Supreme Court of Texas

No. 24-0293

In re Greystar Development & Construction, L.P.; Gabriella Tower, LLC; and Greystar Development & Construction, L.P.—Gabriella Tower Contractor Series,

Relators

On Petition for Writ of Mandamus

Statement of JUSTICE HAWKINS, in which Justice Young and Justice Sullivan join, respecting the denial of the motion for rehearing.

From the outset of this dispute, both sides have presented powerful arguments on the proper reading of Chapter 52—so mutually compelling that they fractured our Court by the narrowest possible margin. Now seeking rehearing, Relators argue that the statute, as the Court has interpreted it, creates inefficiency and deadweight loss. Large supersedeas bonds make appeals much more expensive: fees, premiums, interest payments, and the like all drive up the cost of litigation. And in the event the defendant winds up securing reversal, the costs associated with those bonds are forever lost. Even when a trial court issues a plainly unlawful judgment, the defendant may incur millions of dollars in bond-related outlays simply to forestall execution on that judgment over the course of a multi-year appeal. That pressure in turn distorts the settlement dynamic and leads to the resolution of cases not on their merits, but on economic pressure.

It does not have to be this way. The Legislature, of course, is always free to revisit any statute, and this case illustrates why the statute at issue here may warrant legislative attention. The divided opinions reflect that the text generates no clear or easy answer. The Court has done its best with what we have, but better still would be statutory clarity that embraced the Court's reading, or the dissent's, or something altogether different. Nothing precludes the Legislature from making any adjustments, large or small, to how judgments are superseded.

But there is another angle as well. This Court has a duty to administer the judicial branch effectively. Whether supersedeas is capped at $25 million per judgment, or $25 million per judgment debtor, or something else entirely, courts confront an important question in finalizing judgments at the end of the process: Who bears the risk?

In my view, our adversarial system would be better served under the cost-shifting approach of our federal counterparts. It works like this. When a plaintiff wins a final judgment, the defendant holds the power to appeal, and to supersede the judgment with a bond. The prevailing plaintiff, in turn, holds the power to demand as large a supersedeas bond as the law permits—but the costs of that bond are taxable against the losing side following the resolution of the appellate process. *See* FED. R. APP. P. 39(a), (f)(3); *City of San Antonio v. Hotels.com, L.P.*, 593 U.S. 330, 335-36, 342 (2021).

That landscape emanates from Federal Rule of Appellate Procedure 39(a), which shifts appellate costs to the losing side, consistent with the "venerable presumption that prevailing parties are entitled to costs." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013). As the U.S. Supreme Court confirmed a few years ago, the rule reaches the costs of supersedeas bonds. *See Hotels.com*, 593 U.S. at 335-36, 342. In *Hotels.com*, some $2.3 million in costs were taxed against the losing side—and "[t]he lion's share of these costs were supersedeas bond premiums." *Id.* at 330, 335. The U.S. Supreme Court blessed this approach, and noted one salutary consequence of its application: "the underlying supersedeas bonds will often [be] negotiated by the parties." *Id.* at 342. In the federal system, both sides can protect themselves, and both have an incentive to strike a sensible balance.

Consider how that practice would operate here. The plaintiffs won a judgment of $360 million in compensatory damages against three defendants. As interpreted by the Court in this case, the statute allows them to demand each judgment debtor post $25 million—so, $75 million across three debtors—to supersede the judgment. Under the federal system, the plaintiffs would face a strategic choice. They *could* demand the defendants post the full $75 million—but in doing so, they would accept the risk of paying those supersedeas costs in the event of appellate reversal. If the judgment is reversed in whole, the plaintiffs would have to reimburse the defendants for millions in supersedeas-bond premiums. If the judgment is substantially reduced but not reversed, the plaintiffs still would be on the hook for a proportional share of the bond costs. *See id.* at 337 ("[A] court of appeals may apportion costs in accordance with the parties' relative success, so that if, for example, the appellant wins what is essentially a 75% victory, the appellant can be awarded 75% of its costs.").

Texas Rule of Appellate Procedure 43.4 already provides for taxing appellate costs against the losing party:

> The court of appeals' judgment should award to the prevailing party costs incurred by that party related to the appeal, including filing fees in the court of appeals and costs for preparation of the record. The court of appeals may tax costs otherwise as required by law or for good cause.

But our courts have traditionally treated "costs" as those imposed by the courts themselves—for example, "fees of the clerk and service fees due the county," "fees of the court reporter," and the like. *See* TEX. CIV. PRAC. & REM. CODE § 31.007(b)(1), (2). As we explained some eight decades ago, "the taxing of costs . . . is but the ministerial act of the clerk." *Reaugh v. McCollum Expl. Co.*, 167 S.W.2d 727, 728 (Tex. 1943). Intermediate courts have since held that Rule 43.4's use of "costs" refers to "those items in the clerk's bill of costs." *County of El Paso v. Dorado*, 180 S.W.3d 854, 873 (Tex. App.—El Paso 2005, pet. denied). Accordingly, they have rejected efforts to tax the sorts of costs typically imposed by third parties, including, for example, "the costs to videotape a deposition or obtain a copy of a deposition transcript." *Gumpert v. ABF Freight Sys., Inc.*, 312 S.W.3d 237, 242 (Tex. App.—Dallas 2010, no pet.).

From the perspective of sound judicial administration—that is, making the system work better—there is much to commend the federal approach. Most importantly, it better aligns incentives by forcing each side to put skin in the game. Plaintiff-creditors are free to demand maximal bonds, but they carry a strong incentive not to do so when their prospects on appeal are dim. Relators' concern about the costs of appealing unlawful "nuclear verdicts" should be at least partially addressed by that principle. Defendant-debtors, meanwhile, are free to appeal and supersede the judgment, but they are disincentivized from burdening our courts with weak appeals where they will have to pay not only the judgment but the costs to supersede it. And both sides are better positioned to negotiate a fair settlement grounded in the merits without financial pressure points playing a coercive role.

We could perhaps achieve that result by revisiting our precedents and asking afresh what Rule 43.4 really means by "costs." But just as it would be better for statutes to spell out with clarity whatever policy choices the Legislature chooses to enact, so too should the Court speak with clarity in our procedural rules. It would be easy enough to declare in the Texas Rules of Appellate Procedure that when the Legislature has provided a mechanism to supersede a judgment's enforcement through a bond—as it has done in Chapter 52—the costs associated with that bond are taxable. I hope the Court considers this matter in the proper course.

Kyle D. Hawkins
Justice

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