IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

No. 324711-III

JAMES W. and JUDY D. AASEBY, husband and wife,

Appellants/Plaintiffs,

v.

WILLIAM VUE, et al,

Defendants

J. SCOTT MILLER,

and

the Law Firm of Miller, Devlin & McLean P.S. (dissolved),

Respondents

BRIEF OF RESPONDENT

J. Scott Miller
WSBA No. 14620
Law Offices of J. Scott Miller, P.S.
201 W. North River Drive, Suite 500
Spokane, WA 99201
509/327-5591
Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

COURT RULES:

Other:

I. INTRODUCTION

Plaintiffs' entire appeal[1] rests on the assumption that when this Court of Appeals reversed the trial court's imposition of sanctions, the trial court lost jurisdiction to enforce the appellate instructions. Plaintiffs are misguided, and this appeal should be dismissed with prejudice. Respondent[2] respectfully requests that attorney fees be awarded, as described below.

The Mandate[3] at issue explicitly states:

> "*The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.*"

The appellate decision[4] referenced in the Mandate is equally clear:

> "*We reverse the trial court's imposition of sanctions against Mr. Miller. We deny both parties' request for attorney fees on appeal. Finally, we remand to the trial court for denial of the Aaseby's April 2012 cross motion for sanctions.*"

There is no indication that the remand was "solely" to deny cross motions for sanctions as asserted by Plaintiffs[5].

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[1] For convenience of the Court, Respondent's briefing will use the same document and page referencing adopted by Appellants.
[2] Note: Respondent in this matter was never named as a party and, therefore, is not properly referred to as "defendant."
[3] CP 001.
[4] CP 002-025; *Aaseby v. Vu*, 2013 Wash. App. Lexis 2052, *rev. den.* 179 Wn.2d 1012, 316 P.3d 494, 2014 Wash. Lexis 29 (2014) ... referred to herein as "Aaseby I".

There is no legitimate basis on which to reasonably conclude the appellate court intended to prevent the trial court from refunding the amount paid to satisfy the judgment that was reversed on appeal.

II. RESPONDENT'S RESPONSES TO PLAINTIFFS' ASSIGNMENTS OF ERROR ON APPEAL

Responses to Plaintiffs' Assignment of Error No. 1 –

A. The trial court complied with the Appellate Court's decision by vacating the judgment entered in error.

B. The trial court complied with the Appellate Court's decision by refunding the judgment amount previously paid by Respondent.

C. The trial court correctly applied Washington law by awarding statutory interest from the date the erroneous judgment was entered.

D. The trial court correctly held Plaintiffs and attorney Delay jointly and severally liable for interest owed from the date the erroneous judgment was entered.

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[5] See Brief of Appellants at p. 1 *et seq.*

Response to Plaintiffs' Assignment of Error No. 2 –

The trial court correctly held Plaintiffs and attorney Delay jointly and severally liable for interest owed from the date the erroneous judgment was entered.

Response to Plaintiffs' Assignment of Error No. 3 –

The Court of Appeals original decision did not restrict the trial court to merely entering an order denying Plaintiffs' cross motions for sanctions.

III. COUNTER-STATEMENT OF THE CASE

This Court of Appeals previously ruled that the trial court erred when it entered judgment against Respondent[6]. Because Respondent had paid the underlying judgment, the trial court correctly ordered that the payment be refunded, with interest at the statutory rate, from the date the judgment was paid.

A. Chronology of Events

Undoubtedly, this Court is well aware of the history of this matter. However, to summarize:

- 10/20/2001 – motor vehicle accident at issue in underlying case;
- 10/16/2003 – Summons and Complaint[7] filed;

[6] CP 002-025; *Aaseby v. Vu*, 2013 Wash.App. Lexis 2052, *rev. den.* 179 Wn.2d 1012, 316 P.3d 494, 2014 Wash. Lexis 80723 (2014) sometimes referred to herein as "Aaseby I".
[7] CP1 0001-0006.

- 06/24/2004 – underlying litigation settled, Order of Dismissal[8] entered;
- 07/01/2005 – Order Vacating Dismissal[9] entered;
- 06/06/2011 – Judgment #1 for Sanctions[10] of $46,285.27 entered;
- 10/14/2011 – Reconsideration Order[11] entered;
- 11/22/2011 – Amended Judgment[12] for $22,300.00 entered;
- 04/03/2012 – Amended Judgment paid in full including 12% interest, Satisfaction of Judgment[13] entered by trial court[14];
- 08/29/2013 – Court of Appeals Decision[15] reversing trial court;
- 01/08/2014 – Washington State Supreme Court Review Denied[16];
- 01/27/2014 – Division III Mandate[17] issued to Trial Court with appellate Opinion[18];

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[8] CP1 0011-0012.
[9] CP1 0017-0021.
[10] CP1 0398-0400.
[11] CP1 0931-0935.
[12] CP1 0936-0938.
[13] CP1 2340 & CP1 2342-2347.
[14] Note: Plaintiffs failed to withdraw the judgment payments. Therefore, the funds paid to satisfy the judgment remained on deposit with the Superior Court Clerk until the trial court entered an order for restitution and interest in 2014 (CP 0082-0083).
[15] CP 0002-0025.
[16] 179 Wn.2d 1012, 316 P.3d 494, 2014 Wash. Lexis 80723 (2014).
[17] CP 0001.
[18] CP 002-025.

- 02/21/2014 – Order Vacating [Amended] Judgment, Awarding Restitution and Awarding Interest and Order to Pay Out[19] entered;
- 02/21/2014 – Order Denying Plaintiffs Cross Motion for Sanctions[20] entered;
- 04/03/2014 – Order Denying Plaintiff's Motion for Reconsideration[21] entered.

B. Counter-Statement of Issues

Plaintiffs' attorneys are confused about the law of judgments, and also improperly attempt to reargue matters previously decided by this court in the first appeal which are now *res judicata* (or at least the law of the case.)

Plaintiffs contend that once a judgment is paid the Court of Appeals has no authority to grant relief because the matter is finalized. Plaintiffs also attempt to revive their argument from "Aaseby I", that there is no right to reimbursement unless appellant posted a supercedeas bond. This claim was resolved by the "Aaseby I" appeal.

Plaintiffs' other argument is truly imaginative. They assert that even though this Court of Appeals has reversed a judgment,

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[19] CP 0082-0083.
[20] CP 0071 – Note: this Order was entered pursuant to the instructions by Court of Appeals in its decision at p. 23 "*Finally, we remand to the trial court for denial of the Aaseby's April 2012 cross motion for sanctions.*" See: RP at p. 35:3-18
[21] CP 0185-0186.

the prevailing party is not entitled to return of the funds paid in satisfaction of that judgment. To reach this bizarre conclusion, Plaintiffs argue that payment of the judgment discharges that debt and, therefore, respondent is not entitled to return of the funds even after the judgment is reversed on appeal.

Plaintiffs also seem to argue that after a judgment is reversed and the Court of Appeals remands the matter, the trial court has no authority to take action to enforce the appellate decision. In this case the Plaintiffs claim the trial court was powerless to restore the appellant to his pre-judgment position.

Clearly, Plaintiffs' attorneys misapprehend not only the law of judgments, but the authority of the appellate courts with respect to reversible error. This appeal should be dismissed, and Respondent should be awarded attorney fees and sanctions as discussed below.

IV. SUMMARY OF ARGUMENT

The trial court entered judgment imposing sanctions in 2012. The Court of Appeals reversed that judgment in 2013, and the Supreme Court denied review in 2014. Subsequently a Mandate was issued to the trial court to comply with the appellate decision.

Plaintiffs' arguments that the courts were without jurisdiction, because the judgment was paid while the appeal was pending, are specious.

V. ARGUMENT

A. Plaintiff's Arguments "1-A" & "1-B" Regarding Discharge of Judgment Liens Are Irrelevant

Plaintiffs' arguments regarding discharge of judgment liens are particularly convoluted.

It is puzzling why Plaintiffs cite the court to *in re Bailey's Estate* 56 Wn.2d 623, 354 920 (1960). That case simply notes that at common law the court clerk did not have authority to accept payments intended to satisfy a judgment, therefore payment must be accompanied by some documentation indicating how the payment is to be credited. In this case the pleadings clearly and unequivocally provided that the payment was in full satisfaction of the judgment. (CP1 2340-2347). Plaintiffs' apparently acknowledge this fact. (Brief of Appellant at p. 17). In fact, Plaintiffs cite this court to the clerk's docket clearly showing that the satisfaction of judgment was entered[22] as discussed in *Bailey's Estate.*

Plaintiffs' citation to *Lindsay v. Pacific Topsoils, Inc.,* 129 Wn.App. 672, 120 P.3d 102 (2005) is similarly unhelpful. In

[22] CP 146.

Lindsay the appellate court held that RCW § 4.56.110(4) required interest to run from the verdict date because the defendant had unsuccessfully appealed the merits of the case. In this case, the trial court properly calculated interest from the date that the judgment was satisfied until the date the clerk was ordered to pay out the funds after judgment was reversed. Interest on a judgments is mandatory. RCW 4.56.110.

Plaintiffs' citation to *Bank of America v. Owens*, 177 Wn.App. 181, 311 P.3d 594, (2013) serves no purpose. That case merely states that a trial court is obliged to enter orders that conform to the decision by the Supreme Court. And *Marriage of McCausland*, 129 Wn.App. 390, 118 P.3d 944 (2005) is a child support case, which was reversed on appeal[23].

In summary, Plaintiffs unsuccessfully argue that there is some adverse consequence to Respondent paying the underlying judgment. But the argument has no basis, no support, and would be against public policy. The trial court clearly properly ruled that Plaintiffs and attorney Delay are jointly and severally liable for interest owed from the date the erroneous judgment was entered[24].

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[23] *Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007)

[24] In yet another strange twist, the Plaintiffs and/or attorney Delay did not actually pay the interest as ordered by the court, but posted the amount as a "cash supercedeas." CP 0084-0085. Therefore, upon remand the Plaintiffs and attorney Delay are jointly and severally liable for the original interest award plus interest on that amount at the statutory

B. Plaintiffs' Argument "1-C" Regarding Mootness of Cross Appeals Is Irrelevant

Plaintiffs assert that they did not request payment of the judgment[25], which is certainly odd since attorney Delay spent countless hours arguing that judgment should be entered, and that sanctions should be entered against opposing counsel for resisting those attempts.

After reciting RCW §4.56.100 for the unremarkable proposition that payment of a judgment discharges that debt, Plaintiffs point the court to *Ryan v. Plath*, 20 Wn.2d 663, 148 P.2d 946 (1944). That case, however, held that the beneficiary of a constructive trust was entitled to an accounting and restitution. The defendant attempted to avoid the plaintiff's appeal by paying the judgment, but the court held, appropriately, that a party cannot prevent an appeal by paying a judgment when the amount of that judgment is the basis for the appeal.

Here there was no attempt to avoid the appeal, or have it dismissed by paying the judgment. *Ryan v. Plath* is obviously inapposite.

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rate. This could have been avoided if attorney Delay had simply paid the interest as ordered by the trial court.

[25] Brief of Appellant at p. 22.

Plaintiffs also rely on *Maxham v. Berne*, 88 Wash. 158, 673 (1915), decided almost 100 years ago. The defendant, Berne, paid a judgment into the registry of the court and a satisfaction of judgment was entered. Maxham appealed. The Court held that because Maxham accepted the payment, there was no basis for an appeal.

It is unclear how *Maxham v. Berne* applies here. In this case not only did the trial court enter a satisfaction of judgment[26] the Superior Court Clerk recorded the satisfaction as required by RCW 4.56.100[27].

C. Plaintiffs' Argument D Regarding Satisfaction of Judgments Is Irrelevant

Plaintiffs seem to argue that when a judgment is paid, the courts lose jurisdiction, and the clerk of court is vested with exclusive authority to administer the judgment. This is not only absurd, it is obviously wrong. Washington law is replete with examples of how the courts have continuing jurisdiction to manage a case even after a judgment is paid.

- CR 58 – a judgment shall be entered immediately upon being signed by the judge;
- CR 60(e) – a judgment may be vacated upon motion (see also Title 4.72 RCW);

[26] CP1 2342-2343 and at CP 140-141.
[27] CP 146.

- CR 62 – enforcement of a judgment is stayed for only 14 days if the matter is appealed;
- RCW 4.16.230 – if a judgment is reversed on appeal, the plaintiff has one year to commence an entirely new action.
- RCW 4.56.080 – in an action involving personal property, "*... judgment for the defendant may be for a return of the property, or the value thereof* ..."

To avoid the inevitable statutory lien under RCW 4.56.190 it was essential that Respondent pay the judgment, not merely post a supercedeas bond. There is always a risk with this approach because if the judgment is reversed the funds may have been dissipated (or unique property sold.) However, in this case the Aasebys and attorney Delay left the funds deposited with the Superior Court Clerk. So after the judgment was reversed the trial court simply ordered that the funds be refunded (plus interest.)[28]

There is no statute, court rule, judicial decision, or other basis for Plaintiff's frivolous argument that payment of a judgment deprives the courts of jurisdiction to reverse the trial court's error, and restore the parties to their proper situations.

[28] CP 148-153.

D. Plaintiffs' Arguments E & F Regarding RAP 12.8 Misstate the Law

RAP 12.8 is clearly controlling in this situation. The rule reads:

> "If a party has voluntarily or involuntarily, partially or wholly, satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision." (emphasis added).

It could not be clearer. The judgment was reversed on appeal, therefore the trial court not only has inherent authority to restore the funds paid, it is required to do so.

This continuing authority of the trial court after reversal by the appellate court is, of course, completely consistent with the common law and rules of equity, as well as rules of court. The law clearly and consistently provides for return of the defendant's property after a judgment is reversed.

Argument "F" is particularly baffling, because the Plaintiffs' attorneys seem to seriously argue that their clients should be allowed to keep the funds paid to satisfy a judgment that has been reversed on appeal! Even if that outrageous

proposition were not contrary to law, it would be controverted by public policy.

It is quite intriguing that Plaintiffs cite to *Ehsani v McCullough Family Partnership*, 160 Wn.2d 586, 159 P.3d 407 (2007) because it is a classic example of *exceptio probat regulam in casibus non exceptis.*[29] In *Ehsani* the defendant paid a judgment into the plaintiff attorney's trust account. Plaintiff's counsel disbursed the entire amount to his client's creditors (including himself). The Supreme Court held that although unsuccessful plaintiffs were required under RAP 12.8 to refund the judgment payments they had previously received, their attorney was not personally liable to make restitution on their behalf.

In finding the clients remained liable under RAP 12.8 to refund the full amount previously paid for a judgment subsequently reversed, the *Ehsani* court relied in part on *Atlantic C. L. R. Co. v. Florida*, 295 U.S. 301 (1935) as well as Restatement of Judgments, §74:

> "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess."

[29] The exception proves the rule.

In addition to reimbursement of the judgment, the trial court correctly imposed interest on that amount. See: *State v. A.N.W. Seed Corp.*,116 Wn.2d 39, 802 P.2d 1353 (1991).

Ehsani obviously does not apply here. Since attorney Delay insisted on being named as a judgment creditor on the judgment[30] he was holding the payment personally, not as a fiduciary for his clients[31]. Therefore, it is more than appropriate that he be jointly and severally liable for reimbursing not only the full amount of the judgment, but also the interest owed from the date of payment to the date that the interest is ultimately paid. Since, however, the interest was paid into court as a "cash supercedeas"[32] it is unavailable to Respondent until the decision in this pending appeal is final.

Plaintiffs attempt to resuscitate the argument already rejected by this court that despite paying the judgment in full, there was some additional obligation to also post a supercedeas bond. The court of appeals disposed of this obviously flawed claim in "Aaseby I".

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[30] CP1 0936-0938.

[31] The fact that attorney Delay chose to leave the funds on deposit with the Superior Court Clerk instead of withdrawing them does not detract from the truth that the judgment debtor (Miller) was deprived of those funds. As was argued to the trial court, it is the deprivation of the funds that triggers the duty to pay interest on them. CP 26-29.

[32] CP 0084-0085.

Plaintiffs also cite to *Estate of Spahi v Hughes NW, Inc.,* 107 Wn.App. 763, 27 P.3d 1233 (2001), but that case also articulates an exception that proves the general rule. *Spahi* explains that RAP 12.8 requires the plaintiff to refund payments after a satisfied judgment is reversed, but the defendant is not entitled to return of real property that has been purchased in good faith by a non-party. The facts of that case do not apply, but it does serve to show that RAP 12.8 requires Aaseby and Delay, as judgment creditors, to refund the full amount of the previously satisfied judgment.

The citation to *in re Sims' Estate*, 39 Wn.2d 288, 235 P.2d 204 (1951)[33] merely says a defendant is not required to file a supesedeas bond; "it is a right and a privilege ... but it is not something he is obligated to do." *Sims* in no way stands for a rule, or even implies, that failure to file a supercedeas bond gives the plaintiffs access to payments made on a judgment that is reversed

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[33] Appellant's Brief at p. 32.

VI. ATTORNEY FEES ON APPEAL

RAP 18.1 requires that a party requesting attorney fees on appeal devote a section of that party's opening brief to fees or expenses. An affidavit of reasonable attorney fees and expenses is not filed until the court awards that relief.

Respondent respectfully requests that the court award attorney fees and expenses because the appeal currently pending has no legal basis and is premised solely on incomprehensible arguments raised improperly.

In "Aaseby I" the request for attorney fees by Respondent herein was denied because the court found the Aasebys "*incessant request for sanctions is troublesome*" but not frivolous.

This appeal is different.

There is absolutely no legal basis on which to claim the trial court lacks jurisdictional authority to comply with the appellate court's Opinion. Similarly, it is frivolous for Plaintiffs to assert that an appeal is voided by payment of a judgment that is on appeal (instead of filing a supersedeas bond.)

RCW 4.84.185 provides statutory basis to award attorney fees to a prevailing party for opposing a frivolous action.

RAP 18.9(a) provides the appellate court with authority to impose terms or compensatory damages to be paid to the party harmed by a frivolous appeal. An appeal is frivolous where

there are no debatable issues on which reasonable minds might differ, and is devoid of merit, so there is no reasonable possibility of reversal. *Green River Community College Dist. No. 10 v. Higher Ed. Personnel Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986). See also, *PEMCO v. Rash*, 48 Wn.App. 701, 740 P.2d 370 (1987); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510 (1987); *Federal Land Bank of Spokane v. Redwine*, 51 Wn.App. 766, 755 P.2d 822 (1988).

The fact that Respondent is an attorney representing himself does not invalidate the basis for awarding attorney fees, because it is necessary to take time away from other practice to respond to a frivolous appeal. *Leen v. Demopolis*, 62 Wn.App. 473, 815 P.2d 269 (1991).

The trial court in this case was not hamstrung by the appellate court's language. The trial court was not told it was "solely" limited to entering an order denying sanctions. And there certainly is no logical or reasonable basis on which to argue a trial court is unable to take all actions necessary to reverse the effects of a judgment entered in error.

VII. CONCLUSION

Plaintiffs' attempts to create a scenario in which the erroneous judgment that has been reversed in Aaseby I are, perhaps, imaginative, but they are frivolous.

This Court of Appeals reversed the Order imposing sanctions, and it fell to the trial court to take appropriate actions to put everyone back in the position before the judgment was entered. There is no basis for this appeal, and reasonable minds cannot differ that it should be dismissed.

DATED this 7th day of November, 2014.

Law Offices of J. Scott Miller, P.S.

By: _____

J. SCOTT MILLER
WSBA No. 14620
Respondent

CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on November 7, 2014, that a true and correct copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

✓	Hand delivery	Michael J. Delay
___	Overnight mail	Attorney at Law
___	U.S. Mail	10 N. Post Street, Suite 301
___	Fascimile	Spokane, WA 99201-0705
___	Email	

___	Hand delivery	Patrick J. Kirby
___	Overnight mail	Patrick J. Kirby Law Office
✓	U.S. Mail	421 W. Riverside Avenue, Suite 802
___	Fascimile	Spokane, WA 99201
___	Email	

LISA S. MITTLEIDER, Paralegal
Law Offices of J. Scott Miller, P.S.