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No. 63567-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

ELLIS, LI & McKINSTRY PLLC,  
a Washington professional liability company,

Respondent,

v.

EDWARD R. MacDONALD  
and the marital community of Edward R. MacDonald  
and Susan MacDonald,

Petitioner/Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JULIE SPECTOR

REPLY BRIEF OF PETITIONER/APPELLANT

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## I. REPLY ARGUMENT

### A. **The Superior Court Could Not Compel MacDonald To Pay Funds To ELM Without First Entering Judgment On ELM's Contested Claim For Money Damages.**

#### 1. **The Civil Rules Do Not Authorize An Order For Immediate Payment Of Money To The Plaintiff Prior To Entry Of Judgment On A Claim For Money Damages.**

No legal authority supports the superior court's prejudgment order requiring the "immediate" delivery of over \$131,000 to ELM. The superior court entered its order without discovery, without an evidentiary hearing, and without a summary judgment establishing MacDonald's liability to ELM. ELM's attempt to present the scant and disputed evidence of MacDonald's liability in the light most favorable to ELM must be rejected given the procedural posture of this case, in which the superior court ordered MacDonald to pay over \$130,000 to his former attorneys, upon six days notice and without entering a judgment on any portion of ELM's claim. (CP 113, 251-52)

ELM's recitation of the facts in the light most favorable to the respondent ignores that the superior court did not enter findings following a trial, where ELM would have been required to prove the enforceability of its fee agreement and/or the reasonableness of the

fees and costs that it demands. Nor was there was a summary judgment under CR 56, where ELM would bear the burden of showing that there was no “genuine issue as to any material fact,” and all reasonable inferences from the evidence would be taken in the light most favorable to MacDonald, the nonmoving party. ***Mutual of Enumclaw Ins. Co. v. USF Ins. Co.***, 164 Wn.2d 411, 418, ¶ 10, 191 P.3d 866 (2008). Finally, there was no judgment on the pleadings under CR 12(c), where ELM would be required to admit “the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied.” ***Hodgson v. Bicknell***, 49 Wn.2d 130, 136, 298 P.2d 844 (1956).

ELM’s argument that MacDonald waived any objection to his right to the notice required by CR 56 because he did not seek a continuance (Resp. Br. 18) is without merit. ELM ignores the fact that MacDonald specifically objected to the superior court’s resolution of “this . . . highly disputed attorney fee claim with numerous fact issues” without complying with CR 56. (CP 219-20) MacDonald argued that he would be deprived of his “constitutional rights to due process and trial by jury” were the superior court to order payment of MacDonald’s money to ELM “before a single

substantive issue has been adjudicated.” (CP 219-20) ELM's attempt to dispense with the requirements of the Civil Rules is unsupported by any authority. See ***Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc.***, 54 Wn.2d 211, 215, 339 P.2d 89 (1959) (Civil Rule 56(c) requires that a party receive at least 28 days notice “to prevent a summary judgment from being too summary”). This court should reverse for this reason alone.

**2. The Superior Court Could Not Ignore MacDonald's Denial Of Liability In His Answer, Or MacDonald's Specific Allegations That Disputed ELM's Claim.**

ELM seeks to avoid the procedural requirements of the Civil Rules by portraying MacDonald's liability under its contingent fee agreement as a certainty even though there has never been any determination on the merits of ELM's claim. In doing so, ELM simply ignores MacDonald's answer to ELM's complaint, where he specifically “denie[d] that the fees and costs claimed to be owing by plaintiff are reasonable and necessary, and denie[d] a present obligation to pay the sum claimed by plaintiff to be owing.” (CP 7) MacDonald asked that “plaintiff's claims for attorney's fees and costs should be denied, or; the sum claimed by plaintiff should be reduced, or; that plaintiff should be entitled only to a quantum meruit

recovery, or; plaintiff should be required to disgorge fees previously paid.” (CP 8)

Ignoring MacDonald’s denial of liability, ELM attempts to bind him to alleged concessions derived from statements made outside of his pleadings, and in pre-litigation settlement discussions, to support the superior court’s decision. For example, as evidence that MacDonald “conceded” liability of “at least \$1.155 million,” ELM relies on MacDonald’s November 13, 2008 offer of settlement, in which he explained that while he did not have all of the information that he needed to fully address ELM’s demand for fees and costs, he was willing to make a “compromise and settlement” offer to pay ELM \$1.155 million. (Resp. Br. 4, 12 *citing* CP 476) But offers of settlement are “not admissible to prove liability.” ER 408; *see e.g., Duckworth v. Langland*, 95 Wn. App. 1, 6, 988 P.2d 967 (1998), *rev. denied*, 138 Wn.2d 1002 (1999) (trial court properly excluded a pre-lawsuit offering to pay the plaintiff \$35,000). The fact that MacDonald referred to his offer of settlement to rebut ELM’s allegations of MacDonald’s bad faith in this dispute with his former attorneys does not waive the requirements of ER 408. (CP 46, 440; *see* Resp. Br. 12)

ER 408 allows the admission of offers of settlement only if “offered for another purpose,” but not to establish liability. **Matteson v. Ziebarth**, 40 Wn.2d 286, 294, 242 P.2d 1025 (1952) (trial court could consider settlement offer not as evidence of liability, but as evidence of a party’s good faith or lack of good faith in a transaction). Offers of compromise are not proper evidence of liability because, as here, MacDonald made the offer to “buy peace” from his former advocates, who were now his adversaries, and avoid this litigation. **Weyerhaeuser Co. v. Commercial Union Ins. Co.**, 142 Wn.2d 654, 675, 15 P.3d 115 (2000) (offers of compromise are irrelevant “because an offer to settle may be motivated solely by a desire to buy peace”) (citing 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 408.1, at 48 (4th ed.1999)). Thus, even if the superior court could ignore the requirements of the Civil Rules in adjudicating MacDonald’s liability on ELM’s Motion For Delivery Of Dixon Proceeds, it could not rely on MacDonald’s offer of settlement as a basis for ordering him to pay money to ELM before any judicial determination on the merits of ELM’s claims.

ELM continues the fiction that MacDonald “conceded” that he owes \$307,440 in costs to ELM, (Resp. Br. 1, 6, 12, 18-19),

without any evidence in the record of this alleged concession. ELM cites to MacDonald's assertion that \$180,000 of the \$487,000 in "costs" that ELM claims it was owed in fact represented attorney fees for California counsel hired without notice to MacDonald, (CP 55-56), in order to argue that the remainder of ELM's cost claim was undisputed. (Resp. Br. 18-19) But this was not MacDonald's only complaint with the fees and costs sought by ELM. (See CP 6-9) MacDonald also challenged ELM's entitlement to costs because the fee agreement limited his payment of costs and hourly fees to \$250,000, an amount that he already paid to ELM. (See CP 55, 75)

Further, MacDonald had requested "detailed time records" for the "\$200K to \$250K in charges for non-ELM staff that performed legal (or para-legal) services that were treated as costs." (CP 476) MacDonald also requested "a description of services that were performed" for the "\$150K in charges for outside services that were charge[d] as costs." (CP 476) MacDonald also requested "an allocation among various matters of the items of expense incurred from November of 2004 through October of 2008 that were treated as cost items charged back to me." (CP 476) He had received none of this information because the superior court

prematurely ordered MacDonald to pay funds to ELM before discovery had even begun. (See CP 113)

Because there were both factual and legal disputes to be resolved to determine whether the fee agreements were valid and whether ELM should be required to disgorge any of the \$258,000 it already received from MacDonald, it was error for the superior court to order MacDonald to pay money to ELM without first resolving the claims on its merits in either a trial or summary judgment motion. ***Rainier National Bank v. McCracken***, 26 Wn. App. 498, 509, 615 P.2d 469 (1980) (whether a party should be ordered to pay funds to the other party “requires a judicial determination, on the hearing of all the facts, that [defendant] has no right to the funds”).

**3. MacDonald Was Entitled To Due Process Before He Could Be Compelled To Pay Money To ELM.**

“When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.” ***Amunrud v. Board of Appeals***, 158 Wn.2d 208, 216, 143 P.3d 571 (2006), *cert. denied*, 549 U.S. 1282 (2007) (*citations omitted*). A court “is without jurisdiction to compel [a party] to surrender [money]” by ordering either a deposit

into the court registry or payment to the other party. See **Rainier National Bank**, 26 Wn. App. at 509, quoting with approval **In re Elias**, 209 Cal.App.2d 262, 25 Cal.Rptr. 739, 747-48 (1962). “[T]his constitutes an issue which should not be tried in this summary manner, but one which requires a judicial determination, on the hearing of all the facts, that [defendant] has no right to the funds.” **Rainier National Bank**, 26 Wn. App. at 509.

Allowing a party to “execute on a claim absent a final judgment as to that claim” would improperly allow “a prevailing party [to], under court authority, seize the property, garnish the proceeds, or sell the assets of the losing party without the latter having any immediate avenue available for challenging the underlying interlocutory judgment.” **Fluor Enterprises, Inc. v. Walter Const., Ltd.**, 141 Wn. App. 761, 768-69, ¶ 15, 172 P.3d 368 (2007); see also **Gazin v. Hieber**, 8 Wn. App. 104, 113, 504 P.2d 1178 (1972) (“when a litigant is required to deliver physical property to his protagonist by reason of an order which does not adjudicate the entire claim” the litigant may appeal because if he complies with the order, he will “face the possibility that by the time

a 'final' order is entered his property is irrevocably beyond his reach").

ELM does not take issue with these fundamental principles but argues that they simply do not apply to its motion because six court days was sufficient notice for entry of the superior court's pre-judgment order directing MacDonald to pay ELM money on a disputed claim. The superior court's order deprived MacDonald of rudimentary constitutional protections by taking his property prior to entry of judgment without any safeguards, such as a bond.

**4. The Attorney Lien Statute Did Not Entitle ELM To Immediate Payment Without The Court First Determining The Validity Of ELM's Alleged Attorney's Lien.**

The superior court did not rely on ELM's purported attorney's lien in entering its orders because ELM's complaint did not mention a lien. (See CP 3-5, 251-52, 398-400) Even if it had, however, RCW ch. 60.40 does not authorize ELM to obtain an immediate payment on its contested claim for fees and costs without the superior court first making a determination on the validity of the lien. (Resp. Br. 13) See *Keyes v. Ahrenstedt*, 164 Wash. 106, 109, 1 P.2d 843 (1931) (an attorney lien "must be adjudicated by some appropriate judicial proceeding before becoming finally effective");

***State ex. rel. Angeles Brewing & Malting Co. v. King County***, 89 Wash. 342, 346, 154 P. 603 (1916) (the validity of an attorney lien “and the legality and justice of the claim, are questions which cannot in this instance be determined by a summary proceeding to strike [the lien]”).

The attorney lien statute allows for a summary determination on the “facts on which the claim of a lien is founded,” RCW 60.40.030(2), but only where the attorney has the client’s “money or papers” in his or her possession – not in a situation, such as this, where an attorney is seeking payment of money held by a client or third party. See ***King County v. Seawest Inv. Associates, LLC***, 141 Wn. App. 304, 312, ¶ 12, 170 P.3d 53 (2007), *rev. denied*, 163 Wn.2d 1054 (2008) (the summary procedures of RCW 60.40.030 are only triggered when the attorney has the papers or money of the client, which the attorney refuses to deliver). In any event, there must be some type of adjudication before an attorney may foreclose on its lien, however summary. This court has held that an adjudication of any attorney’s lien must, at a minimum, afford the client an evidentiary hearing with adequate notice. See ***Seawest Inv. Associates***, 141 Wn. App. at 314-15, ¶¶ 21, 23 (approving of

a procedure that provided the client with an evidentiary hearing after three months to allow for time to conduct discovery and prepare for the hearing). Even in the summary proceeding authorized by RCW 60.40.030(2), our courts have required an evidentiary hearing to resolve disputed factual issues in a challenge to an attorney lien. See *Krein v. Nordstrom*, 80 Wn. App. 306, 308-09, 310, 908 P.2d 889 (1995) (the trial court properly allowed for a one-half day trial where live testimony was taken in addition to consideration of affidavits). Here, there was no determination that any fees and costs were owed to ELM, and no notice to MacDonald that ELM would seek to foreclose its attorney's lien in this lawsuit.

ELM does not address the merits of MacDonald's choice of law argument. Conceding that its attorney lien could not attach to real property, ELM argues that its attorney's lien attached not to real property, but to MacDonald's interest in a California promissory note that was secured by California real property, whose proceeds ELM seized. (Resp. Br. at 21). Even if ELM is correct, however, the superior court could not order a California resident to turn over proceeds from the payment of an obligation owed by another California resident, that were being held by California counsel, and

received as part of a settlement with other California litigants, based on an attorney's lien allegedly covering as costs legal services performed in California.

ELM does not deny that no lien could be established under California law, under which an attorney's lien can only be created by contract, and not by "the mere fact that an attorney has performed services in a case." See *Fletcher v. Davis*, 33 Cal.4<sup>th</sup> 61, 90 P.3d 1216, 1219 (2004). Instead, ELM complains that MacDonald "cites only one authority," *Plummer v. Great Northern Ry. Co.*, 60 Wash. 214, 110 P. 989 (1910), for the principle that California law governs ELM's rights to foreclose its attorney's lien. (Resp. Br. 19) In *Plummer*, in an action brought in Washington by Washington attorneys against former clients, our Supreme Court held that a Washington attorney lien could not be satisfied from payment from settlement proceeds when the underlying action on behalf of the client was brought in British Columbia, where attorney's liens are not allowed. 60 Wash. at 215, 217. ELM does not substantively challenge the *Plummer* Court's choice of law analysis, and cites to no authority that would authorize the application of Washington's attorney's lien statute to property

located out-of-state, for “costs” incurred out-of-state. (See Resp. Br. 19-20)

ELM also contends that MacDonald waived any challenge to the superior court’s authority to foreclose its lien because, in his answer to ELM’s complaint, MacDonald admitted that King County, Washington was the proper venue and the superior court had jurisdiction. (Resp. Br. 19, *citing* CP 3-4, 6-7) Because ELM never pleaded the attorney lien in its complaint, MacDonald had no reason to raise a choice of law issue in his answer. (See CP 3-5) MacDonald consented to jurisdiction and venue in ELM’s claim for a money judgment, not an action to foreclose an attorney’s lien or to exercise *in rem* jurisdiction over property in California. When ELM finally cited RCW 60.40.010 as a basis for entry of the superior court’s order, MacDonald promptly disputed the application of Washington’s lien statute to the property that was located in California. (CP 224-26)

There is no legal authority to support the superior court’s prejudgment order compelling a California resident to turn over proceeds from the sale of California real property as a result of a purported attorney’s lien. This court should reverse the order and

direct restitution of any funds paid to ELM pending an adjudication of MacDonald's liability and entry of an enforceable judgment.

**5. The Court Could Not Order MacDonald To Pay Money Under RCW 4.44.480 Because His Liability Was Not "Admitted" And The Funds Were Not The "Subject Of The Litigation."**

Recognizing that the superior court never adjudicated the validity of its attorney's lien, ELM attempts to bootstrap its lien foreclosure argument by citing, for the first time on appeal, RCW 4.44.480, (Resp. Br. 13-15), which provides that if a party "admit[s]" in a "pleading or examination" that he or she "has control of any money, or other thing capable of delivery, which being the subject of the litigation . . . belongs or is due to another party," the court may order the party to pay the money or deposit the money into the court registry. This statute, by its plain language, does not apply here.

First, MacDonald did not "admit" that that he owed any money to ELM. He denied liability because ELM's fee agreement violated public policy, because ELM breached its fiduciary duty to MacDonald, and because ELM had not satisfied a contractual condition to the filing of a lawsuit against its former client – an

appraisal because the parties disputed the value of MacDonald's settlement. (CP 7)

Second, the note proceeds, which MacDonald was ordered to pay to ELM, were not the "subject of the litigation." ELM's complaint did not assert any interest in the note, nor an interest in any real or personal property received by MacDonald as part of his settlement with his brother. ELM did not sue to foreclose an attorney's lien. ELM sued for money damages for the amount it claimed it was owed under a contingent fee agreement. (CP 3-5)

RCW 4.44.480 does not purport to supersede the Civil Rules' requirements for adjudicating disputes. "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both. If they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." ***Putman v. Wenatchee Valley Medical Center, P.S.***, 166 Wn.2d 974, 980, ¶ 10, 216 P.3d 374 (2009). If there were no genuine issue of material fact regarding MacDonald's liability to ELM, the superior court should have followed CR 56 and entered a partial summary judgment. If MacDonald in his answer "admitted" liability within the meaning of

RCW 4.44.480, ELM could have moved under CR 12 for judgment on the pleadings. RCW 4.44.480 does not authorize the superior court to order MacDonald to pay money to ELM on its disputed claim without a judgment procured following some form of adjudication on the merits. ***Rainier National Bank v. McCracken***, 26 Wn. App. 498, 510, 615 P.2d 469 (1980), *rev. denied*, 95 Wn.2d 1005 (1981).

In ***Rainier National Bank***, the plaintiff bank claimed it was owed money held by defendant as the proceeds from the sale of real property. The bank claimed that the money had been fraudulently transferred to the defendant by the defendant's son, who owed the bank money. Defendant denied that the bank was entitled to the proceeds from the sale of real property and denied the bank's claim that the property was fraudulently transferred. This court reversed the trial court's pretrial order requiring defendant to deposit an amount equal to the proceeds into the court registry. This court held that because the defendant "at all times claimed title and right to all of those funds, and since that issue had not been judicially determined at the time, the order was invalid." 26 Wn. App. at 510.

ELM's attempt to distinguish ***Rainier National Bank***, on the basis that "it did not involve the broad discretion that a trial court has when enforcing a statutory lien," or by arguing that it was overruled by ***Yamaha Motor Corp., U.S.A. v. Harris***, 29 Wn. App. 859, 631 P.2d 423, *rev. denied*, 96 Wn.2d 1013 (1981) (Resp. Br. 15-16), is without merit. ***Yamaha*** does not even discuss ***Rainier National Bank*** and does not touch upon the case's central holding that a superior court may not order a defendant to pay money to a plaintiff without first adjudicating the merits of the dispute.

In ***Yamaha***, the defendant Harris sold Yamaha snowmobiles, which he had acquired through a security agreement with Yamaha before conveying his Yamaha franchise to a third party and voluntarily terminating his franchise agreement. Yamaha sued Harris to enjoin his sale of Yamaha products, for replevin, and to foreclose on Yamaha's security interest in Harris' inventory and its proceeds. Harris counter-claimed asserting that Yamaha improperly terminated his franchise. 29 Wn. App. at 862. At the hearing on Yamaha's motion for a preliminary injunction, Harris testified that he owed Yamaha money under the security agreement from the sale of Yamaha products. 29 Wn. App. at 863.

As Harris “admitted” in his or “examination” that he had “control of any money or other thing capable of delivery, which being the subject of the litigation . . . belongs or is due” to Yamaha under its security agreement, the case fell squarely within the language of RCW 4.44.480. Division Three affirmed an order directing Harris to pay into the court registry the money he earned from the sale of Yamaha products that were covered by the security agreement. ***Yamaha***, 29 Wn. App. at 863-65.

Here, however, MacDonald denied any liability to ELM, and the proceeds, which MacDonald was ordered to turn over were not the “subject of the litigation” under RCW 4.44.480. The superior court nonetheless ordered payment of money, not to the court registry, but directly to ELM. This was error.

**B. The Superior Court Erred In Holding MacDonald In Contempt Of An Order That Exceeded Its Authority Without Adjudicating MacDonald’s Ability To Comply.**

**1. The Collateral Bar Rule Does Not Prevent MacDonald’s Challenge To The Contempt Order Based On The Invalidity Of The Underlying Order.**

The superior court lacked the authority to enter its May 19 prejudgment order requiring MacDonald to pay over \$131,000 to ELM without any adjudication of the merits. (Reply Arg. § A, *supra*) As a result, the superior court’s contempt order, entered after

MacDonald failed to “immediately” comply with the order, was also erroneous as a matter of law. **Rainier National Bank v. McCracken**, 26 Wn. App. at 510-11.

While ELM argues that “the Court should not even be reviewing the May 19 order” under the collateral bar rule (Resp. Br. 23), this issue was resolved by this court’s Commissioner, who in considering MacDonald’s motion for discretionary review of the May 19 order held that MacDonald’s appeal of the contempt order brought up for review the May 19 order under RAP 2.4(b) because the orders are “inextricably linked.” (July 14, 2009 Comm. Ruling at 3) The Commissioner expressly held that the “collateral bar rule does not preclude review of the May 19 order... [because] MacDonald has timely sought review of both the May 19 and June 3 order.” (July 14, 2009 Comm. Ruling at 3) ELM did not seek to modify this ruling under RAP 17.7 and it is now the law of the case. **State v. Roy**, 147 Wn. App. 309, 315, ¶ 11, 195 P.3d 967 (2008), *rev. denied*, 165 Wn.2d 1051 (2009) (unchallenged appellate court commissioner’s ruling becomes law of the case).

In any event, the Commissioner correctly held that the collateral bar rule has no application where a party is not engaged

in a “collateral” attack on an antecedent order but has timely challenged both the contempt and the order upon which it is based. The purpose of the collateral bar rule is to prevent collateral attacks on a valid final judgment or order in a contempt proceeding. “The proper method of challenging the correctness of an adverse ruling is by an appeal and not by disobedience.” ***Dike v. Dike***, 75 Wn.2d 1, 8, 448 P.2d 490 (1968). But when, as here, a party timely challenges the underlying order contemporaneously with the contempt order, the collateral bar rule does not preclude appellate review of an underlying order in a contempt proceeding. See ***Rainier National Bank v. McCracken***, 26 Wn. App. at 510-11, 516 (court reversed the contempt order after holding that a pre-trial order summarily requiring defendant to deposit funds into court registry was invalid); ***Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.***, 61 Wn. App. 725, 744, 812 P.2d 488 (1991) (court reversed contempt order after holding that discovery order was “too broad”).

Moreover, MacDonald’s challenge to the May 19 order is not based on an argument that it was merely “erroneous,” but that it exceeded the court’s authority and violated his constitutional right

to due process of law. Disobedience of an order which the court lacked the power to make cannot constitute contempt. See e.g. **State v. Turner**, 98 Wn.2d 731, 738-39, 658 P.2d 658 (1983) (holding that truants were not in contempt because the court had no authority to either impose fines on truants or order them to attend school); **State v. Coe**, 101 Wn.2d 364, 372, 374, 679 P.2d 353 (1984) (reversing contempt when the trial court's prior restraint order was patently invalid).

**2. The Superior Court Erred In Finding MacDonald In Contempt Because He Lacked The Ability To Comply With The Order Requiring Him To Pay Money To ELM.**

Regardless of the validity of the May 19 order, the superior court erred in finding MacDonald in contempt because he did not have the present ability to comply with the court's prejudgment order requiring him to turn over the proceeds from the sale of the Dixon property to ELM. (CP 485-88) MacDonald's inability to comply with the order was an affirmative defense to contempt. **Britannia Holdings Ltd. v. Greer**, 127 Wn. App. 926, 933-34, ¶ 17, 113 P.3d 1041 (2005), *rev. denied*, 156 Wn.2d 1032 (2006). The superior court erred in refusing to consider it.

MacDonald did not have possession or control of the proceeds that he was directed to pay to ELM when the court entered its May 19 order. He could not therefore fully comply with it. Contrary to ELM's assertion, MacDonald did not "create[ ] the alleged inability" to comply with the court's May 19 order. MacDonald expended the funds in the normal course of business before he even had notice of ELM's motion to require him to pay. (CP 486-87)

***State v. Phipps***, 174 Wash. 443, 24 P.2d 1073 (1933), cited by ELM (Resp. Br. 24), supports MacDonald's position that he could not be found in contempt when his inability to comply arose before the order was entered. In ***Phipps***, the court held that the defendant was not in contempt of an order requiring him to return money when the money was acquired one year before the contempt action was brought and there was no evidence that defendant did anything to "disable himself from paying the money subsequent to the initiation of the original proceeding." 174 Wash. at 446.

Contrary to ELM's claim, MacDonald never agreed to hold *all* of the proceeds "in abeyance" before the court issued its order.

(Resp. Br. 25) Instead, consistent with the disputed fee agreement, MacDonald agreed to retain 10% of the proceeds in trust, while the fee dispute was pending. (See CP 34: "if the distribution is instead paid directly to you, you shall immediately pay 10% of the money to ELM"; CP 488) However, by the time the May 19 order was entered, a substantial portion of the proceeds had been paid to third parties. (See CP 487-88)

ELM makes much of the fact that in addition to the \$13,125 held in trust, MacDonald had \$37,952.50 he retained in his checking account that had not yet been expended. (Resp. Br. 25) But the fact that some portion of the funds was still in his possession, does not bear on MacDonald's ability to pay over \$131,000 as required by the superior court in its May 19 order. MacDonald explained that he had been trying "to secure additional funds to either post a supersedeas bond for the appeal [of the pretrial order if discretionary order was granted] or fulfill the terms of the order." (CP 488)

Finally, the superior court could not bind third parties to the contempt order for funds that they received before the order compelling MacDonald to turn over funds to ELM was entered.

MacDonald paid his attorneys from the proceeds he received under the promissory note, while retaining 10% of those funds, which ELM might receive under the disputed fee agreement. At the time the attorneys received these funds there was no order limiting MacDonald's use of these funds, and the attorneys could not be bound by an order, which was not entered at the time, and for which they obviously had no notice. ***Stella Sales, Inc. v. Johnson***, 97 Wn. App. 11, 20, 985 P.2d 391, *rev. denied*, 139 Wn.2d 1012 (1999) (nonparty may only be held in contempt for violating a court order, if the court finds that the person had actual knowledge of the order).

Thus, contrary to ELM's argument, the attorneys were "good faith transferees" when they received the funds. (Resp. Br. 27) The fact that the attorneys had notice of ELM's claimed attorney's lien is of no consequence (Resp. Br. 27-28), since the validity of the lien had not yet been determined and MacDonald could not have been required to turn over these funds to ELM. (See Reply Br. Arg. § A.4) The attorneys properly accepted payment from the proceeds, especially in light of the fact that MacDonald retained 10% of the proceeds as required by the disputed fee agreement.

This court must vacate that portion of the superior court's order that purports to bind MacDonald's attorneys.

## II. CONCLUSION

The superior court's prejudgment order directing MacDonald to immediately deliver funds to his former attorneys without first adjudicating the merits of the underlying claim on which the payment was predicated violates fundamental principles of due process. The superior court compounded its error by holding the client in contempt despite evidence that MacDonald lacked the present ability to comply with the order. This court should reverse, vacate the order of contempt, and direct full restitution to MacDonald.

Dated this 22nd day of February, 2010.

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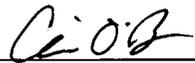
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 22, 2010, I arranged for service of the Reply Brief of Petitioner/Appellant, to the court and to counsel for the parties to this action as follows:

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**DATED** at Seattle, Washington this 22nd day of February, 2010.

  
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