Motion for Sanctions are unavailing. Consequently, the Estate respectfully requests that the Court impose sanctions against Brand under RAP 18.9(a) including conditioning Brand's right to participate in review proceedings upon

immediate and verified compliance with RAP 8.1 and the Court's May 11, 2017 Order requiring Brand to post a supersedeas bond in the amount of $2,182,155.66.

RESPECTFULLY SUBMITTED this 20th day of June 2017.

BERGMAN DRAPER OSLUND, PLLC

By: _____

Matthew P. Bergman, WSBA # 20894
Kaitlin T. Wright, WSBA #45241

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP
Leonard Feldman, WSBA #20961

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on June 20, 2017, I caused to be served a true and correct copy of the foregoing document via electronic service upon:

David A. Shaw
Katherine M. Steele
Malika I. Johnson
WILLIAMS KASTNER & GIBBS, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101

Timothy K. Thorson
Michael B. King
CARNEY BADLEY SPELLMAN, PS
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

Christopher S. Marks
Megan M. Coluccio
SEDGWICK, LLP
520 Pike Street, Suite 2200
Seattle, WA 98101

K. Michael Fandel
MILLER NASH GRAHAM & DUNN
Pier 70
2801 Alaska Way, Suite 300
Seattle, WA 98121

Albert H. Parnell
HAWKINS & PARNELL
303 Peachtree Street N.E.
Suite 4000
Atlanta, GA 30308

Richard G. Gawlowski
WILSON, SMITH, COCHRAN & DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164

Dated at Seattle, Washington this 20th day of June 2017.

BERGMAN DRAPER OSLUND

Wil John Cabatic