DA 21-0603

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 62

NORVAL ELECTRIC COOPERATIVE, INC.,

Petitioner, Appellant,
and Cross-Appellee,

v.

SHALAINE LAWSON,

Respondent, Appellee,
and Cross-Appellant.

APPEAL FROM: District Court of the Seventeenth Judicial District,
In and For the County of Valley, Cause Nos. DV-2020-11 and DV-2020-15
Honorable Yvonne Laird, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Maxon R. Davis, Davis, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana

For Appellee:

Thomas ("Todd") D. Shea, Jr., Shea Law Office, Bozeman, Montana

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Decided: March 29, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion and Order of the Court.

¶1 Petitioner, Appellant, and Cross-Appellee NorVal Electric Cooperative, Inc. (NorVal), has moved for relief from the January 19, 2022 Order on Motion to Stay Proceedings to Enforce Judgment in the Seventeenth Judicial District Court, Valley County, Cause Nos. DV-2020-11 and DV-2020-15. In that Order, the District Court denied NorVal's motion to stay the proceedings to enforce the judgment against it after the court concluded that the supersedeas bond NorVal offered was inadequate. Respondent, Appellee, and Cross-Appellant Shalaine Lawson (Lawson) has responded in opposition to NorVal's motion for relief.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In November 2017, Lawson filed a complaint against NorVal with the Montana Department of Labor & Industry, Human Rights Bureau Equal Employment Opportunity Commission, alleging employment discrimination based on sexual harassment and retaliation. After a contested case hearing, a Hearing Officer sustained Lawson's complaint and awarded her damages including backpay, front pay, interest on lost wages, and damages for emotional distress, as well as affirmative relief.

¶3 NorVal and Lawson each appealed the Hearing Officer's determinations to the Human Rights Commission (HRC). The HRC affirmed the Hearing Officer's determinations but modified the amount of the award for backpay, front pay, and interest on lost wages to correct mathematical errors.

¶4 NorVal and Lawson each petitioned the District Court for judicial review of various aspects of the HRC's Final Agency Decision. The court consolidated the matters and

issued its Order Regarding the Parties' Petitions for Judicial Review on February 26, 2021. The court upheld the administrative determinations that NorVal had subjected Lawson to employment discrimination based on sexual harassment and retaliation and that Lawson was entitled to damages. The court further concluded that the administrative determinations had incorrectly limited Lawson's requested front pay damages and it modified the amount of that award accordingly.

¶5 On November 16, 2021, the District Court issued its Consolidated Final Judgment, which entered judgment in favor of Lawson in the amount of $1,631,834.60, with interest to accrue at the rate of 6.25% per annum, and with NorVal to pay prejudgment interest at the rate of 8% per annum. The court further awarded Lawson her attorney fees and costs, with interest to accrue at the rate of 6.25% per annum.

¶6 On November 30, 2021, NorVal filed its Notice of Appeal in this Court. On December 3, 2021, Lawson filed a Notice of Entry of Final Judgment in the District Court, asserting that entry was warranted because the parties had reached agreement regarding the calculation of prejudgment interest and had resolved a dispute over the amount of fees and costs NorVal would pay Lawson to comply with a sanction order the court had entered. Lawson asserted that as of December 3, 2021, the value of the Consolidated Final Judgment totaled $2,477,513.80.

¶7 Counsel for NorVal and Lawson engaged in negotiations in an attempt to reach an agreement in which NorVal would obtain a supersedeas bond satisfactory to Lawson and in exchange Lawson would agree not to oppose a stay of enforcement of the judgment until this matter was resolved on appeal. NorVal initially proposed a bond with Federated Rural

Electric Insurance Exchange (FREIE) designated as surety. Lawson's counsel advised that this would not satisfy Lawson as it was unclear whether FREIE was "qualified to serve as one of the 2 required sureties[.]"

¶8 On December 9, 2021, NorVal filed a Motion to Stay Proceedings to Enforce Judgment in the District Court pursuant to M. R. Civ. P. 62(d). NorVal asserted that it had provided Lawson with a supersedeas bond in the amount of $2,698,743.06, but Lawson had advised NorVal that she opposed staying the judgment. NorVal further provided to the court a Supersedeas Bond signed by NorVal's President as Principal, and as Surety the Vice-President of Claims for FREIE and the Vice-President, General Counsel, and Assistant Secretary for Federated Rural Electric Management Corporation (FREMC). FREIE describes itself as a reciprocal insurance company that issues policies by and through FREMC as its attorney-in-fact. FREMC is registered as a not-for-profit corporation in the State of Kansas.

¶9 In response to NorVal's Motion to Stay Proceedings to Enforce Judgment, Lawson asserted that NorVal's proposed bond did not comport with Montana law and she thus found it unacceptable as the basis to stay enforcement of judgment. Lawson argued that neither FREIE nor FREMC qualify as sureties under Montana law because they are not incorporated under Montana law: FREIE's office is located in Kansas and Lawson had been unable to determine if it is incorporated, and FREMC is incorporated in Kansas. Lawson further asserted that NorVal had not provided proof that it had purchased a supersedeas bond; rather NorVal had apparently asked its liability insurer FREIE to serve as surety for the proposed bond. Lawson argued that if she prevailed on appeal, FREIE

would be the party liable for all or part of her damages and it could not act as its own surety. Next, Lawson asserted that NorVal is also an owner and member of FREIE and as such FREIE would not be considered a separate entity answering for the debt of another because of its ownership/membership relationship with NorVal. Finally, Lawson asserted that the amount of the proposed bond was inadequate because it was not sufficient to cover her reasonable attorney fees and costs on appeal if she prevails.

¶10 In reply, NorVal argued that Lawson was incorrect in asserting that only insurers organized under Montana law could act as sureties for a supersedeas bond and that the Montana State Auditor had authorized FREIE to provide sureties in Montana since 1973. NorVal further asserted that it was a separate entity from FREIE, FREIE was not named as a defendant in Lawson's lawsuit, and FREIE was therefore not acting as surety for its own obligation. Although NorVal did not deny that FREIE might have to indemnify it for "some portion" of Lawson's judgment, it argued that FREIE's obligation to act as surety pursuant to the supersedeas bond is wholly unrelated to any liability coverage FREIE provides to NorVal. NorVal further asserted that Lawson had failed to explain the legal significance of any pre-existing business relationship between NorVal and FREIE that could preclude FREIE from serving as surety for NorVal.

¶11 NorVal also objected to Lawson's assertion that it had any obligation to "purchase" a bond or prove that it had done so, contending that the applicable procedural rules only require that a bond be executed by "an insurer in the surety business in Montana" with sufficient assets. NorVal asserted that no legal authority required it to "purchase" a bond: "If there were an obligation to purchase a supersedeas bond, Lawson is in effect

asking the district court to open a Pandora's box to determine if the purchase price was sufficient. There is no authority requiring such an inquiry." Finally, NorVal asserted that the supersedeas bond it obtained was sufficient to cover its obligations to Lawson in the event she prevailed on appeal.

¶12 In its ruling, the District Court only addressed Lawson's first argument, regarding the ability of FREIE and FREMC to act as surety since neither is incorporated under Montana law, because the court found that issue dispositive. The court relied on § 33-26-101(1), MCA, which provides:

> In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any law of this state, any corporation with a paid-up capital of not less than $100,000, incorporated under the laws of this state for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertaking required or authorized by law, may become and must be accepted as security or as a sole and sufficient security upon the undertaking or bond, and the corporate surety must be subject to all liabilities and entitled to all the rights of natural persons as sureties.

Applying this statute to FREIE and FREMC, the court concluded that neither entity qualified as a surety because they were both incorporated in Kansas.[1] The court further determined that neither qualified as a non-corporate surety under § 33-26-102, MCA, because that statute requires non-corporate sureties to be "residents and householders or freeholders" within Montana. Thus the court concluded that NorVal had failed to comply with the surety requirements and it denied NorVal's motion.

[1] FREMC is incorporated in Kansas, but FREIE is not a corporation. However, the District Court's apparently incorrect finding that FREIE is incorporated in Kansas is immaterial to the outcome of the present dispute.

¶13 Pursuant to M. R. App. P. 22(2), NorVal then filed the present motion for relief from the District Court's Order in this Court.

DISCUSSION

¶14 Under M. R. App. P. 22(2)(a), in relevant part, a party may move this Court for relief from a district court order that denies a motion to stay a judgment or denies approval of a supersedeas bond. Any such motion must: demonstrate good cause for the relief requested, supported by affidavit; include copies of relevant documents from the record; include a copy of the order from which the movant seeks relief; and not exceed ten pages of text, including the affidavit. M. R. App. P. 22(4) further provides that except in extraordinary circumstances, this Court will summarily deny motions not filed in accordance with Rule 22(2)(a) and motions for relief filed without prior notice to the opposing party.

¶15 Lawson challenges NorVal's motion for relief on the grounds that it fails to comply with Rule 22 in several ways. First, she urges this Court to deny the motion because NorVal failed to comply with Rule 22(4), which requires in part that the movant provide prior notice to the opposing party. Next, she argues that this Court should deny NorVal's motion for relief because Rule 22(2)(a)(iv) limits such motion, including the affidavit, to ten pages of text, and NorVal's motion exceeds this limit. Third, she argues that while Rule 22(2)(a)(i) requires that a motion for relief must demonstrate good cause for the relief requested, as supported by affidavit, the declaration submitted by NorVal does not support the good cause rationale NorVal offers in its motion. Fourth, Lawson maintains that NorVal violated Rule 22(2)(a)(ii), which directs the movant to include copies of all relevant

documents from the record, because NorVal did not include a Declaration that Lawson filed in support of her brief in opposition to NorVal's Motion to Stay Proceedings to Enforce Judgment in the District Court.

¶16 We have considered the procedural arguments Lawson has raised, but do not find these grounds sufficient to deny NorVal's motion without considering the substance of its arguments. Although NorVal should have explicitly provided Lawson with prior notice to comport with Rule 22(4), it is clear from the record that Lawson knew that NorVal intended to challenge the District Court's decision and it is equally clear that Lawson would oppose NorVal's motion for relief.

¶17 Next, although Lawson asserts that NorVal's submission should be rejected because it is overlength, we find it sufficiently in compliance with the ten-page length limit provided in Rule 22(2)(a)(iv). Lawson's third argument—that NorVal's affidavit fails to support its demonstration of good cause—goes more to the persuasiveness of NorVal's argument than to a procedural bar to its motion. Finally, we are unpersuaded by Lawson's assertion that NorVal failed to include copies of all relevant documents from the record because, while we found the declaration of Lawson's counsel helpful in providing us with clarification about the relationship between FREIE and FREMC, it was not indispensable to our resolution of NorVal's motion.

¶18 As to the substance of the pending matter, NorVal argues that the District Court erred in denying NorVal's motion to stay because NorVal maintains that its supersedeas bond is legally sufficient. It asserts that FREIE may provide surety under Montana law because it is a foreign insurer which received authorization to provide surety insurance in

Montana under § 33-2-115, MCA. NorVal contends that the District Court disregarded this authorization and instead misinterpreted and misapplied § 33-26-101(1), MCA. NorVal argues that § 33-26-101(1), MCA, does not prohibit authorized insurers who are not incorporated in Montana from offering surety insurance here, but rather mandates that a surety bond offered from a Montana entity that meets the criteria within the statute must be accepted, even if the capital of the entity appears inadequate to back the undertaking.[2]

¶19 In support of its interpretation of § 33-26-101, MCA, NorVal points to § 33-26-103, MCA, which provides:

> A surety insurer authorized as such under this code shall have the power to become the surety on bonds and undertakings required by law, subject to all the rights and liabilities of private persons. This section shall not be deemed to limit in any way the powers, obligations, and liabilities of such insurers as provided for in other provisions of this code.

¶20 NorVal urged the District Court to interpret § 33-26-103, MCA, to mean that any entity which has been authorized to be a surety insurer under Montana statute may provide a supersedeas bond. The District Court rejected NorVal's interpretation, stating, "The plain language of § 33-26-103, MCA, simply provides that a surety insurer may become a surety on a supersedeas bond if it is so authorized by other provisions in the code such as § 33-26-101 and § 33-26-102, MCA." NorVal also draws our attention to

[2] In its motion for relief, NorVal asserts that § 33-26-101(1), MCA, interpreted correctly, means that "a surety bond from . . . a Montana entity [as described by this statute] *must* be accepted . . . even if [its] paid-up capital . . . is woefully inadequate to back the undertaking." (Emphasis NorVal's.) We note that, except for stylistic changes, the language of this statute, including the $100,000 requirement, is unchanged since its 1893 enactment. 1893 Mont. Laws, An Act Relative to Sureties on Undertakings and Bonds, at 70-71. That historical context further supports NorVal's interpretation of the statute. In her response brief, Lawson does not disagree with NorVal's interpretation, but points out that § 33-26-101(2), MCA, would prevent a corporation from providing surety for an amount greater than its assets.

§ 33-26-105, MCA, which provides, "No foreign or other surety company shall be permitted to furnish the bond for any state, county, or city official, where such company requires in addition to the payment of reasonable premiums any indemnity or other security." NorVal maintains that it would make little sense for this statute to speak of "foreign" surety insurers if such cannot furnish supersedeas bonds in Montana under any circumstances.

¶21 A supersedeas bond is a type of surety insurance, as defined in § 33-1-211(2), MCA. A surety is "one who, at the request of another person and for the purpose of securing to the other person a benefit, becomes responsible for the performance by the other person of some act in favor of a third person or pledges property as security for the performance." Section 28-11-401, MCA. A surety is a class of insurance subject to regulation under the insurance laws of Montana, and an entity who issues surety bonds is "in the business of insurance" in this State. *K-W Indus. v. Nat'l Sur. Corp.*, 231 Mont. 461, 465, 754 P.2d 502, 504 (1988) (citation omitted). An insurer transacting insurance in Montana must have a certificate of authority issued by the Montana Insurance Commissioner. Section 33-2-101(1), MCA. The process for applying for this certificate of authority is governed by § 33-2-115, MCA, which enumerates the documentation that applicants, including foreign insurers, must provide to seek a certificate. In this case it is undisputed that FREIE has a certificate of authority from the Insurance Commissioner.

¶22 NorVal argues that the District Court incorrectly limited the provision of supersedeas bonds to only those entities which satisfy the criteria of § 33-26-101(1), MCA. NorVal argues that neither § 33-26-101 nor § 33-26-102, MCA, can authorize an entity to

provide surety insurance in Montana as authorization to do so comes from the Insurance Commissioner as provided in § 33-2-115, MCA. NorVal relies upon *Wilshire Ins. Co. v. Carrington*, 570 P.2d 301 (Mont. 1977). In that case, Wilshire Insurance Company, a California corporation that the Montana State Commissioner of Insurance had authorized to do business in Montana as a commercial surety, sought a writ of mandamus after a Montana Justice of the Peace refused to accept its bail bonds. *Wilshire*, 570 P.2d at 302. On appeal, this Court held that courts cannot refuse to accept bonds offered by commercial sureties properly authorized to do business in Montana. *Wilshire*, 570 P.2d at 304. NorVal points out that Wilshire, a California corporation, did not meet the requirements of § 33-26-101(1), MCA, and yet this Court ordered that Montana courts accept its bail bonds because it was properly authorized to do business as a commercial surety by the Insurance Commissioner. NorVal argues that the District Court's decision in this case cannot be reconciled with *Wilshire's* holding.

¶23 The District Court, however, relied on *Adams v. Crismore*, 211 Mont. 245, 683 P.2d 497 (1984), which superficially appears to conflict with *Wilshire*. Adams obtained a default judgment against Crismore in Justice Court. *Adams*, 211 Mont. at 246, 683 P.2d at 498. Pursuant to § 25-33-201(1), MCA, an appeal from a justice court "is not effectual for any purpose unless an undertaking[3] is filed, with two or more sureties, in a

[3] We largely consider "undertaking" and "supersedeas bond" synonymous. "An undertaking to secure an appeal to the supreme court is technically a bond within the common-law definition, save that it is not under seal; there is, however, no difference in this state between sealed and unsealed private writings." *King v. Pony Gold Mining Co.*, 24 Mont. 470, 480, 62 P. 783, 787 (1900).

sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money." Crismore then filed a notice of appeal in the District Court, along with an undertaking, but Adams objected, asserting the undertaking was defective. *Adams*, 211 Mont. at 246, 683 P.2d at 498. When Crismore failed to cure the alleged defect, Adams moved to dismiss on the grounds that the District Court's jurisdiction had not been properly invoked because the undertaking was defective. *Adams*, 211 Mont. at 247, 683 P.2d at 498. Initially, the District Court ruled on the appeal without requiring Crismore to cure the defect, but after Adams moved to set aside the ruling under M. R. Civ. P. 60(b), the court granted Adams's motion to dismiss Crismore's appeal for lack of jurisdiction due to Crismore's failure to cure the defect in the undertaking. *Adams*, 211 Mont. at 247-48, 683 P.2d at 498-99.

¶24 Crismore then appealed to this Court, arguing that the District Court erred in concluding it lacked jurisdiction to hear his appeal. *Adams*, 211 Mont. at 248, 683 P.2d at 499. This Court affirmed the District Court, concluding:

> Although the sum of the undertaking was sufficient, the singular signature violates 25-33-201, MCA, which clearly requires two or more sureties. In addition, Empire Construction Company, Inc., which appears on the undertaking, is a foreign corporation, not incorporated under the laws of this State for the purpose of making, guaranteeing or becoming a surety and thus is not a valid corporation surety pursuant to 33-26-101(1), MCA. Moreover, the trial court judge unequivocably [sic] recognized that the appellant's undertaking filed with the notice of appeal failed to comply with statutory criteria.

Adams, 211 Mont. at 248-49, 683 P.2d at 499.

¶25 NorVal asserts that the District Court overlooked the context in which the above language from *Adams* appeared, when it relied on *Adams* to conclude that using a

"foreign corporation, not incorporated under the laws of this State" as a surety is prohibited by § 33-26-101(1), MCA. NorVal points out that the entity which Crismore attempted to use as surety was "Empire Construction Company, Inc.," and although *Adams* does not specify the type of work Empire Construction Company, Inc., performed, it "certainly does not look to have been a 'corporation authorized by the Montana State Commissioner of Insurance to do business in Montana as a commercial surety.'" Thus, since Empire Construction Company, Inc., was not authorized by the Insurance Commissioner as provided in § 33-2-115, MCA, its remaining avenue to provide acceptable surety for Crismore's appeal would have been via § 33-26-101(1), MCA. Since Empire Construction Company, Inc., was also a foreign corporation, it was not "a valid corporation surety pursuant to 33-26-101(1), MCA." *Adams*, 211 Mont. at 249, 683 P.2d at 499. Thus, Empire Construction Company, Inc., could not provide surety in this instance because it was neither authorized by the Insurance Commissioner nor did it meet the criteria of § 33-26-101(1), MCA.

¶26 In her brief in opposition to NorVal's motion for relief in this Court, Lawson asserts that *King v. Pony Gold Mining Co.*, 24 Mont. 470, 62 P. 783 (1900), and *James Talcott Constr. v. P & D Land Enters.*, 261 Mont. 260, 862 P.2d 395 (1993), also support the District Court's interpretation of § 33-26-101(1), MCA. We find Lawson's reliance on those cases is misplaced.

¶27 In *King*, King moved to dismiss the appeal of Pony Gold Mining Co. and other appellants (Pony) because King alleged that the undertaking that Pony proffered, with Union Bank & Trust Company providing surety, was void. *King*, 24 Mont. at 471-72,

62 P. at 784. King argued that Part II, Title 14, Sections 1900 and 1901, of the Code of Civil Procedure violated Article V, Section 26, of the Montana Constitution (1889), and also conflicted with other statutes. *King*, 24 Mont. at 475-78, 62 P. at 785-86. Section 1900 of the Code of Civil Procedure of Montana of 1895, enacted as 1893 Mont. Laws, § 1 at 70, is the predecessor of § 33-26-101, MCA, and the substance of the pertinent statutory language is largely unchanged from its enactment. The Montana Supreme Court determined that Union Bank & Trust Company was a corporation organized under Division 1, Part IV, Title 3, Section 604, Subdivision 3, of the Civil Code of 1895 [Trust Deposit and Security Corporations], which provided in relevant part that a corporation created under it could "execute or guarantee any bond or bonds required by law to be given in any proceedings in law or equity in any of the courts of this State or other State, or of the United States," and it therefore had the authority to execute an undertaking on appeal. *King*, 24 Mont. at 479, 62 P. at 787. In that case, this Court determined that Union Bank & Trust Company was a Montana corporation, and because it was a Montana corporation, the predecessor of § 33-26-101, MCA, gave it the authority to provide surety.

¶28 Pertinent to NorVal's assertion that FREIE's authority to provide sureties in Montana arises not from § 33-26-101, MCA, but from § 33-2-115, MCA, are the developments in Montana law subsequent to *King* but prior to *James Talcott Constr*. In 1909, the Legislature enacted "An Act to Permit Foreign Surety Companies to do Business in this State, and regulating the Method thereof." 1909 Mont. Laws ch. 139. This Act provided that any company incorporated and organized under the laws of any of the United

States for the purpose of transacting business as surety could do so in Montana so long as it met the Act's requirements, and that "all courts, judges . . . and public officers of every character shall accept and treat accordingly such bond, undertaking . . . or guaranty when so executed by such company[.]" 1909 Mont. Laws ch. 139, §§ 1-2. This Act was codified as § 6206 et seq., RCM (1921), renumbered as § 40-1601 et seq., RCM (1947), and ultimately replaced by the current Montana Insurance Code, including § 33-2-115, MCA. 1959 Mont. Laws ch. 286.

¶29 In *James Talcott Constr.*, the company appealed from a district court order that deemed a letter of credit to be a surety bond. *James Talcott Constr.*, 261 Mont. at 262, 862 P.2d at 396. James Talcott Construction had sued to foreclose upon a construction lien and the respondent P & D Land Enterprises provided the court with an "Irrevocable Standby Letter of Credit" issued by the Mountain Bank of Whitefish as a bond in lieu of the lien, which the court approved and accepted. *James Talcott Constr.*, 261 Mont. at 262-63, 862 P.2d at 396. On appeal, this Court interpreted § 71-3-551, MCA, which provides for the conditions under which a lien claimant may substitute a bond for a construction lien. Applying the statute to the facts of the case on appeal, this Court concluded that the purported bond was untimely filed and that it further failed to comply with § 71-3-551(2), MCA, which requires in part that such bond must be either in cash or written by a corporate surety company. *James Talcott Constr.*, 261 Mont. at 265-67, 862 P.2d at 398-99. This Court determined that Mountain Bank of Whitefish was not a corporate surety company: the bank did not meet the statutory definition of § 33-26-101(1), MCA, because it was incorporated for the purpose of conducting the

business of banking and not for the purpose of "making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law." *James Talcott Constr.*, 261 Mont. at 266, 862 P.2d at 398-99 (quoting § 33-26-101(1), MCA). By this time, Division 1, Part IV, Title 3, Section 604, Subdivision 3, of the Civil Code of 1895, which applied in *King* and which provided authority for the bank and trust company to offer surety there, had been repealed and replaced by a new statutory scheme which did not include the provision this Court quoted in *King*. 1915 Mont. Laws ch. 89, § 6(3). Like the construction company in *Adams*, it appears that Mountain Bank of Whitefish was not a corporation authorized by the Insurance Commissioner to do business as a commercial surety in Montana. Therefore, since the bank was incorporated in Montana but was not authorized by the Insurance Commissioner to do business as a surety, § 33-26-101, MCA, was the correct statute to apply to determine if the bank could provide surety for P & D Land Enterprises.

¶30 As NorVal asserts, the District Court failed to apprehend this context in its reliance on *Adams*. In the present case, there was no need to rely on § 33-26-101(1), MCA, in evaluating FREIE's eligibility to issue a bond because FREIE is authorized by the Insurance Commissioner to do business as a commercial surety in Montana. Section 33-2-115, MCA. Under § 33-26-103, MCA, since FREIE is a surety insurer authorized as such under Montana law, it has the power to be a surety for a supersedeas bond. Therefore the District Court erred when it concluded that FREIE could not serve as a surety to NorVal's supersedeas bond because it was a foreign corporation. So long as an

entity is duly authorized by the Montana Insurance Commissioner, it can do business as a surety in Montana for purposes of guaranteeing a supersedeas bond.

¶31 Although the District Court erred in denying NorVal its requested stay when it erroneously relied on § 33-26-101(1), MCA, Lawson raised additional objections to the adequacy of the supersedeas bond pursuant to M. R. App. P. 22(1)(b). However, the District Court did not reach these objections after concluding that foreign corporations could not serve as sureties for a supersedeas bond in Montana. Thus, to determine if NorVal has demonstrated good cause for relief from the District Court's order, we must further consider whether the District Court's denial of the motion to stay enforcement should be upheld on other grounds.

¶32 In opposition to NorVal's present motion for relief, Lawson offers three reasons why she believes this Court should uphold the District Court's determination that the supersedeas bond NorVal offered is inadequate security even if we conclude the District Court erred in its interpretation of § 33-26-101, MCA. First, Lawson attacks the legitimacy of the bond because she maintains that NorVal did not "purchase" it. Next, she argues that since FREIE is NorVal's liability insurer, it cannot act as surety for a judgment that it may ultimately be liable to pay. Finally, she argues that since FREIE is a reciprocal insurer and NorVal is one of its subscribers, FREIE cannot provide surety for NorVal because this creates a relationship that causes this supersedeas bond to violate the very definition of what it means to provide surety. Each of these arguments warrants further scrutiny.

¶33 Lawson initially raised her contention that NorVal's supersedeas bond was inadequate because NorVal did not "purchase" it in her Response to NorVal's Motion to Stay Proceedings to Enforce Judgment in the District Court. There, she asserted that NorVal had failed to provide "documentation or explanation concerning the proposed bond" and she was therefore unable to ascertain if the bond had in fact been "purchased." In reply, NorVal asserted that it had no obligation to "purchase" the bond and that no authority supported Lawson's contention that such inquiry was appropriate. NorVal argued that if a party were required to prove purchase, this would "open a Pandora's box" because courts would need "to determine if the purchase price was sufficient." NorVal asserted that in this instance, FREIE executed a supersedeas bond and it was authorized by the Insurance Commissioner to conduct surety business in Montana, and "[t]hat should be the end of the inquiry."

¶34 In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Section 28-11-403, MCA. A bond is a contract that governs the surety's liability to the obligee and is interpreted using general principles of contract construction and performance. *Colo. Structures, Inc. v. Ins. Co. of the W.*, 167 P. 3d 1125, 1131 (Wash. 2007). The applicable term of art for this "purchase" dispute—which neither Lawson nor NorVal landed upon—is "consideration." Contrary to NorVal's assertions, a suretyship contract, like other contracts, must be supported by sufficient consideration. 74 Am. Jur. 2d *Suretyship* § 11 (2012). If the consideration fails, the surety is not obligated for the debt. *Andrus v. Zion's First Nat'l Bank*, 588 P.2d 452, 454 (Id. 1978) (citing 72 C.J.S. *Principal and Surety* § 70 (1951)). NorVal's concern that

the requirement of consideration would lead to courts' burdensome inquiries into the sufficiency of such consideration is also misplaced. A secondary obligation does not fail for lack of consideration if the promise of the secondary obligor, or the entity providing surety, is in writing and signed by the secondary obligor and recites a nominal purported consideration. Restatement (Third) of Suretyship & Guaranty § 9(2)(b) (Am. Law Inst. 1996). Although NorVal maintains that any inquiry into the terms of a supersedeas bond should end once it is established that the secondary obligor has sufficient assets and is authorized by the Insurance Commissioner to be in the surety business, Lawson's concern as to the validity of the bond is not misplaced. A surety that is called upon to pay the debt of the principal obligor may raise failure of consideration as a defense:

> A contract of suretyship must be supported by sufficient consideration. The defense of want or failure of consideration is not one that is personal to the principal but goes to the existence of the debt. Therefore, a surety may avail itself of the defense of failure of consideration although the principal is not a party to the action.

74 Am. Jur. 2d *Suretyship* § 80 (2012). Thus, in the event that Lawson prevails on appeal and NorVal fails to pay the judgment, FREIE may defend against Lawson by asserting failure of consideration. In this case, the only documentation NorVal has supplied is the Supersedeas Bond, which is silent as to any consideration. Thus, while the District Court relied on incorrect grounds, it was nonetheless correct in concluding that NorVal's supersedeas bond was inadequate security for Lawson's judgment.

¶35 Because we recognize that this deficiency is readily cured, we also reach Lawson's remaining arguments to promote judicial efficiency in resolving this dispute.

¶36 Lawson next maintains that FREIE could not provide surety to NorVal for two reasons relating to the relationship between NorVal and FREIE. First she contends that FREIE may be liable to pay the judgment if Lawson prevails on appeal because it supplies NorVal with liability insurance, therefore it would be essentially providing surety to itself in this instance. Lawson also contends that FREIE is not a separate entity from NorVal for the purpose of acting as surety because NorVal is an owner/member of FREIE and thus on this basis it would also be impermissibly providing surety to itself.

¶37 FREIE is a reciprocal insurer—an unincorporated aggregation of subscribers operating individually and collectively through an attorney-in-fact to provide reciprocal insurance among themselves. Section 33-5-102(2), MCA. Because FREIE is authorized to do business as an insurer in Montana, it is subject to Montana's laws concerning reciprocal insurers, except those expressly applicable only to domestic reciprocals. Section 33-5-101(1), MCA. "Reciprocal insurance" is that resulting from an interexchange among persons, known as "subscribers," of reciprocal agreements of indemnity, with the interexchange effectuated through an attorney-in-fact common to all the subscribers. Section 33-5-102(1), MCA.

¶38 FREMC is the attorney-in-fact through which FREIE operates. As permitted by § 33-5-104(1), MCA, a corporation may be the attorney-in-fact for a reciprocal insurer. Pursuant to § 33-5-502(1), MCA, and as was apparently done in this instance, the reciprocal insurer's certificate of authority is issued in the name of the insurer; here, the Certificate of Authority from the Insurance Commissioner names FREIE as the entity authorized to transact business as an insurer in Montana.

¶39 FREIE's status as a non-corporate entity with a corporate attorney-in-fact raises another question we must address that Lawson alluded to in the parties' ultimately unsuccessful negotiations for agreeable surety terms: Under M. R. App. P. 22(1)(b) in relevant part, "If the appellant desires a stay of execution, the appellant must, unless the requirement is waived by the opposing party, obtain the district court's approval of a supersedeas bond which shall have 2 sureties or a corporate surety as may be authorized by law." Under this Rule, an appellant must either provide two sureties or a single, corporate surety. This Court has found such distinction justified as corporations are subject to State regulation and "must make regular reports showing in detail their liabilities, their assets and their investments," with falsified reports subjecting their agents to severe penalties. *King*, 24 Mont. at 477, 62 P. at 786.

¶40 To determine if FREIE may be a sole surety under M. R. App. P. 22(1)(b), we must decide whether FREIE, an "unincorporated aggregation of subscribers" as defined in § 33-5-102(2), MCA, whose attorney-in-fact is a corporation, is nonetheless a "corporate surety." If it is not a corporate surety, NorVal's bond is inadequately secured under Rule 22(1)(b). Section 33-5-104(2), MCA, provides:

> The attorney of a foreign or alien reciprocal insurer, which insurer is duly authorized to transact insurance in this state, shall not, by virtue of discharge of its duties as such attorney with respect to the insurer's transactions in this state, be thereby deemed to be doing business in this state within the meaning of any laws of this state applying to foreign firms or corporations.

Thus FREMC is not a corporation doing business in this state with respect to FREIE's transactions—including the supersedeas bond at issue here. Since FREIE's corporate attorney-in-fact is not a corporation doing business in Montana and FREIE is

unincorporated, FREIE is not a "corporate surety." Here, NorVal's supersedeas bond is inadequate as it contains only one non-corporate surety—FREIE—and FREIE's agent FREMC which, although a corporation, is not considered to be "doing business in this state" under the applicable insurance code.

¶41 However, Lawson disputes whether FREIE can serve as surety for NorVal at all. We reach this question because, as with the failure of consideration, we recognize that NorVal could readily cure this defect by obtaining a second surety. As noted above, Lawson maintains that FREIE cannot provide surety for NorVal because it is NorVal's liability insurer and as such, it will be liable to pay the judgment if Lawson prevails on appeal. And Lawson argues that FREIE is not a separate entity from NorVal because it is a reciprocal insurer and NorVal is one of its subscribers.

¶42 As to Lawson's first argument, we are unpersuaded by Lawson's contention that since FREIE is NorVal's liability insurer, it cannot also provide surety for NorVal. Under Montana law, a surety is a form of insurance. *K-W Indus.*, 231 Mont. at 465, 754 P.2d at 504. Surety insurance is also separate and distinct from other forms of insurance; it includes insurance guaranteeing the performance of contract *other than* insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship. Section 33-1-211(2), MCA (emphasis added). NorVal cites *Cmty. Health of S. Dade v. Hale*, 395 So. 2d 1286 (Fla. Dist. Ct. App. 1981), which held that an insurance carrier can act as surety for a party for which it also provides liability insurance because the insurer is not a named party to the lawsuit and we know of no Montana case law to the contrary. Furthermore, we are not aware of any legal bar by which one entity cannot insure

another for more than one purpose and under separate policies, even if the possibility exists that in some circumstances, one policy may become liable to the other. For example, a person who has both their home and automobile insured by the same insurer may suffer the misfortune of hitting their home with the vehicle, thus potentially causing such situation.

¶43 However, we further consider Lawson's assertion that FREIE cannot provide surety to NorVal in any event because its status as a reciprocal insurer, to which NorVal is a subscriber, means that it is essentially attempting to act as its own surety here. As defined in § 28-11-401, MCA, a surety is "one who . . . becomes responsible for the performance by [a second] person of some act in favor of a third person[.]" In other words, one cannot act as a surety for oneself. *Red Lodging v. Miller*, 2001 MT 135, ¶ 12, 305 Mont. 477, 29 P.3d 477. FREIE is not a wholly separate insurance company that sold a liability policy to NorVal; rather, it is a reciprocal insurer whose subscribers reciprocally agree to indemnify. Section § 33-5-102(1), MCA. If the judgment is ultimately upheld and FREIE is obligated to pay some portion of it as NorVal's liability insurer, NorVal may be obligated in turn to indemnify FREIE for that payment.

¶44 To determine if a suretyship exists, one must examine the relationship between the principal obligor and the entity purporting to provide surety, or secondary obligor. *CRM Collateral II, Inc. v. TriCounty Metropolitan Transp. Dist. of Oregon*, 669 F.3d 963, 972 (9th Cir. 2012). A surety is jointly and severally liable with the principal obligor on an obligation to which they are bound. Restatement (Third) of Suretyship & Guaranty § 1, cmt. c (Am. Law Inst. 1996); 74 Am. Jur. 2d *Suretyship* § 19 (2012).

¶45 Although we agree that FREIE is authorized by the Insurance Commissioner to offer sureties in Montana, in this particular instance, the Supersedeas Bond does not provide adequate surety because it does not create a security relationship separate from the relationship that already exists between NorVal and FREIE. If FREIE pays this judgment, even *without* the existence of the bond, NorVal as one of FREIE's subscribers may in turn indemnify FREIE for this payment. Under § 28-11-401, MCA, NorVal cannot be both the principal obligor and the secondary obligor. Thus, under the unique facts in this case, we conclude that the District Court did not err in ruling that the Supersedeas Bond does not provide adequate surety such that the court denied NorVal's Motion to Stay Proceedings to Enforce Judgment.

¶46 We therefore conclude that NorVal is not entitled to relief from the District Court's Order on Motion to Stay Proceedings to Enforce Judgment, as NorVal has failed to demonstrate the good cause for such relief that M. R. App. P. 22(2) requires.

ORDER

¶47 THEREFORE, NorVal's Motion for Relief is DENIED.

¶48 The Clerk of this Court is directed to provide copies of this Opinion and Order to all counsel of record and to the Seventeenth Judicial District Court, Valley County.

DATED this 29th day of March, 2022.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE