

FILED
IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

2022 MAY 27 AM 11:37

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

COURT OF COMMON PLEAS Case No.: 17CV193761
TOM ORLANDO

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

**MOTION TO ENTER JUDGMENT
AGAINST SURETY ZURICH AMERICAN INSURANCE COMPANY**

“An appeal was filed without a stay, and the plaintiff then got the money.”

Wiest v. Wiegele, 170 Ohio App.3d 700, 868 N.E.2d 1040, 2006-Ohio-5348 (1st Dist.)
Judge Painter—summarizing the simple rule and simple consequences at issue here

“[T]he integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment.”

Davis v. Immediate Medical Services, Inc., 80 Ohio St.3d 10, 684 N.E.2d 292, 1997-Ohio-363

“We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution.”

Gibson Bros., Inc. v. Oberlin College,
9th Dist. Lorain Nos. 19CA011563, 20CA001632, 2022-Ohio-1079

Plaintiffs Gibson Bros., Inc. and Lorna J. Gibson, as the executor and representative of the Estate of David R. Gibson and the Estate of Allyn W. Gibson (collectively “the Gibsons”) respectfully request that this Honorable Court enter judgment against the surety Zurich American Insurance Company, Bond No. 9280167 in the amount of \$36,127,181.25 plus \$4,331.19 per diem from the date of filing. A chart calculating the judgment per diem is attached for the Court’s convenience as **Exhibit 1**. There is no valid stay of execution of judgment remaining, and the Gibsons are entitled to judgment in accordance with the mandate from the Ninth District Court of

Appeals.

PRELIMINARY STATEMENT

Nearly three years ago, a jury of Lorain County citizens took an oath, served through a nearly six-week trial, carefully deliberated, and found Oberlin College and its Dean of Students liable for their ruinous accusations and intentional conduct aimed at the Gibsons. Much has happened since, including the tragic deaths of David and Allyn Gibson—neither of whom lived to see justice done for their family and its business. The bakery continues to labor under the effects of the stigma created by Defendants, but without the relief awarded by the jury.

It is now time to honor the jury's verdict. It is time to execute on the judgment awarded by them, entered by this Court, and affirmed by a unanimous panel of the Ninth District Court of Appeals.

The stay of execution entered by this Court only had the power to stay its own judgment. If Defendants wanted to stay execution of the mandate of the Ninth District Court of Appeals, they were required to seek that stay in the Ohio Supreme Court. They did not. Plaintiffs are entitled to judgment on the surety bond as provided by R.C. 2505.20.

RELEVANT PROCEDURAL HISTORY

On June 7, 2019 and June 13, 2019 the jury reached separate verdicts in the compensatory and punitive damage phases of the trial. On June 27, 2019, this Court entered judgment in favor of David Gibson for \$14 million, in favor of Allyn Gibson for \$6.5 million, and in favor of Gibson Bros. for \$4,549,000.00. On July 17, 2019, the Court awarded the Gibsons an additional \$6,565,531.79 in attorney fees and litigation expenses.

Defendants appealed this decision to the Ninth District Court of Appeals. This Court stayed execution on its judgment, conditioned on Defendants posting an adequate bond. On March 31,

2022, the Ninth District unanimously affirmed this Court's decision. That same day, the mandate of the Ninth District "to carry this judgment into execution" was filed with this Court:

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

The Ninth District's mandate directs this Court to carry its judgment into execution, and Defendants have failed to take the required action that would prevent this.

Despite the new mandate, Defendants did not ask the Ninth District to stay execution of its mandate, nor did they seek a preliminary stay with the Ohio Supreme Court. Defendants filed their Notice of Appeal and Memorandum in Support of Jurisdiction in the Ohio Supreme Court on May 13, 2022. Again, Defendants failed to file a motion to stay execution with the Ohio Supreme Court. Because of this failure, there is no effective stay in this case, and the Gibsons are entitled to immediately execute on the judgment, including execution on the bond.

As was their approach with the Ninth District, Defendants twist the entire tenure of this case to entice the Ohio Supreme Court into accepting jurisdiction on false pretenses. Despite this Court's meticulous rulings separating statements of the Defendants from the statements made by student protestors and parsing statements of fact from statements of opinion, Defendants persist in alleging that this Court's decision is one that will "suppress free speech on college campuses."¹ Although Defendants attempt to rationalize their appeal by erecting a "False Flag" of student' free speech, no students testified at trial, no students were deposed, no students submitted any affidavits at any point in the three-year litigation, and no student testimony was proffered into evidence.

¹ Memorandum in Support of Jurisdiction of Appellants Oberlin College and Dr. Meredith Raimondo, p.1, attached hereto as Exhibit 1.

Ignoring these facts, Defendants intentionally falsely declare in one of their headings that this case was a lawsuit that led “to an over \$30 million judgment against a college for the opinions its students expressed,²” an insulting characterization to anyone with real knowledge of the trial court proceedings and the jury’s verdict. In addition to their hyperbolic creation of a false crisis, Defendants litter their brief with citations to inflammatory non-evidence that was never part of the trial, nor was even proffered.

And on the facts at hand, immediate execution on the judgment honors both of the conflicting goals of the appellant and appellee concerning the appeal bond: the Defendants, the losing parties, did receive appellate review and unanimous affirmance of the jury verdict and therefore are assured of the accuracy, credibility and legitimacy of the jury verdict, and the Gibsons, the prevailing parties, although having to wait nearly three years, are assured by the bond that the entire judgement plus interest will now be paid.

In their pre-occupation with ignoring the trial court record and weaving a false tale of constitutional tragedy to this State’s highest court, Defendants skipped a critical step—they failed to secure an additional stay that would prevent execution of the Ninth District Court of Appeal’s mandate. This Court’s prior stay is ineffective once the superior court issued its mandate. Between March 31, 2022, and May 13, 2022, Defendants could have obtained an additional stay, but did not, and therefore the Gibsons are free to execute on the surety bond.

ANALYSIS

I. The Plain Language of R.C. 2505.20 Unequivocally Provides that the Gibsons are Entitled to Execute on the Bond

The Gibsons are entitled to immediately execute their judgment on the surety bond filed with this Court. On March 31, 2022, the Ninth District Court of Appeals unanimously affirmed

² *Id.* at p.8.

this Court’s judgment. R.C. 2505.20 provides the remedy in this instance, which includes execution on the bond:

Upon the affirmance of a final order, judgment, or decree by an appellate court, a judgment or order may be entered against the sureties on any supersedeas bond involved when the mandate of affirmance from the appellate court is filed in the trial court * * *.

R.C. 2505.20. The Ninth District Court of Appeals affirmed this Court’s final order and judgment on March 31, 2021. The mandate of affirmance was filed in the trial court on March 31, 2021. The Court may now enter judgment against Zurich American Insurance Company on the supersedeas bond—Bond No. 9280167—which was in place when the Ninth District affirmed this Court’s judgment. No further action is required, and the plain language of R.C. 2505.20 compels this result. **Further, as reviewed in detail in Section III below, the Ohio Supreme Court has clarified multiple times that “A trial court may not vary the mandate of an appellate court, but is bound by that mandate.”** *Transamerica Ins. Co. v. Nolan*, 72 Ohio St. 3d 320, 323, 649 N.E.2d 1229 (1995) [emphasis added]; *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 266-267, 853 N.E.2d 275, 276-77 (2006) (same, quoting *Transamerica*).

II. This Case is Indistinguishable from *Northern Ohio Sewer Contractors, Inc. v. Bradley Development Co., Inc.*, Where Judgment was Entered Against the Surety When the Defendant Failed to Obtain a Further Stay in the Ohio Supreme Court

The Eighth District case of *Northern Ohio Sewer Contractors, Inc. v. Bradley Development Co., Inc.*, 8th Dist. Cuyahoga No. 87053, 2006-Ohio-1741 illustrates the recourse for Defendants’ failure to obtain further stay. In that case, the plaintiff received judgment from the trial court on April 20, 2004. *Id.* at ¶2. Defendant appealed, posted a supersedeas bond, and execution of the judgment was stayed. *Id.* On March 21, 2005, the appellate court affirmed the trial court’s judgment. *Id.* Defendant appealed to the Supreme Court. *Id.* at ¶3. In the interim, the plaintiff moved to enter judgment against the surety, which the trial court eventually granted. *Id.* at ¶3-4.

The appellate court agreed that the surety was required to pay on the bond, even though the case was pending in the Supreme Court of Ohio. *Id.* at ¶8. The court concluded that the original trial court stay was no longer in effect after the appellate court affirmed the trial court’s judgment: “R.C. 2505.20 and App.R. 7(B) direct that the stay of execution ends when a final order, judgment or decree has been affirmed by the intermediate appellate court, not the Supreme Court.” *Id.* at ¶13. The execution was proper because the defendant failed to obtain a second stay:

Thus, after this court affirmed the trial court's judgment, appellees *would have needed to request, and been granted, another stay and post the proper supersedeas bond in order for execution of the judgment of this court to be stayed.* As appellees failed to obtain another stay and post another proper supersedeas bond pending the appeal to the Supreme Court, the action was not stayed at the time of the trial court's order and the judgment directing Park View Federal Savings Bank to render payment to appellant was, and is, valid.

Id. at ¶16 (internal citations omitted, emphasis added). Just as in *Northern Ohio Sewer Contractors*, once the appellate court affirmed this Court’s judgment, Defendants would have needed to request—and obtain—an additional stay in order to stay execution of the Ninth District’s mandate. Defendants failed to obtain another stay pending appeal to the Supreme Court. As such, this execution is not stayed, and the Court should order judgment directing Zurich American Insurance Company to render payment to the Gibsons.

III. This Court’s Stay of November 19, 2019 Cannot Operate to Stay the Court of Appeal’s Mandate, and Defendants Failed to Timely Seek a Stay from the Supreme Court as Required

It is anticipated that Defendants will attempt to argue that this matter is still stayed under this Court’s November 19, 2019 order. At Defendants’ request, that order provided that “the Court’s previous stay of execution of the judgment shall continue until the exhaustion of all of the Defendant’s appeals.” However, this Court’s order could only stay its own judgment—it cannot operate to stay the mandate of the Ninth District—which was ordered two years and four months

after this Court's order.

Ohio Rule of Appellate Procedure 7 governs stays on appeal from the trial court's judgment through the date of the appellate decision. Following the court of appeal's decision, Ohio Rule of Appellate Procedure 27 governs such stays. It provides:

A court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on appeal, to the court or agency below for specific or general execution thereof, or to the court below for further proceedings therein.

A certified copy of the judgment shall constitute the mandate. *A stay of execution of the judgment mandate pending appeal may be granted upon motion, and a bond or other security may be required as a condition to the grant or continuance of the stay.*

App.R. 27. Defendants have not obtained a stay of execution of “the judgment mandate” as required by App.R. 27.

Defendants are not the first litigants to ignore this requirement. In *DeLost v. Ohio Edison Co.* 7th Dist. Mahoning No. 10 MA 162, 2012-Ohio-4561, the Court considered a case in which the Seventh District Court of Appeals held that Ohio Edison had the right to cut down certain trees in its utility easement. *Id.* at ¶1 and 5. The appellees did not immediately move to stay the judgment. *Id.* at ¶5. The appellees later appealed to the Ohio Supreme Court, and sought a stay—but in the meantime, Ohio Edison chopped down the trees. *Id.* at ¶5-6. The appellees then filed a new action, alleging that it was improper to cut down the trees after the court of appeals' decision and while the case was on appeal to the Ohio Supreme Court. *Id.* at ¶7. The Seventh District explained that there was nothing improper about carrying the judgment into effect, because appellees failed to timely seek a further stay:

Once a court of appeals issues a ruling, the parties *may act on it immediately*. Even the filing of a notice of appeal to the Ohio Supreme Court does not generally give rise to any type of automatic stay of a judgment from a court of appeals. The non-prevailing party in an appeal *must either file a motion for stay in the court of appeals* under App.R. 27, *or seek a stay in Ohio Supreme Court* pursuant to

S.Ct.Prac.R. 2.2(A)(3)(a), after filing a further appeal to that Court.

Id. at ¶28 (emphasis added). Under the reasoning of *DeLost*, after the Ninth District issued its mandate, the Gibsons were permitted to act on the judgment immediately. There is no automatic stay. Oberlin and its Dean were required to file a motion to stay in either the Ninth District or the Ohio Supreme Court, but did neither. As *DeLost* explained, there is no such thing as a “continuing stay.” *Id.* at ¶26. Once the appellate opinion was released, “they could have attempted to obtain a stay of execution from the Ohio Supreme Court. They did not do this. They could have also attempted to obtain an immediate stay from this Court under App .R. 27, but this was not done.” *Id.* Defendants have failed to take the appropriate steps to prevent execution of the judgment.

While only a few courts have had occasion to consider an appellant’s failure to seek a stay between the appellate court and the Ohio Supreme Court, they do routinely consider circumstances where the appellant fails to seek a stay of the trial court’s judgment. When the parties execute on a judgment during the pendency of an appeal because of the failure to seek a stay, appellate courts do not interfere with the execution, but rather routinely declare the appeal moot. *See MHN Sub I, L.L.C. v. Donnelly*, 11th Dist. Lake No. 2014-L-031, 2014-Ohio-2148 (Finding appeal moot where judgment was satisfied by foreclosure sale during appeal due to appellant’s failure to obtain stay); *Kogler v. Daniels Bros. Fuel Co.*, 11th Dist. Lake No. 2002-L-122, 2003-Ohio-6774 (Appeal mooted when appellant failed to obtain a stay and there was a subsequent satisfaction of judgment); *Marotta Bldg. Co. v. Lesinski*, 11th Dist. Geauga No. 2004-G-2562, 2005-Ohio-558 (same); *Spencer v. Kiowa Developing Co.*, 9th Dist. Summit No. 19524, 2001 WL 15079 (“In the instant case, satisfaction of the judgment occurred prior to defendant's request for a stay of execution. Consequently, the trial court's issue of the stay of execution was not valid.”).

Because Defendants have not obtained a valid stay further preventing action, this Court has

no choice but to carry out the Ninth District's mandate: "A trial court may not vary the mandate of an appellate court, but is bound by that mandate." *Transamerica Ins. Co. v. Nolan*, 72 Ohio St. 3d 320, 323, 649 N.E.2d 1229 (1995). *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 266-267, 853 N.E.2d 275, 276-77 (same, quoting *Transamerica*). In *Transamerica*, the Ohio Supreme Court did not mince words about this directive: "the court of appeals issued a mandate to the trial court to enter judgment for the insurers on the issue of underinsured motorist coverage. The trial court was *obligated to comply with that mandate and enter judgment accordingly.*" *Id.* at 1232 (emphasis added). "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan v. Nolan*, 11 Ohio St. 3d 1, 1, 462 N.E.2d 410 (1984).

CONCLUSION

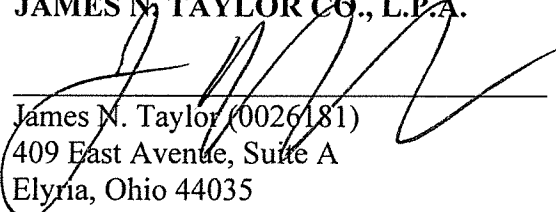
As Judge Painter succinctly stated in a case where the defendant failed to secure the proper bond pending appeal: "An appeal was filed without a stay, and the plaintiff then got the money." *Wiest v. Wiegele*, 170 Ohio App.3d 700, 868 N.E.2d 1040, 2006-Ohio-5348 (1st Dist.). Under Ohio law, this case also concludes just as simply.

The Ninth District Court of Appeals issued a mandate affirming this Court's judgment. The Ninth District ordered this Court "to carry this judgment into execution." Defendants failed to seek a stay of that mandate. The Gibsons respectfully request that this Honorable Court enter judgment against the surety Zurich American Insurance Company, Bond No. 9280167 in the amount of \$36,127,181.25 plus \$4331.19 per diem. A chart calculating the judgment per diem is attached for the Court's convenience. Then this Court can also declare, as Judge Painter did, "[w]ith our decision today, this case is finally over." *Id.* at ¶2.

DATED: May 27, 2022

Respectfully submitted,

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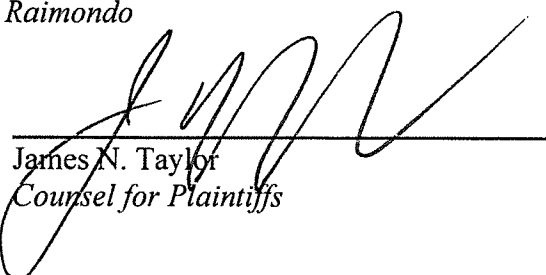
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Date	Interest Rate	Interest	Total Owed
July 17, 2019			\$31,614,531.00
December 31, 2019	5% (167 days)	\$723,236.14	\$32,337,767.14
December 31, 2020	5% (one year)	\$1,580,726.55	\$33,918,493.69
December 31, 2021	5% (one year)	\$1,580,726.55	\$35,499,220.24
May 25, 2022	5% (143 days)	\$619,298.63	\$36,118,518.87
May 26, 2022	5% (per diem)	\$4,331.19	\$36,122,850.06
May 27, 2022	5% (per diem)	\$4,331.19	\$36,127,181.25
May 28, 2022	5% (per diem)	\$4,331.19	\$36,131,512.11
May 29, 2022	5% (per diem)	\$4,331.19	\$36,135,843.63
May 30, 2022	5% (per diem)	\$4,331.19	\$36,140,174.82
May 31, 2022	5% (per diem)	\$4,331.19	\$36,144,506.01
June 1, 2022	5% (per diem)	\$4,331.19	\$36,148,837.20
June 2, 2022	5% (per diem)	\$4,331.19	\$36,153,168.39
June 3, 2022	5% (per diem)	\$4,331.19	\$36,157,499.58
June 4, 2022	5% (per diem)	\$4,331.19	\$36,161,830.77
June 5, 2022	5% (per diem)	\$4,331.19	\$36,166,161.96
June 6, 2022	5% (per diem)	\$4,331.19	\$36,170,493.15
June 7, 2022	5% (per diem)	\$4,331.19	\$36,174,824.34
June 8, 2022	5% (per diem)	\$4,331.19	\$36,179,155.53
June 9, 2022	5% (per diem)	\$4,331.19	\$36,183,486.72
June 10, 2022	5% (per diem)	\$4,331.19	\$36,187,817.91
June 11, 2022	5% (per diem)	\$4,331.19	\$36,192,149.10
June 12, 2022	5% (per diem)	\$4,331.19	\$36,196,480.29
June 13, 2022	5% (per diem)	\$4,331.19	\$36,200,811.48
June 14, 2022	5% (per diem)	\$4,331.19	\$36,205,142.67
June 15, 2022	5% (per diem)	\$4,331.19	\$36,209,473.86
June 16, 2022	5% (per diem)	\$4,331.19	\$36,213,805.05
June 17, 2022	5% (per diem)	\$4,331.19	\$36,218,136.24
June 18, 2022	5% (per diem)	\$4,331.19	\$36,222,467.43
June 19, 2022	5% (per diem)	\$4,331.19	\$36,226,798.62
June 20, 2022	5% (per diem)	\$4,331.19	\$36,311,129.81
June 21, 2022	5% (per diem)	\$4,331.19	\$36,235,461.00
June 22, 2022	5% (per diem)	\$4,331.19	\$36,239,792.19
June 23, 2022	5% (per diem)	\$4,331.19	\$36,244,123.38
June 24, 2022	5% (per diem)	\$4,331.19	\$36,248,454.57
June 25, 2022	5% (per diem)	\$4,331.19	\$36,252,785.76
June 26, 2022	5% (per diem)	\$4,331.19	\$36,257,116.95
June 27, 2022	5% (per diem)	\$4,331.19	\$36,261,448.14
June 28, 2022	5% (per diem)	\$4,331.19	\$36,265,779.33
June 29, 2022	5% (per diem)	\$4,331.19	\$36,270,110.52
June 30, 2022	5% (per diem)	\$4,331.19	\$36,274,441.71

EXHIBIT

1