

64036-4

64036-4

NO. 64036-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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ALLAN PARMELEE, APPELLANT;

v.

STATE OF WASHINGTON, RESPONDENT.

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COURT OF APPEALS  
STATE OF WASHINGTON  
MAY 11 11:17 AM '17

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. DID THE TRIAL COURT CORRECTLY ENTER AN ORDER DENYING PARMELEE'S CLAIM OF EXEMPTION BECAUSE IT WAS NOT TIMELY SERVED AS REQUIRED BY RCW 6.27.160(1) AND BECAUSE PARMELEE'S CLAIM OF EXEMPTION CONTAINED NO VALID BASIS UNDER APPLICABLE STATUTES TO EXEMPT FROM GARNISHMENT THE FUNDS HELD BY THE DEPARTMENT OF CORRECTIONS?
2. RELYING ON THE ORDER DENYING PARMELEE'S EXEMPTION CLAIM IN THE GARNISHMENT SOUGHT BY THE SUPERIOR COURT CLERK AND KING COUNTY, DID THE TRIAL COURT CORRECTLY SIGN THE JULY 1, 2009 JUDGMENT AND ORDER TO PAY?
3. DID THE TRIAL COURT PROPERLY REJECT PARMELEE'S MOTION FOR RECONSIDERATION BECAUSE THE REQUIREMENTS OF RCW 6.27.160 DID NOT REQUIRE THE COURT TO DISMISS THE GARNISHMENT?
4. SHOULD THIS COURT REJECT PARMELEE'S REQUEST FOR ATTORNEYS FEES BECAUSE NO VALID BASIS EXISTS FOR THE REQUEST?

B. STATEMENT OF THE CASE

Appellant Alan Parmelee ("Parmelee") has appealed the garnishment Judgment and Order to Pay ("Judgment") and the denial of the motion for reconsideration signed by the trial court. CP 60-63. This judgment relates to the writ of garnishment for funds the Washington State Department of Corrections ("DOC") owed to Parmelee. CP 9-10. On 1/4/2008 the King County Superior Court Clerk ("Clerk"), on behalf of judgment creditors, and

King County ("County"), as a judgment creditor for the legal financial obligations owed under the criminal judgment, applied for a writ of garnishment against the funds held by the DOC and included the address of W-400 516 Third Avenue, Seattle, WA 98104. CP 9-10. The underlying judgment for this writ was Parmelee's criminal judgment in King County Superior Court Cause No. 02-1-07183-6. The writ was issued on 1/4/08 and served on Alan Parmelee and the DOC. CP 85-89. The DOC filed an answer to the writ. CP 22-23. On 1/30/08 Parmelee filed a claim of exemption asserting that the funds held by the DOC were exempt from garnishment for a number of reasons. CP 24-25. The claim of exemption dated 1/30/08 indicated that it was mailed on that date, but did not identify a specific mailing address. CP 24-25. Counsel for Clerk and County had not received the pleading as of 2/13/08. CP 171-172. Parmelee's counsel confirmed that service was made by delivery and that he did not deliver the claim of exemption to the W-400 address. CP 171, CP 106, CP 124-125. The claim of exemption was not timely received by counsel. CP 124-163.

After the statutory time period for objecting to the claim of Exemption had passed, counsel for Clerk and County was notified

by Parmelee's counsel that the claim of exemption had been filed. CP 171-173. Counsel for County and Clerk filed an Objection to the Claim of Exemption and noted a date for a hearing on the exemption claim. CP 92-99. Parmelee filed a response to Plaintiff's Motion for Garnishment raising a number of arguments, but did not argue that the Clerk and County waived their right to object to the claim of exemption. CP 106-123. After a hearing, Judge Michael Fox signed an order denying the claim of exemption.

On 6/10/08, Parmelee filed with Division I of the Court of Appeals an appeal of that order. CP ---. The appeal was subsequently dismissed on procedural grounds. CP ---. After the dismissal Clerk and King County served on the attorneys in this garnishment a proposed judgment, along with a note for presentation. CP 181-184. In response, Parmelee's attorney sought to withdraw from representation of Parmelee in the garnishment and moved for an extension of time. CP 64-65.

At the hearing, Judge Fox denied the request for an extension of time; however, Parmelee has not appealed this decision. CP 173. Parmelee's attorney voluntarily withdrew his request to withdraw and argued against the proposed judgment. CP 66-67. Judge Fox rejected Parmelee's arguments and signed the

judgment and order to pay. CP 173, 57-58. Parmelee's attorney filed a motion for reconsideration. CP 51-55. Without further briefing, Judge Fox denied the motion for reconsideration and signed the final judgment and order to pay. CP 63. On 8/17/09, Parmelee filed a notice of appeal. CP 60-63.

C. ARGUMENT

1. THE STANDARD OF REVIEW FOR THE TRIAL COURT'S DECISIONS IN THIS CASE IS A MANIFEST ABUSE OF DISCRETION.

Parmelee challenges several orders of the trial court on appeal, including a motion for reconsideration. The standard of review for issues related to Parmelee's motion for reconsideration is a manifest abuse of discretion. Lian v. Stalick, 106 Wn.App. 811, 824, 25 P.3d 467 (2001).

2. RELYING ON THE ORDER DENYING PARMELEE'S EXEMPTION CLAIM IN THE GARNISHMENT SOUGHT BY THE SUPERIOR COURT CLERK AND KING COUNTY, THE TRIAL COURT PROPERLY SIGNED THE JUDGMENT AND ORDER TO PAY.

a. The trial court properly determined that Parmelee did not timely serve a claim of exemption at the address on the writ of garnishment as required by RCW 6.27.160.

Garnishment is a statutory procedure providing a method for judgment creditors to collect on a valid judgment. See, RCW 6.27

et seq. Washington courts have held that strict compliance with the requirements set forth in the statute is required. Watkins v. Peterson Enterprises, Inc., 137 Wn. 2d 632, 640, 973 P.2d 1037 (1999). RCW 6.27160 (1) allows a party served writ of garnishment to file a claim asserting that the funds subject to the writ are exempt from garnishment, but must do so as required by the statute properly and within the required time period. That statute provides, in relevant part:

(1) A defendant may claim exemptions from garnishment in the manner specified by the statute that creates the exemption or by delivering to or mailing by first class mail to the clerk of the court out of which the writ was issued a declaration in substantially the following form or in the form set forth in RCW 6.27.140 and mailing a copy of the form by first class mail to the plaintiff or plaintiff's attorney at the address shown on the writ of garnishment, all not later than twenty-eight days after the date stated on the writ except that the time shall be extended to allow a declaration mailed or delivered to the clerk within twenty-one days after service of the writ on the garnishee if service on the garnishee is delayed more than seven days after the date of the writ. (Emphasis added)

In his brief, Parmelee concedes that he did not serve the claim of objection to W-400 King County Prosecuting Attorney's Office, the address listed in the writ of garnishment, as required by RCW 6.27.160(1). Rather Parmelee asserts that he substantially complied with the statute when his counsel hand delivered the

pleading to a different address location at the office. Parmelee's contention that service to the criminal division because the case is a criminal one, is incorrect. A garnishment action is a civil matter. *Robb v. Kaufman*, 81 Wn.App. 182, 186, 913 P2d 828 (1996) (civil rules apply to garnishment) Parmelee's failure to serve the claim of exemption to the address listed on the writ is troubling because it was not received by counsel and because the claim of exemption triggered a short deadline for a timely response by the Clerk and County. In addition, the language in the statute does not appear to provide for hand delivery of the pleading.

Parmelee is incorrect to assert substantial compliance with the statutory requirements for service of his claim of exemption, because case law does not support his position. The Supreme Court has held that strict compliance with the express procedures in the garnishment statute is required. *Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 973 P.2d 1037 (1999). In that case, the court rejected a judgment creditor's argument that its attorney's fees and costs could be recovered from a judgment debtor where no judgment was obtained. The *Watkins* court analyzed the language in the statute and held that in order to recover attorney's fees and costs against a judgment debtor, the

judgment creditor must obtain a judgment as required by the garnishment statute. 137 Wn.2d at 648. Because RCW 6.27.160 sets out a specific procedure for service, this court should reject Parmelee's argument that serving the claim of exemption at a different address than the one listed on the writ. Requiring actual compliance with this service requirement is warranted given the short amount of time prescribed in RCW 6.27.160 to respond to a claim of exemption. Because strict compliance with the procedures in the garnishment statute is required, this court should affirm that the trial court's entry of the order denying Parmelee's claim for exemption. Watkins, 137 Wn.2d at 640.

b. Parmelee's failure to assign error to the court's decision on the merits of Parmelee's exemption claim and Parmelee's failure to provide argument or legal authority precludes this court's consideration of the issue.

The order denying Parmelee's claim for exemption shows that the trial court considered Parmelee's claim for exemption on the merits and determined there was no legal basis for Parmelee's claim that the funds held by the Department of Corrections was exempt from garnishment. CP 50. In his brief Parmelee suggests that this court address the merits of his claim of exemption on appeal. Brief p. 9. However, Parmelee has failed to provide a

sufficient basis for this court to consider this argument as required by RAP 10.3(a) (4). Notwithstanding Parmelee's assignment of error to the trial court's entry of the April 8<sup>th</sup>, 2008 order denying Parmelee's exemption claim, he has not identified any legal issue concerning the trial court's determination on the merits of the exemption. Neither does his brief provide argument, citations to legal authority, or to the relevant parts of the records in support of this aspect of the error as required by RAP 10.3(a) (4). His failure to comply with the appellate court rules limits this court's ability to review this issue. Idahosa v. King County, 113 Wn.App. 930, 55 P.3d 657 (2002), review denied, 149 Wn.2d 1011. As a result, this court should reject the suggestion and affirm the trial court's order denying the claim for exemption on the merits.

c. Parmelee's waiver argument based on the failure to object to the claim of exemption in a previous garnishment does not apply as the parties to the two garnishment actions are not the same.

Throughout his brief Parmelee repeatedly identifies the plaintiffs in the garnishment as the State. He fails to recognize that the garnishment order appealed in this case was sought by the King County Superior Court Clerk and County, a judgment creditor,

not the State of Washington. This distinction means that his waiver argument is not supported by the facts in the record.

RCW 9.94A.760 authorizes the Superior Court Clerk and a judgment creditor, such as King County, to collect any legal financial obligation owed in a criminal case in through a writ of garnishment. In State v. Wiens, 77 Wn.App. 651, 894 P.2d 651, 894 P.2d 569 (1995) the Court of Appeals approved this process and the jurisdiction in the underlying criminal case to pursue the garnishment. Wiens, 77 Wn.App. at 656. The Clerk and County applied for the writ of garnishment to collect the outstanding legal financial obligations of Parmelee under the criminal case. CP 9-10. They did not apply for the prior writ of garnishment referenced by Parmelee. CP 1-2. Parmelee's attempt to blur this distinction is not supported by the facts and should be rejected by this court\.

Waiver requires that a party intentionally relinquish a known right and requires unequivocal acts or conduct evincing an intent to waive a right. TMT Bear Creek Shopping Center, Inc, v. Petco Animal Supplies, 140 Wn.App. 191, 207, 165 P.3d 1271 (2007). Parmelee's argument that the dismissal of a prior garnishment waives the Clerk and County's right to object to Parmelee's claim of exemption is not supported by Washington case law.

Parmelee's reliance on Bour v Johnson, 80 Wn.App. 643, 910 P.2d 548 (1996) is misplaced. In that garnishment case the garnishee defendant failed to answer the writ of garnishment and was subject to a default judgment. In its motion to vacate the default judgment the garnishee defendant argued that the superior court had no subject matter jurisdiction because a federal statute exempted the funds from garnishment. The Bour court held that while a valid defense to the garnishment existed, the garnishee defendant waived the right to assert the defense by failing to answer the writ. The case does not, however, stand for the proposition that a third party's failure to assert a defense may result in the waiver of that defense by another party.

Neither does Camp Finance, LLC v. Brazington, 133 Wn.App. 156, 135 P.3d 946 (2006), a case analyzing the waiver of affirmative defenses, support Parmelee's case. As in Bour, the waiver was premised on the failure of the party to act (failure of plaintiff to object to a sheriff's sale). Camp Finance 133 Wn. App. at 166. However, as discussed above, Parmelee's waiver argument cannot apply here because the Clerk and County were not party to the prior garnishment action.

3. RCW 6.27.310 DID NOT REQUIRE DISMISSAL OF THE GARNISHMENT WHEN PARMELEE'S MOTION FOR RECONSIDERATION WAS PENDING BEFORE THE COURT.

RCW 6.27.310 directs the court to dismiss a garnishment under certain circumstances. Although Parmelee argues that these statutory requirements had been met, the facts do not support his position. To the extent this statute applied in this case, Parmelee has failed to cite to the record on appeal to show that any written notice to Clerk and County was made prior to the trial court's entry of the Judgment and Order to Pay on July 1, 2009. Because Parmelee failed to present such evidence to the trial court at the hearing, the court was not required to dismiss this garnishment, because it was not required under the specific terms of the statute.

Further, the request for dismissal was part of Parmelee's motion for reconsideration. By that time the judgment had been signed by the trial court and the garnishment was pending only because of Parmelee's motion for reconsideration. It is disingenuous for Parmelee to assert that the statute required the trial court to dismiss this action when the judgment had already been signed by the trial court. Whether the term "shall" is interpreted as directory or mandatory depends on legislative intent and will be interpreted as directory when a literal reading would

frustrate the legislative purpose of the statute. Burr v. Lane, 10 Wash.App. 661, 517 P.2d 988 (1974). Frank v. Washington State Dept. of Licensing, 94 Wn.App. 306, 972 P.2d 491 (1999). RCW 6.27.310, by its language is designed to provide the court a method to dismiss stale garnishments when no action had occurred in the case or if notice is provided to the court that the garnishment is still pending. The facts here did not warrant dismissal of the writ.

At the presentation hearing no evidence was presented that Clerk and County received notice providing that the garnishment would be dismissed absent further action. Because the trial court was fully aware that the garnishment was pending, to argue that Clerk and County were required to file an affidavit to demonstrate to the court of a fact the court was already aware turns form over substance. The purpose of this statute did not require dismissal when entry of a judgment was being considered by the court.

Parmelee raised the issue that the garnishment should be dismissed pursuant to this statute in his motion for reconsideration, where the King County Local Court Rule 59(b) does not allow a response unless requested by the court. Clerk and County should not be penalized for failing to notify the court that the case was pending when it was not allowed to respond to the motion for

reconsideration and the trial court was already aware that the garnishment was pending. Given the facts here, the trial court did not abuse its discretion by not dismissing the garnishment action and denying Parmelee's motion for reconsideration.

4. NO VALID BASIS EXISTS FOR PARMELEE'S CLAIM FOR ATTORNEY'S FEES ON APPEAL.

a. Parmelee has failed to show a lack of good faith to warrant an award of attorney's fees under RCW 6.27.160(2).

Although he was not the prevailing party below, Parmelee has requested an award of attorney's fees based on RCW 6.27.160(2) making the bald assertion that the Clerk and County did not apply for the writ of garnishment in good faith. His sole support for this contention is the fact that another party - the State of Washington - who was also authorized to pursue a garnishment against the same funds had not challenged Parmelee's claim of exemption in a prior garnishment. Nor has he cited any legal authority to indicate that one is acting in bad faith by exercising a right to collect on a judgment. RCW 9.94A.760 authorizes Clerk and County to pursue collections against Parmelee. The facts do not support Parmelee's allegation of bad faith and his request for attorney's fees RCW 6.27.160(2) should be rejected.

b. Case law does not support Parmelee's request for attorney's fees based on equity.

Contrary to Parmelee's arguments, the rationale for awarding attorney's fees to dissolve a wrongly issued injunction or restraining order do not apply to an appeal of a judgment in a garnishment. The court in Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1966) in awarding attorney's fees relied upon the fact that no other procedure was available to dissolve the injunction. There is no similarity here where a full statutory procedure is in place to resolve any issues about whether a judgment on a writ of garnishment should be issued. The procedure allows a controversion of the answer and, in addition, the defendant has the opportunity to assert a claim of exemption. RCW 6.27.210 and RCW 6.27.160. Further the garnishment statute contains an attorney's fees provision that outlines the circumstances where attorney's fees are allowed. RCW 6.27.230.

Equity is an extraordinary remedy and requires a showing that the party is entitled to a remedy and that no adequate remedy is available at law. Sorenson v. Pyeatt, 158 Wn.2d 523, 146 P.3d 1172 (2006). No equitable remedy exists to award of attorney's fee for dissolving a judgment in a garnishment, because as noted

earlier, the statute sets out several procedures for resolving issues to prevent the unlawful issuance of a writ. The answer may be controverted or a claim for exemption filed or challenged. The rationale applied in Cecil does not exist in this case. Parmelee's request for attorneys fees based on equity should be rejected.

5. COUNTY AND CLERK REQUEST ATTORNEY'S FEES BASED ON RCW 6.27.160(2).

To the extent this court affirms the trial court's decision concerning the denial of Parmelee's exemption claim, the County and Clerk request attorney's fees under RCW 6.27.160(2).

D. CONCLUSION

For the reasons stated above, this court should affirm the order denying Parmelee's claim of exemption, the judgment and order to pay, and the denial of the motion for reconsideration. In addition, this court should reject Parmelee's request for attorney's fees.

DATED this 1st day of February, 2010.

RESPECTFULLY submitted,

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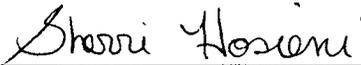
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I declare under penalty of perjury under the laws of Washington  
that the foregoing is true and correct.

Dated this 1<sup>st</sup> day of February, 2010 at Seattle, Washington.

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