

**IN THE COURT OF APPEALS OF IOWA**

No. 9-320 / 08-0751

Filed July 22, 2009

**DARLO A. ESPEY n/k/a DARLO A.  
ANTOMORI JR. and TRAVIS ESPEY,**  
Plaintiffs,

**vs.**

**IOWA DISTRICT COURT FOR POLK  
COUNTY,**  
Defendant.

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Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Darlo Antomori Jr. and Travis Espey seek certiorari review of a district court order requiring them to post a bond to cover the costs of appellate attorney fees and costs that could be awarded to the appellee in a related case. **WRIT SUSTAINED.**

Valerie Cramer, Des Moines, for plaintiffs.

Thomas P. Lenihan, West Des Moines, for Mary Ann Antomori.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**DOYLE, J.**

Darlo Antomori Jr. and Travis Espey, appellants in a related case, seek certiorari review of a district court order requiring them to post a bond to cover the costs of appellate attorney fees and costs that could be awarded to the appellee, Mary Ann Antomori<sup>1</sup>, in the related case. We conclude the district court improperly applied the law in granting Mary Ann's application for bond on appeal and thus acted illegally in ordering Darlo Jr. and Travis to post such a bond. We therefore sustain the writ of certiorari.

***I. Background Facts and Proceedings.***

The certiorari action before us arises from a related case that we affirmed on appeal. See *Antomori v. Espey*, No. 07-2089 (Iowa Ct. App. June 17, 2009). The facts of that case are set out in that decision and need not be fully repeated here. However, we restate certain facts of that case and add additional facts relevant to this certiorari action.

On August 31, 2006, Mary Ann filed an action in district court to enforce her mechanic's lien against a property owned by Darlo Antomori Jr., Travis Espey, and Nicole Espey. The property owners filed various counterclaims against Mary Ann. Thereafter, the property owners sold the property. On July 23, 2007, the property owners posted a cash bond with the Clerk of the Polk County District Court pursuant to Iowa Code section 527.15 (2005) to discharge Mary Ann's mechanic's lien against the property to allow for the sale of the

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<sup>1</sup> Mary Ann Antomori died on June 19, 2009, four days before oral argument of this matter.

subject property while the litigation ensued. Nicole ultimately settled with Mary Ann and was dismissed from the suit.<sup>2</sup>

The matters between Mary Ann, Darlo Jr., and Travis proceeded to trial. At the end of the trial, the district court requested the parties submit proposed findings and conclusions to the court on their causes of action. Mary Ann's proposed ruling proposed, among other things, that judgment be entered in her favor and that the clerk of court be ordered to satisfy her judgment and any awarded fees and costs from the cash bond previously posted by Darlo Jr., Travis, and Nicole. Mary Ann's proposed ruling further proposed that the clerk of court be "directed to remit the balance, after satisfaction of [Mary Ann's] judgment, attorney's fees, and costs, to [Darlo Jr., Travis, and Nicole] . . . ."<sup>3</sup>

On October 2, 2007, the district court entered its ruling finding in favor of Mary Ann and ordered judgment be rendered in her favor plus interest, court costs, trial attorney fees, and other costs. The court dismissed Darlo Jr.'s and Travis's counterclaims. Additionally, the court ordered that the clerk of court satisfy Mary Ann's judgment and other awarded costs and fees from the cash bond previously posted by Darlo Jr., Travis, and Nicole, and that the remainder be returned to Darlo Jr. and Travis, as proposed by Mary Ann. The clerk then dispersed the proceeds of the bond to Mary Ann, Darlo Jr., and Travis in accordance with the court's order.

On December 12, 2007, after all of the bond proceeds had been distributed, Darlo Jr. and Travis filed their notice of appeal. On February 7, 2008,

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<sup>2</sup> Nicole is not a party to the certiorari action presently before this court.

<sup>3</sup> We are unable to determine whether Darlo Jr. and Travis submitted their own proposal.

Mary Ann filed an application for bond on appeal before the district court. Mary Ann's application stated that as a result of the distribution of the bond proceeds, there remained no further bond/security held by the clerk to satisfy her attorney fees and costs incurred on appeal. The application further stated that Darlo Jr. and Travis "failed to apply to the [clerk] to determine bond on appeal." Because she may be entitled to attorney fees and costs on appeal, Mary Ann asserted she was entitled to security by an order of the district court, citing Iowa Code section 572.32 and *Schaffer v. Frank Moyer Construction, Inc.*, 628 N.W.2d 11 (Iowa 2001). The application's prayer further requested a hearing as provided by Iowa Rule of Appellate Procedure 6.8 and Iowa Code chapter 625A. Darlo Jr. and Travis resisted the application.

On April 10, 2008, the district court entered its ruling granting Mary Ann's application for bond on appeal. The court explained:

[Darlo Jr. and Travis] originally posted a bond. Said bond was posted . . . to allow for the sale of the subject property while this litigation ensued. The bond that was previously posted was not a supersedeas bond, nor one posted under any of the rules of appellate procedure.

. . . .

It is clear to the court, having reviewed the rules and case law cited by [Mary Ann] herein, that generally a supersedeas bond requested under Rule 6.7 of the Iowa Rules of Appellate Procedure is designed to cover not only the judgment entered by the court but "also all costs and damages adjudged against an appellant on the appeal." See Iowa [R. App. P.] 6.9. Costs of an appeal in this mechanic's lien foreclosure case could include appellate attorney fees and court costs. See [*Schaffer*, 628 N.W.2d at 23]. The court notes also under Rule 6.8 of the Iowa Rules of Appellate Procedure, it is the district court that is to determine the sufficiency of the bond.

In additional support of her request, [Mary Ann] has cited the court to Iowa Code section 625A.12, which provides that the "appellant may be required to give security for costs under the

same circumstances and upon the same showing as plaintiffs in civil actions . . . .”

Accordingly, the court determines that [Mary Ann’s] application for bond on appeal should be granted. The court further determines that [Mary Ann’s] request for a bond in an amount no less than \$5000 is fair and reasonable.

Darlo Jr. and Travis subsequently filed a motion to reconsider, which the district court denied.

On May 8, 2008, Darlo Jr. and Travis filed an application for discretionary review of the district court’s order requiring them to post the bond. The Iowa Supreme Court determined the proper request for relief was by way of a petition for writ of certiorari and treated the application as such. Our supreme court then granted the petition, stayed the district court’s order requiring the bond be posted, and transferred the matter to this court for review.

## ***II. Scope and Standards of Review.***

“In an original certiorari proceeding, our review is for errors at law.” *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 863 (Iowa 2005) (citation omitted).

“A writ of certiorari lies where a lower board, tribunal, or court has exceeded its jurisdiction or otherwise has acted illegally. For this reason, this court ‘may examine only the jurisdiction of the district court and the legality of its actions.’ ‘Illegality exists when the court’s findings lack substantial evidentiary support, or when the court has not properly applied the law.’”

*Id.* (citation omitted).

## ***III. Discussion.***

On appeal, Darlo Jr. and Travis (hereinafter “appellants”) argue that the district court erred in requiring them to post an appeal bond for Mary Ann’s possible future appellate attorney fees where the underlying judgment of the district court has been satisfied. Mary Ann argues that because she may be

entitled to appellate attorney fees on appeal, the appellants are required to repost a bond to cover that amount, and thus the district court did not err. The district court did not specify exactly which Code section, rule, or case it relied upon in granting the motion, but cited those raised in Mary Ann's motion, *Schaffer*, 628 N.W.2d at 11 (which discusses Iowa Code sections 572.15 and 572.32), Iowa Rules of Appellate Procedure 6.7 and 6.9, and Iowa Code chapter 625A, in support of its ruling. We discuss each authority in turn.

**A. Mechanic's Lien Bond.**

The related underlying action was for the enforcement of a mechanic's lien. A mechanic's lien is purely statutory in nature. *Griess & Ginder Drywall, Inc. v. Moran*, 561 N.W.2d 815, 816 (Iowa 1997). Mechanic's lien statutes are liberally construed to promote restitution, prevent unjust enrichment, and assist parties in obtaining justice. *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994).

The property owners in the related underlying case filed their original bond with the district court clerk pursuant to Iowa Code section 572.15. Section 572.15 provides, in relevant part:

A mechanic's lien may be discharged at any time by the owner . . . [by] filing with the clerk of the district court of the county in which the property is located a bond in twice the amount of the sum for which the claim for the lien is filed, with surety or sureties, to be approved by the clerk, *conditioned for the payment of any sum for which the claimant may obtain judgment upon the claim.*

(Emphasis added.) Section 572.32(1) provides that, in an action to enforce a mechanic's lien, a prevailing plaintiff who furnished labor and materials directly to the defendant may be awarded reasonable attorney fees. The Iowa Supreme

Court has held that section 572.32 provides for both trial and appellate attorney fees. See *Schaffer*, 628 N.W.2d at 23. Thus, reading sections 572.15 and 573.32 together, the bond posted is for the payment of any sum for which the claimant may obtain judgment upon the claim, including trial and appellate attorney fees.

Here, the problem lies in the fact that all the cash bond proceeds were dispersed before the appeal was filed. The proceeds satisfied Mary Ann's judgment, her trial attorney fees and costs, and court costs, with the balance remitted to Darlo and Travis. This distribution was precisely the relief Mary Ann requested in her proposed ruling to the district court. She did not propose or request the court to order retention of a portion of the bond to satisfy any potential appellate attorney fees she may be entitled to in the event the appellants appealed the district court's ruling. She did not propose or request the court to order that disbursement of the bond proceeds be delayed until after the time for appeal had expired or until after final judgment on appeal was rendered. Although Mary Ann could have employed the cash bond to secure her appellate attorney fees, we find no language in section 572.15 or 572.32 allowing resurrection of the bond to cover her potential appellate attorney fees once the original bond proceeds were disbursed to satisfy her judgment. Nor do we find any provision in the mechanic's lien statute authorizing a separate appeal bond under the circumstances presented in this case. Additionally, although *Schaffer* recognizes appellate attorney fees are permitted under section 572.32, the decision does not establish or provide authority for an extra-statutory appeal bond to secure appellate attorney fees. *Schaffer*, 628 N.W.2d at 23.

Consequently, under the facts of this case, we find no support for the district court's grant of Mary Ann's application for an appellate bond under sections 572.15 or 572.32, or *Schaffer*.

***B. Supersedeas Bond.***

A supersedeas bond is defined as “[a]n *appellant’s* bond to stay execution on a judgment during the pendency of the appeal.” Black’s Law Dictionary 171 (7th ed. 1999) (emphasis added). It “is a method of keeping creditors at bay to maintain the status quo until an appeal is decided.” *Edge v. Harsha*, 334 N.W.2d 741, 742 (Iowa 1983). Iowa Rule of Appellate Procedure 6.7(1) provides for the filing of a supersedeas bond by an appellant in order to “stay proceedings under a judgment” on the condition that the appellant “will satisfy and perform the judgment if affirmed” including “all costs and damages adjudged against appellant on the appeal . . . .” Under the plain language of rule 6.7, a supersedeas bond is to be employed exclusively by an appellant. Rule 6.9 provides that upon affirmance from an appellate court, the case may be remanded “to the district court for the determination of such damages and costs and entry of judgment on the bond.”

“In Iowa an appellee may invoke judicial power to enforce a decree while its correctness is being appealed, unless a supersedeas bond is filed.” *Lutz v. Darbyshire*, 297 N.W.2d 349, 352 (Iowa 1980). It is clear that a supersedeas bond is a method to be used solely at appellant’s discretion. Thus, it is improper for an appellee to apply to the court to require an appellant to obtain a supersedeas bond, and it is improper for the court to require an appellant to obtain such a bond. The appellee’s remedy is to simply execute upon the

judgment. If an appellant wishes to stave off execution of the judgment, the appellant may obtain and file a supersedeas bond.

Iowa Rule of Appellate Procedure 6.8 limits the district court to a review of a clerk's actions.<sup>4</sup> Here, there had been no action on the part of the clerk. The previous bond had been disbursed pursuant to court order. No bond was on file with the clerk at the time the appellant's application was filed. There was no action for the court to review.

At Mary Ann's request the judgment was satisfied with the bond proceeds. Thereafter, she had no judgment upon which to execute. When appellants filed their notice of appeal, there was no judgment for them to stave off. There was nothing to stay. Issuance of a supersedeas bond was therefore moot and inapplicable. In any event, had there been a judgment pending against appellants, it would be their decision, not Mary Ann's, to seek the protection of a bond. Accordingly, we find no support for the district court's grant of Mary Ann's application for bond on appeal under Iowa Rules of Appellate Procedure 6.7 and 6.9.

***C. Iowa Code Chapter 625A.***

Iowa Code chapter 625A is entitled "Appellate Court Procedure." Section 625A.12 provides that "[t]he appellant may be required to give security for costs under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior court may be." Under this section in the Code, the code editor refers one to "Cost bond, chapter 621." Section 621.1, "bond for costs,"

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<sup>4</sup> Rule 6.8 provides, in part: "If any party to an appeal is aggrieved by the clerk's approval of, or refusal to approve, a supersedeas bond tendered by appellant, the party may apply to the district court . . . to review the clerk's action."

sets forth the requirements for obtaining security for costs in the district court. Under section 621.1, a “defendant at anytime before answering, may file a motion to require plaintiff to file a bond for costs if the plaintiff” or a party bringing the action “is a nonresident of Iowa or a private or foreign corporation.” Barry A. Lindahl, 12 Iowa Practice *Civil & Appellate Procedure* § 40.18, at 426 (2008). “The defendant must make and file an affidavit stating that the defendant has a good defense in whole or in part to the claim made.” *Id.* Upon such filing, the nonresident plaintiff or party, “must file in the clerk’s office a bond with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may legally be adjudged against plaintiff.” Iowa Code § 621.1.<sup>5</sup> Thus, applying section 621.1 to section 625A.12, an appellant may be required to give security for costs if the appellant is a nonresident of the state and the appellee files an affidavit stating that the appellee has a good defense in whole or in part to the claim made.

Here, appellants were residents of Iowa, so section 625A.12 has no application to this case. Additionally, Mary Ann did not file an affidavit in support of her application. Without the requisite circumstances and showing, we find no support for the district court’s grant of Mary Ann’s application for bond on appeal bond under section 625A.12.<sup>6</sup>

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<sup>5</sup> Section 621.6 provides that a motion for additional security may be filed.

<sup>6</sup> Additionally, we question whether the district court had the authority to require a bond for costs on appeal under section 625A.12. Chapter 625A is entitled “Appellate Court Procedure,” necessarily implying its provisions are limited to actions by and before the appellate courts. Section 625A.12 makes no provision for district court action. Although district courts regularly determine the amount of the appellate attorney fees to award, see *Lehigh Clay Prods, Ltd. v. Iowa Dep’t of Transp.*, 545 N.W.2d 526, 528 n.2 (Iowa 1996), it is the appellate courts that determine whether appellate attorney fees should be awarded. See *Fed. Land Bank of Omaha v. Woods*, 480 N.W.2d 61, 70 (Iowa 1992).

**IV. Conclusion.**

Because we find the district court's grant of Mary Ann's application for bond on appeal to secure her appellate attorney fees was not supported by Iowa Code sections 572.15, 572.32, 625A.12 and Iowa Rules of Appellate Procedure 6.7 and 6.9, or *Schaffer*, we conclude the court improperly applied the law in granting Mary Ann's application and thus acted illegally. We therefore sustain the writ of certiorari.<sup>7</sup>

**WRIT SUSTAINED.**

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<sup>7</sup> Because our determination of this issue is dispositive, we need not and do not address the appellant's additional claim.