

68731-0

68731-0

No. 68731-0-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

WILLARD GIBSON,

Appellant,

v.

MARIE-CLAIRE PAGH

Respondent.

BRIEF OF RESPONDENT

Mark Rising, WSBA #14096
Lauren D. Parris, WSBA # 44064
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Respondent

A handwritten signature in black ink, appearing to be the initials 'JP' or similar, located in the bottom right corner of the page.

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | RESPONSE TO ASSIGNMENT OF ERROR..... | 1 |
| II. | RESTATEMENT OF THE CASE | 4 |
| III. | ARGUMENT | 22 |
| | A. Standard of Review | 22 |
| | B. There Is a Presumption that Funds in an IOLTA Account Are Held for the Client, Not the Attorney | 23 |
| | C. Garnishment of the IOLTA Trust Account Was Proper Because the Advance Fee Deposit Belonged to Gibson | 25 |
| | D. A Plaintiff Is Allowed Attorney Fees for Opposing an Unjustified Exemption Claim Raised through a Garnishee's Answer..... | 26 |
| | E. There Is No Statutory Cap on Attorney Fees Related to a Controversion Hearing in Garnishment Proceedings .. | 28 |
| | F. Gibson Is Not Entitled to Fees on Appeal | 29 |
| IV. | CONCLUSION | 30 |

TABLE OF AUTHORITIES

Cases

| | |
|---|----|
| <i>Am. Legion Post # 149 v. Wash. State Dep't of Health,</i> 164 Wn.2d 570, 192 P.3d 306 (2008)..... | 27 |
| <i>Caplan v. Sullivan,</i> 37 Wn. App. 289, 679 P.2d 949 (Div.1 1984)..... | 29 |
| <i>Cockle v. Dep't of Labor & Indus.,</i> 142 Wn.2d 801, 16 P.3d 583 (2001)..... | 28 |
| <i>Hubbard v. Dep't of Labor & Industries,</i> 140 Wn.2d 35, 992 P.2d 1002 (2000)..... | 22 |
| <i>Johnson v. Kittitas County,</i> 103 Wn. App. 212, 11 P.3d 862 (2000)..... | 22 |
| <i>Mottet v. Stafford,</i> 94 Wash. 572, 162 P.1001 (1917) | 17 |
| <i>State v. Azpitarte,</i> 140 Wn.2d 138, 995 P.2d 31 (2000)..... | 22 |
| <i>State v. Watson,</i> 146 Wn.2d 947, 51 P.3d 66 (2002)..... | 23 |

Unreported Cases

| | |
|--|--------|
| <i>Mayers v. Bell,</i> 167 Wn. App. 1039, Not Reported in P.3d (Div. I 2012)..... | 26, 30 |
|--|--------|

State Statutes

| | |
|-----------------------|--------|
| RCW 4.84.185 | 30 |
| RCW 6.27.005 | 25 |
| RCW 6.27.030 | 29 |
| RCW 6.27.090(2) | 28, 29 |
| RCW 6.27.120 | 14, 17 |

| | |
|-----------------------|-------------------------------|
| RCW 6.27.120(1) | 11 |
| RCW 6.27.160(2) | 1, 2, 4, 5, 19, 26-27, 29 |
| RCW 6.27.190(3) | 9 |
| RCW 6.27.200 | 1, 2, 4, 6, 10, 19, 29 |
| RCW 6.27.210 | 11, 26 |
| RCW 6.27.220 | 11, 12, 13 |
| RCW 6.27.230 | 1, 2, 3, 4, 6, 19, 26, 28, 29 |
| RCW 60.40.010 | 15 |

Other Authorities

| | |
|---------------------------|--------------|
| CR 11 | 14 |
| CR 60 | 20 |
| RAP 14.2 | 29 |
| RAP 14.3 | 29 |
| RAP 18.1 | 29 |
| RAP 18.9 | 21 |
| RPC 1.15, Comment 2 | 23 |
| RPC 1.15A | 1, 2, 14, 15 |
| RPC 1.15A(h) | 1, 23, 24 |

No. 68731-0-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

WILLARD GIBSON,

Appellant,

v.

MARIE-CLAIRE PAGH

Respondent.

BRIEF OF RESPONDENT

Mark Rising, WSBA #14096
Lauren D. Parris, WSBA # 44064
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Respondent

I. RESPONSE TO ASSIGNMENT OF ERROR

Respondent Pagh responds to the assignment of error claimed by Appellant Gibson as follows:

1. The trial court did not err in ordering a judgment on the 11/28/11 Writ of Garnishment because the advance fee deposit belonged to Gibson and attorney fees were properly awarded under RCW 6.27.160(2), under RCW 6.27.200 and under RCW 6.27.230 against Garnishee's principal, Gibson.

2. The trial court did not err in finding that no bill for legal services had been produced at the time the Writ was served because CP 45-47 are not evidence of notification sent to Gibson of legal services rendered as required by RPC 1.15A(h)(3) and Garnishee offered no evidence that a bill had been prepared and sent to Gibson or the Gibson had authorized payment of monies in the trust account prior to service of the Writ of Garnishment.

3. The trial court did not err in finding that RPC 1.15A had not been followed because the Garnishee offered no evidence that it sent Gibson notification of the bill for legal services rendered and in whatever case Garnishee's fee agreement admittedly did not allow Garnishee to remove funds from Gibson's trust account at the time the Writ of Garnishment was served.

4. The trial court did not err in finding that funds in the attorney trust account remained presumptively the client's because RPC comments specifically state that advanced fee deposits are client funds and under Garnishee's fee agreement Garnishee had no right to take client funds at the time the Writ of Garnishment was served.

5. The trial court did not err in finding the funds in the IOLTA account at the time the Writ was served were subject to garnishment because the funds were client funds under Garnishee's fee agreement with Gibson and under RPC 1.15A.

6. The trial court did not err in awarding attorney fees to Pagh and against Gibson under RCW 6.27.160(2), RCW 6.27.200 and RCW 6.27.230 because at all times Garnishee was acting as Gibson's agent in failing to properly answer the Writ of Garnishment and in asserting Gibson's exemption claim thereby forcing Pagh to controvert Garnishee's Answer to the Writ of Garnishment and causing Pagh to incur attorney fees and costs.

7. The trial court did not err in denying Gibson's Motion for Reconsideration.

8. The trial court did not err in finding that the Garnishee (Gibson's attorney) had in its possession or control funds of Gibson because under RPC 1.15A an advanced fee deposit in an IOLTA trust

account belongs to the client and under Garnishee's fee agreement with Gibson Garnishee was not authorized to use funds in the account at the time the Writ of Garnishment was served.

9. The trial court did not err in finding that Respondent Pagh defended her Controversion of Garnishee's Answer to the Writ of Garnishment and thus was entitled to attorney fees and costs under RCW 6.27.230.

10. The trial court did not err in awarding a \$5,000 judgment against the Garnishee because \$5,000 was in an IOLTA trust account being held for Gibson at the time the Writ of Garnishment was served and after service of the Writ, Garnishee wrongfully transferred those funds to itself.

11. The trial court did not err in finding that RCW 6.27.230 does not preclude an award of fees to Respondent Pagh as prevailing party in defending the controversion of Garnishee's Answer to the Writ of Garnishment and that Gibson was the proper judgment debtor for such award because Garnishee at all times acted as Gibson's agent.

12. The trial court properly awarded attorney fees in the amount of \$4,164 against Gibson as the principal of Garnishee in the controversion because the court can award reasonable compensation for attorneys under RCW 6.27.230.

13. The trial court did not err in not applying the statutory cap on garnishment fees to the fees awarded for controverting the Garnishee's Answer to the Writ because that cap does not apply to fee awards under RCW 6.27.200 (actions that need to be taken because of Garnishee's failure to answer), 6.27.230 (prevailing party in controversion proceedings), or RCW 6.27.160(2) (wrongful assertion of exemption claim).

II. RESTATEMENT OF THE CASE

A. The Case on Appeal

On February 15, 2011, King County Superior Court Judge James Doerty entered a money judgment against appellant Gibson and in favor of respondent Pagh in King County Superior Court Case No. 10-3-00907-1 SEA. The principal amount of the judgment was \$45,876.48.

Gibson engaged the Law Offices of Michael W. Bugni & Associates, PLLC ("Garnishee") on an hourly basis to appeal the February 15, 2011 judgment. Gibson's agreement with Garnishee stated, among other things, that Gibson was required to give Garnishee an advance fee deposit that Garnishee would hold and not use to satisfy Gibson's obligation to Garnishee until 15 days after Garnishee billed Gibson for fees and costs. Gibson appealed the judgment, but did not file a supersedeas bond.

Gibson gave Garnishee an advance fee deposit of \$5,000 on November 21, 2011. It appears that the same day, Garnishee sent Gibson a bill for \$2,919.11 for attorney fees and costs through November 21, 2011. CP 98-100. That bill stated that Gibson's \$5,000 trust account balance would not be used to pay the \$2,919.11 Gibson owed until "15 days from the date of this statement" (i.e., 15 days after November 21, 2011). CP 100; compare RPC 1.15A. Eight days later, on November 29, 2011, judgment creditor Pagh served Garnishee with a Writ of Garnishment.

Despite service of the Writ of Garnishment prohibiting Garnishee from transferring funds being held for Gibson, Garnishee paid itself the \$5,000 it was holding in Gibson's trust account. Garnishee then refused to answer the Writ of Garnishment, and Gibson filed numerous documents claiming that the \$5,000 held in trust for him was exempt from garnishment. In subsequent litigation, King County Superior Court Judge Laura Inveen rejected Gibson's exemption claim, granted judgment against Garnishee for the \$5,000 it took from the trust account after service of the Writ of Garnishment, and granted judgment against Gibson for \$4,164 in attorney fees incurred by Pagh as a consequence of Gibson's wrongful assertion of an exemption claim (RCW 6.27.160(2)), control of Garnishee in failing to fully respond to Writ of Garnishment and forcing

Pagh to contravene Garnishee's Answer (RCW 6.27.200 and RCW 6.27.230).

On December 3, 2012, this court issued an Unpublished Opinion in another case vacating the judgment upon which Pagh's garnishment was based. *See*, Case No. 66833-1-I. The same day, Pagh filed a Motion For Stay of Further Proceedings in this appeal pending issuance of a mandate in Case No. 66833-1-I finally deciding the validity of the underlying money judgment. The Court of Appeals denied Pagh's motion for a stay and ordered Pagh to file this response to Gibson's appeal.

B. The February 15, 2011 Judgment

In early 2011, respondent Pagh filed a domestic violence and parenting plan action against appellant Gibson. The trial of Pagh's domestic violence and parenting plan action occurred on February 1, 2011. On February 15, 2011, the trial court granted Pagh a judgment against Gibson in the principal amount of \$45,876.48. CP 11. Gibson appealed the judgment to this court in Case No. 66833-1-I, but did not post any appeal or supersedes bond. On October 18, 2012, Gibson filed a Financial Declaration with this court in Case No. 66833-1-I which stated that he had incurred \$91,778.83 in attorney fees, including \$14,112.49 (in addition to a \$5,000 appeal bond) to appeal this garnishment of \$5,000 in his attorney's trust account.

C. *Gibson's Agreement with Garnishee*

Gibson claims, without offering any admissible evidence, that he hired Garnishee on June 6, 2011 pursuant to the partially redacted “Agreement To Employ Attorney” found at CP 94-96. That agreement clearly states: (i) that Garnishee was being hired on an hourly basis (at an hourly rate \$20 per hour less than allegedly billed) to represent Gibson in the appeal of Case No. 66833-1-I; (ii) that “[i]t is not possible to determine in advance the exact amount of attorney time that will be needed to complete this matter” [CP 94]; (iii) that Gibson will receive a “monthly statement for fees and costs which, unless otherwise agreed, must be paid within 20 days of receipt” [CP 95]; and (iv) that Gibson must maintain at least a \$1,500 “advance deposit” balance in Garnishee’s trust account [CP 95].

Gibson offers no explanation as to why he claims Garnishee was not engaged until June 6, 2011 when the Notice of Appeal filed in this case clearly shows that Garnishee was representing Gibson at least as early as March 30, 2011. CP 137-145. Neither do Gibson or Garnishee offer any explanation as to why Garnishee offers billing records that claim the representation began on or about May 31, 2011 [CP 45], two months after Garnishee filed Gibson’s Notice of Appeal.

Gibson also claims, without offering any admissible evidence, that the partially redacted “Statement No. 8” found at CP 98-100 is an example of a “monthly billing statement.” That document, and two other “special billing statements” Garnishee admits it prepared *for the court* to further its legal argument [CP 80], all contain the following statement:

Please be advised that 15 days from the date of this statement your trust fund balance (if applicable) will be adjusted to pay the balance due on your account. If there are insufficient funds in your account to pay the current balance, please remit any amounts still owing within 20 days or less of your receipt of this invoice. (Emphasis added).

CP 100, 102, 103 (Emphasis added.) Thus, Garnishee’s own bills state very clearly that advance fee deposits being held in the IOLTA trust account were owned by Gibson, not Garnishee.

D. The November 29, 2011 Writ of Garnishment

On November 29, 2011, Pagh served Garnishee with a Writ of Garnishment issued by the Honorable Richard F. McDermott of the King County Superior Court. The Writ stated, in part:

YOU ARE HEREBY COMMANDED, unless otherwise directed by the court, by the attorney of record for the petitioner, or by this writ, not to . . . transfer, or recognize any . . . transfer of, any personal property . . . of the respondent [Gibson] in your possession or control at the time when this writ was served. Any such payment . . . or transfer is void to the extent necessary to satisfy the petitioner’s claim and costs for this writ with interest.

YOU ARE FURTHER COMMANDED to answer this writ by filling in the attached form according to the instructions in this writ and in the answer forms

* * *

IF YOU FAIL TO ANSWER THIS WRIT AS COMMANDED, A JUDGMENT MAY BE ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PETITIONER'S CLAIM AGAINST THE RESPONDENT WITH ACCRUING INTEREST, ATTORNEY FEES, AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE RESPONDENT.

CP 12.

E. Garnishee Files Deficient Answer to Writ of Garnishment

On December 19, 2011, Garnishee served and filed its Answer To Writ of Garnishment ("Answer"). Garnishee's Answer altogether failed to respond to Section I (C) of the Garnishee Answer form prescribed by RCW 6.27.190(3) and served with the Writ of Garnishment. The Answer failed and refused to state whether Garnishee had "possession of or control over any funds . . . of the defendant [Gibson]" and merely stated "See attached letter." CP 15. Likewise, the Answer failed to respond to the court's order requiring that it "list all of defendant's property . . . in your possession or control or to explain any uncertainty about your answers" except to state "See Attached letter." CP 16.

An examination of the letter attached to the Answer reveals: (1) that *Garnishee failed to state whether it had funds or other personal property of Gibson in its possession at the time the Writ of Garnishment*

was served on November 29, 2011¹; (2) that Garnishee claimed that if it had “[a]ny funds” from Gibson such funds were an “advance fee deposit” held in its IOLTA trust account and “Mr. Gibson would have no particular right” to such funds unless and until Gibson requested a return of the funds and that Gibson had made no such request; (3) that Garnishee’s IOLTA trust account “is not subject to a Writ of Garnishment”; and (4) that Pagh’s service of a Writ of Garnishment on Garnishee “is not appropriate, legally or ethically.” CP 17-18.

F. Garnishee Violated Writ of Garnishment

Garnishee’s December 19, 2011 Answer is the ONLY sworn statement or admissible evidence of any kind submitted by Garnishee or Gibson in connection with any proceedings in this garnishment matter. In trial court proceedings following its Answer, and in this appeal, however, Garnishee admits: (a) that, at the time the Writ of Garnishment was served on November 29, 2011, it was holding \$5,000.00 in its IOLTA trust account for Gibson [CP 77, 100, 102]; and (b) that, without the agreement of either Pagh or the trial court, and despite service of the court-ordered

¹ RCW 6.27.200 gives plaintiff [Pagh] the right to obtain a default when a garnishee fails to answer and states that in connection with a subsequent motion to adjust the default judgment amount to the sum actually held by garnishee “plaintiff shall be entitled to a reasonable attorney’s fee for the plaintiff’s response to the garnishee’s motion to reduce said judgment against the garnishee under this proviso and the court may allow additional attorney’s fees for other actions taken because of the garnishee’s failure to answer.” [Emphasis added].

Writ of Garnishment expressly prohibiting Garnishee from transferring any funds of Gibson, it withdrew and paid itself the \$5,000 it was holding in the IOLTA trust account for Gibson [CP 102-103].²

G. Pagh Controverted Answer to Writ of Garnishment

Pursuant to RCW 6.27.210, on January 5, 2012, Pagh served and filed an Affidavit Controverting Answer to Writ of Garnishment. CP 20-24. Pursuant to RCW 6.27.220, Pagh's January 5, 2012 Affidavit Controverting Answer to Writ of Garnishment gave Garnishee the right to respond to the controversion with an "affidavit of the garnishee" within twenty (20) days. RCW 6.27.220 goes on to state that, after the 20 days has passed:

... the matter may be noted by any party for hearing before a commissioner or presiding judge for a determination whether an issue is presented that requires a trial. If a trial is required, it shall be noted as in other cases, **but no pleadings shall be necessary on such issue other than the affidavit of the plaintiff, the answer of the garnishee and the reply of the plaintiff or defendant controverting such answer, unless otherwise ordered by the court.**

RCW 6.27.220 (emphasis added).

² Compare RCW 6.27.120(1) ("From and after the service of a writ of garnishment, it shall not be lawful, except as provided in this chapter or as directed by the court, for the garnishee to . . . transfer, or recognize any . . . transfer of, any personal property . . . belonging to the defendant in the garnishee's possession or under the garnishee's control at the time of such service; and any such payment, . . . or transfer shall be void and of no effect as to so much of said . . . personal property . . . as may be necessary to satisfy the plaintiff's demand.")

H. *Garnishee Failed to File Sworn Statement in Response to Controversion*

Garnishee failed to file an “Affidavit of Garnishee” or other sworn statement pursuant to RCW 6.27.220 in response to Pagh’s Affidavit Controverting Writ of Garnishment. Indeed, Garnishee altogether failed to file *anything* in response to Pagh’s controversion of Garnishee’s response to the Writ of Garnishment. Instead, on January 26, 2012, defendant Gibson filed “Father’s Reply Memorandum Re Writ of Garnishment.” Gibson’s January 26, 2012 Reply claimed that upon receipt of funds “deposited on behalf of Mr. Gibson to Michael W. Bugni & Associates [Garnishee],” such funds “become the property of MWB&A, not Mr. Gibson” [CP 31] and would be subject to garnishment only if deposited into the IOLTA trust account “for some purpose other than payment of legal fees.” CP 32. Gibson submitted as Exhibit 2 to his “Reply” a “billing summary statement” which was admittedly *prepared by Garnishee (not Gibson) for the purposes of arguing to the court* that Garnishee had “earned” (albeit not yet even billed) more money than was in Garnishee’s IOLTA trust account for Gibson on November 29, 2011. CP 34. The “billing statement summary” submitted by Gibson (not Garnishee), however, (i) was not authenticated, (ii) was partially redacted, (iii) had handwriting on it, (iv) was not titled with any reference to

“billing,” and (v) did not show the date a single bill was ever generated or sent to Gibson. CP 45-47. The “billing statement summary” Gibson attached to his “Reply,” however, did admit that Garnishee withdrew \$5,000 from “trust” after being served with the court’s Writ of Garnishment on November 29, 2011. CP 47. Finally, Gibson’s Reply asserted that “sanctions under CR 11 are appropriate against Ms. Willits [Pagh’s attorney at the time] personally and/or Ms. Pagh.” CP 33.

I. Pagh’s Motion on Controversion

On February 3, 2012, Pagh filed a Motion On Controversion Of Answer Of Garnishee pursuant to RCW 6.27.220. CP 1- 47. Pagh’s motion asked the trial court to enter a judgment on Garnishee’s Answer or set a summary judgment hearing to decide whether the \$5,000 that was in Garnishee’s IOLTA trust account when the Writ of Garnishment was served belonged to Garnishee or Gibson. CP 4.

On February 10, 2012, defendant Gibson filed a “Response Opposing Motion On Controversion Of Answer Of Garnishee” [CP 48-55] in which he claimed that “there were no ‘unearned’ funds in the Father’s attorney trust account” when the Writ of Garnishment was served. CP 49. Defendant Gibson’s response went on to demand that, because Gibson had made his “no unearned funds” argument (albeit unsupported by declaration or even a copy of a bill sent to Gibson) in his January 26, 2012

reply (see above), Pagh and her counsel should be sanctioned “under CR 11” and “to compensate the Father for the added cost of litigation the Mother created.” CP 49.

Petitioner’s Reply In Support Of Motion On Controversion Of Answer Of Garnishee was served and filed on February 13, 2012. Pagh’s reply noted that Gibson had not paid Pagh one dime of child support since 2010 [CP 59], Gibson had not paid Pagh anything toward satisfaction of the February 15, 2011 judgment [CP 59], and Gibson had not filed a supersedeas bond as part of his appeal of the February 15, 2011 judgment [CP 57]. CP 56 – 63. Pagh also noted that Gibson’s position on the IOLTA trust account was directly contrary to RPC 1.15A, that Gibson cannot claim that he has no interest in the funds when at the same time he admits that he could get the funds back upon request, and that regardless of whether Gibson now asserts that Garnishee should be deemed to have “earned” the money prior to the work being billed, under RCW 6.27.120 Garnishee was prohibited from transferring the funds after service of the Writ of Garnishment but before the court addressed the issue. CP 56 – 63.

J. The March 2, 2011 Order on Controversion

On March 2, 2012, the Honorable Laura C. Inveen of the King County Superior Court signed her Order On Motion On Controversion Of Answer Of Garnishee. In that order, Judge Inveen ordered that Pagh

should have judgment on the Writ of Garnishment and should be awarded attorney fees. Judge Inveen's order states, in part:

Funds of client Gibson were placed in his attorney's trust account as an advance fee deposit. The attorney performed work for the client. A writ of garnishment stemming from a judgment against the client was served on the law firm. At the time the writ was served, the billing for the attorney's work would have been equal to or greater than the amount of the funds on deposit. However, no bill had been produced, nor had the funds been removed from the account pursuant to the procedures set out by RPC 1.15A.

By way of answer to the writ and attached letter dated December 16, 2011, Gibson's counsel argued the funds, as an advance fee deposit, gave title of the funds to the law firm upon deposit. That legal position is unsupportable, and appears to have been abandoned in the February 10, 2012 Response in which Gibson's counsel asserts the funds had been "earned" at the time of the writ.

RCW 60.40.010 gives attorneys lien priority in limited situations: when (d) and (e) of 60.40.010 applies. Neither subsection of that statute is applicable to the facts at hand. Rather, (b) applies (*...money in the attorney's hands belonging to the client*). The funds remained presumptively the clients so long as they remained in the firm's trust account. The court finds that the funds that remained in the IOLTA trust account at the time the writ was served are subject to garnishment.

Counsel shall note for presentation without oral argument a proposed judgment together with supporting documentation of attorney's fees.

CP 64-66.

On March 12, 2012, Gibson filed a Motion For Reconsideration of Judge Inveen's March 2, 2012 order. CP 74-103. As had been the case since Garnishee's December 19, 2011 Answer to Writ of Garnishment, neither Gibson nor Garnishee filed any declaration or admissible evidence in support of Gibson's Motion for Reconsideration. Furthermore, although Gibson attached what he claimed (without supporting declaration) was his partly redacted "Agreement To Employ Attorney" with Garnishee, CP 77, 94-96, Gibson now referred to the funds in Garnishee's IOLTA trust account as "advance consideration" and "advance payment." CP 77. As is noted above, however, the "Agreement To Employ Attorney" clearly states that Gibson hired Garnishee on an hourly basis, that Gibson agreed it was not possible to determine in advance the amount of attorney fees he may incur, and that Gibson would be billed monthly. CP 94-96.

Gibson also attached what he (again, without supporting declaration or other evidence of authenticity) claimed [at CP 78] was an "individual billing statement" dated November 21, 2011 and denominated "Statement No. 8" [CP 98-100] and two "special billing statements" [CP 80] created for the court specifically to show the value of fees Gibson claimed Garnishee had "earned" through the date the Writ of Garnishment

was served [CP 80]. As is noted above, information on “Statement No. 8,” as well as the two “special billing statements” prepared for the court and denominated “Statement No. 10” and “Statement No. 11” contain “white-out” redactions, “black-out” redactions, and counsel’s marginalia. CP 98-103. No explanation was given for why “Statement No. 9” is missing. Gibson, however, claimed in his January 26, 2012 response (above) [CP 37] and on the unauthenticated “billing summary statement” attached thereto as Exhibit 2 [CP 47] that, after subtracting the \$5,000 Garnishee later removed from the IOLTA trust account, Gibson owed Garnishee \$104.11 at the end of the day the Writ of Garnishment was served. In Gibson’s March 12, 2012 Motion for Reconsideration, however, Gibson claimed that, after subtracting the \$5,000 Garnishee later took from the IOLTA trust account, Gibson owed Garnishee only \$89.17. Regardless, Statement No. 10 [CP 101] plainly shows four entries made after receipt of the Writ of Garnishment (the first entry of which begins “Review Garnishment ...”), and which total \$1,155 in attorney fees. CP 101.³ Thus, Gibson’s claim [at CP 80] that he would eventually owe Garnishee \$89.17 more than the \$5,000 Garnishee removed from the IOLTA trust account for services performed prior to the effective time of

³ Compare RCW 6.27.120 (garnishment effective upon service); *Mottet v. Stafford*, 94 Wash. 572, 162 P.1001 (1917) (garnishment superior to assignment of judgment filed three (3) hours after Writ of Garnishment was served).

the Writ of Garnishment was not even supported by the unauthenticated, redacted, and admittedly manipulated documents Gibson offered.

Gibson's Motion for Reconsideration did not claim, much less offer any evidence, that the redacted and marked-up "special billing statements" labeled "Statement No. 10" and "Statement No. 11" were ever sent to him. Regardless, each one of the "statements" offered by Gibson say that funds being held as "advance fee deposit" in the trust account would not be used to pay Garnishee's bills to Gibson until 15 days after the date of the bill. \$5,000 was in the trust account at the time the Writ of Garnishment was served on November 29, 2011. The \$5,000 in the trust account was received by Garnishee on November 21, 2011 [CP 100], only eight (8) days before the Writ of Garnishment was served. Furthermore, the unauthenticated November 21, 2011 bill to Gibson said \$2,919.11 was "0-30" days and that "your trust fund balance" would not be used to pay "this statement" until 15 days after November 21, 2011 - - i.e., at earliest December 6, 2011. CP 100. Thus, even the unauthenticated, selectively redacted documents offered by Gibson established that, as of November 29, 2011, the day the Writ of Garnishment was served, Garnishee had no right to the \$5,000 in Gibson's trust account.

On March 6, 2012, pursuant to Judge Inveen's March 2, 2012 Order On Motion On Controversion Of Answer Of Garnishee, Pagh filed a

Declaration Of Counsel Regarding Attorney Fees. CP 67-73. Gibson and Garnishee filed their Response To Presentation Re Fees Per 3/2/2012 Order on March 14, 2012. CP 104-118. On March 15, 2012, Pagh filed her Reply To Father's Response To Presentation Re Fees Per 3/2/2012 Order, the Declaration of Lisa Gilmore, and the Declaration of Victoria Van Hof. CP 119-132.

K. Judgment on Answer and Order To Pay

On March 19, 2012, Judge Laura Inveen denied Gibson's Motion For Reconsideration [CP 13-134] and granted Pagh a Judgment On Answer And Order To Pay against Garnishee and Gibson. CP 135-136. Due to the fact that Gibson was claiming that the trust funds were exempt from garnishment and that Garnishee was acting as Gibson's agent throughout the proceedings controverting Garnishee's Answer to the Writ of Garnishment, it was appropriate for the court to award Pagh attorney fees against Gibson (under RCW 6.27.200 and RCW 6.27.230, as Garnishee's principal, and under RCW 6.27.160(2) as a defendant wrongfully asserting an exemption claim). Because Gibson was the principal of the Garnishee answering the Writ of Garnishment and not an innocent victim of challenges by a garnishee, and because Gibson was using Garnishee to assert, without a valid basis, an exemption claim to the funds being held in trust, it was proper that the Court found that RCW

6.27.230 did not bar a cost award against Gibson. The court found that attorney billing records showed \$4,164 in fees were reasonably incurred by Pagh defending her claim to the trust account funds. The Court entered judgment against Garnishee for the \$5,000 it held in its trust account for Gibson at the time the Writ of Garnishment was served and \$4,164 for attorney fees against Gibson. CP 135-136.

L. Unpublished Decision In Case No. 66833-1-1 and Court of Appeals Order To File Respondent's Brief

On December 3, 2012, this Court issued an Unpublished Opinion in Case No. 66833-1-I. A letter from Court Administrator Richard D. Johnson accompanying the Unpublished Opinion dated December 3, 2012 stated:

For the reasons discussed above, we affirm the trial court's order denying CR 60 relief and orders relating to the DVPO and parenting plan/child support actions. We deny fees on appeal. We also vacate the fees and costs awarded by the trial court and remand for an entry of appropriate findings of fact consistent with this opinion.

See also, Unpublished Opinion filed in Case No. 66833-1-I on December 3, 2012 at 41. Because this appeal concerns enforcement of the attorney fee and cost judgment "vacated" in the December 3, 2012 Unpublished Opinion in Case No. 66833-1-I, respondent Pagh immediately asked the Court to stay further proceedings in this case until after any final decision was made on any motion for reconsideration and/or discretionary review

(i.e., the period had lapsed for issuance of a mandate) in Case No. 66833-1-I. *See*, December 3, 2012 Motion For Stay Of Further Proceedings filed by respondent in this case. Given that the Unpublished Opinion in Case No. 66833-1-I is the “law of the case,” respondent has no intention of seeking enforcement of the trial court’s February 15, 2011 judgment until the appropriate court finally resolves the validity of that money judgment. Appellant Gibson did not oppose Pagh’s December 3, 2012 Motion For Stay Of Further Proceedings in this appeal.

On December 19, 2012, respondent Pagh received a letter from Court Administrator Johnson denying respondent Pagh’s Motion For Stay Of Further Proceedings in this case until after issuance of a mandate/final decision in Case No. 66833-1-I. On the same date, Court Administrator Johnson sent counsel a letter stating that the Court would move “to impose sanctions and/or dismiss in accordance with RAP 18.9” on “Friday [sic], December 31, 2012” but that such motion “will be stricken if the respondent’s brief or a motion for an extension of time is filed on or before January 4, 2013.”

Gibson, through his attorneys/Garnishee have filed a motion for reconsideration of the December 3, 2012 Unpublished Opinion in Case No. 66833-1-I.

Respondent Pagh believes that the December 3, 2012 Unpublished Opinion in Case No. 66833-1-I vacating the judgment upon which this garnishment appeal is based constitutes the “law of the case” and that this appeal should be stayed pending issuance of a mandate in that case. If a mandate is issued vacating the February 15, 2011 money judgment, this appeal should be dismissed as moot and without costs to either party. If a mandate is issued upholding the February 15, 2011 money judgment, the stay of this case should be lifted. Nevertheless, given the Court of Appeals’ denial of Pagh’s Motion For Stay Of Further Proceedings and threat to sanction Pagh for *not* filing a response, Pagh has no option but to file this response.

III. ARGUMENT

A. Standard of Review.

When an action turns on the correct interpretation of a statute, the standard of review is *de novo*. *Johnson v. Kittitas County*, 103 Wn. App. 212, 216, 11 P.3d 862 (2000). “The purpose of the statutory interpretation is to effectuate the legislature’s intent.” *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Absent ambiguity, the court relies on the statute’s language alone. *State v. Azpitarte*, 140 Wn.2d 138, 142, 995 P.2d 31 (2000). But, if a statute is ambiguous, the court will apply principles of statutory construction, legislative history, and relevant

case law to assist in interpreting it. *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002).

B. There Is a Presumption that Funds in an IOLTA Account Are Held for the Client, Not the Attorney.

Gibson argues that there is a presumption that an advanced fee deposit held in an IOLTA trust account is owned by the lawyer. Appellant's Brief at 15 ("if client ownership was presumed, funds would be held by the clients"). However, such a presumption is not supported by the RPCs. The RPCs clearly state that advanced fee deposits belong to the client, not the attorney. According to RPC 1.15A(h)(1), no funds belonging to the lawyer may be retained in a trust account. Therefore, it would not have ever been appropriate for the Garnishee to deposit those funds into the IOLTA account if it was presumed to be the firm's money. Moreover, the RPC comments specifically state that:

[c]lient funds include, but are not limited to, the following: **legal fees and costs that have been paid in advance other than retainers and flat fees** complying with the requirements of Rule 1.5(f), funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

Comment 2 to RPC 1.15 (emphasis added).

Gibson claims that an attorney who receives funds from or on behalf of a client has a responsibility to hold those funds in trust only until

they are “earned”. Appellant’s Brief at 9. Gibson’s position is directly contrary to the RPCs. “A lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document.” RPC 1.15A(h)(3). If simply working on the case was enough to change ownership of the funds, the RPCs would not require the attorney to give the client reasonable notice. It is only after the attorney has provided such notice and the requisite period has passed that the attorney is allowed to withdraw such funds. Until withdrawal, the funds are owed by the client.

Interestingly, Gibson takes issue with the trial court’s March 5, 2011 finding that the Garnishee had not billed the charges to the client as of November 29, 2011, the day the Writ of Garnishment was served. Appellant’s Brief at 11 (“there is no evidence to support the court’s finding that charges had not been billed”). However, the only document relating to attorney’s fees provided by Gibson at that time was a detailed transaction file list with a date stamp of January 25, 2012. CP 45-47. Gibson failed to give the trial court a billing statement or similar document until March 12, 2011. Moreover, Gibson never gave the court a declaration authenticating even the documents given to the court on March 12, 2011. Finally, the documents Gibson did give to the court on March 12, 2011 showed that Garnishee had no right to withdraw the funds at the

time the Writ of Garnishment was served. Indeed, Garnishee did not actually withdraw the funds from the trust account until December 19, 2011.

C. Garnishment of the IOLTA Trust Account Was Proper Because the Advance Fee Deposit Belonged to Gibson.

Gibson argues that because the purpose of the IOLTA trusts accounts is to protect the clients from the attorney, such accounts cannot be garnished. Appellant’s Brief at 13. He suggests holding otherwise would reward third parties for “sneaking in” to lay claims to funds intended to secure legal services. Appellant’s Brief at 13 (“Such a result would eliminate the “advance fee deposit” system from being a reasonable structure by which to pay for, and secure both legal services and the payments for the same”).

However, the garnishment process poses risk to many systems—bank accounts, employment, etc. As Gibson concedes, the “garnishment statute does not delineate a list of persons or entities who are appropriate “garnishees.”” Appellant’s Brief at 9. The legislature acknowledged that while the garnishment situation is not ideal, the “process is necessary for the enforcement of obligations debtors otherwise fail to honor.” RCW 6.27.005. If the opposite were true—if judgment creditors could not garnish IOLTA accounts—it would encourage debtors to evade their

judgment creditors by hiding money in those accounts.⁴

D. A Plaintiff Is Allowed Attorney Fees for Opposing an Unjustified Exemption Claim Raised through a Garnishee's Answer.

Gibson misrepresents RCW 6.27.230 by suggesting it allows for an award of attorney fees when a defendant controverts an answer to a writ of garnishment, but does not allow an award of fees when a plaintiff controverts the same. Such an interpretation is without justification and is inequitable on its face.

If the garnishee files an answer, **either the plaintiff or the defendant**, if not satisfied with the answer of the garnishee, may controvert within twenty days after filing the answer....

RCW 6.27.210 (emphasis added).

Where the answer is controverted, the costs of the proceeding, including **a reasonable compensation for attorney's fees, shall be awarded to the prevailing party**: PROVIDED, That no costs or attorney's fees in such contest shall be taxable to the defendant in the event of the controversion by the plaintiff.

RCW 6.27.230 (emphasis added). Likewise, RCW 6.27.160(2) states, in part:

After a hearing on an objection to an exemption claim, the court shall award costs to the prevailing party and may also award an attorney's fee to the prevailing party if the court concludes that the

⁴ This is supported by an unreported case heard by this Court earlier this year. *See Mayers v. Bell*, 167 Wn. App. 1039, Not Reported in P.3d (Div. I 2012). There, a debtor requested his lawyer keep funds in the firm's trust account because he wanted to hire the firm to represent him. When the judgment creditor served the debtor's lawyer with a Writ of Garnishment, the debtor and his attorney argued that the money belonged to the firm and not the debtor. The law firm eventually conceded that the debtor's "funds held in the trust account were subject to garnishment." *Id.* at *2.

exemption claim or the objection to the claim was not made in good faith. The defendant bears the burden of proving any claimed exemption, including the obligation to provide sufficient documentation to identify the source and amount of any claimed exempt funds.

See, RCW 6.27.160(2).

Here, Gibson used its agent, Garnishee, to improperly “answer” (and actually fail to answer) the Writ of Garnishment, thereby forcing Pagh to contravene the answer and defend against Gibson’s wrongful claim that funds in Garnishee’s trust account were exempt from execution. As the principal of Garnishee, Gibson was responsible for attorney fees and costs incurred by Pagh in the controversy proceedings.

Reading these statutes together, it is clear that Gibson should not be able to avoid attorney fee liability by using his agent (Garnishee) to improperly assert an exemption claim through the Answer to the Writ of Garnishment, thereby forcing Pagh to initiate the controversy process. To hold that only the defendant, but not the plaintiff, is entitled to attorney’s fees creates conflict between these statutes. A principle of statutory construction is to avoid interpreting statutes to create conflicts between different provisions, so as to achieve a harmonious statutory scheme. *Am. Legion Post # 149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). “Statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous.”

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 809, 16 P.3d 583 (2001). Gibson's interpretation of the statutes would require the legislature to re-write RCW 6.27.230.

RCW 6.27.230 does not mean that *only* the defendant can get fees for successfully controverting a garnishee's answer. It means that when the plaintiff is the prevailing party, the trial court should not penalize the defendant for the garnishee's actions. Here, however, Garnishee's actions were *undertaken solely at the direction of Gibson* and Gibson was the party asserting the exemption claim. Thus, it was proper for the court to award Pugh attorney fees against Gibson.

E. There Is No Statutory Cap on Attorney Fees Related to a Controversion Hearing in Garnishment Proceedings.

The statutory limitation of two hundred fifty dollars for garnishment proceedings does not apply to controversion hearings. The statutory cap in RCW 6.27.090(2) applies to the attorney's for an uncontroverted garnishment proceeding:

Costs recoverable in garnishment proceedings, to be estimated for purposes of subsection (1) of this section, including filing and ex parte fees, service and affidavit fees, postage and costs of certified mail, answer fee or fees, other fees legally chargeable to a plaintiff in the garnishment process, and a garnishment attorney fee in the greater of one hundred dollars or ten percent of (a) the amount of the judgment remaining unsatisfied or (b) the amount prayed for in the complaint. The garnishment attorney fee shall not exceed three hundred dollars⁵.

⁵ The statutory cap was \$250 in 2011.

Id. RCW 6.27.230, on the other hand, states that “where the answer is controverted, the costs of the proceeding, including a reasonable compensation for attorney’s fees, shall be awarded to the prevailing party.” *Id.* (emphasis added). *See also*, RCW 6.27.160(2) (quoted above) and RCW 6.27.200 (“reasonable attorney’s fees”).

The legislature’s intent is evident from the use of the phrases “reasonable compensation for attorney’s fees” (RCW 6.27.230) and “reasonable attorney’s fee” (RCW 6.27.200). These provisions are meant to provide *additional* fees for the situation in which a party has to challenge the garnishee’s answer and/or oppose an unjustified exemption claim. If attorney’s fees were limited to only those provided by RCW 6.27.090(2), there would be no purpose in referring to an attorney fee award in RCW 6.27.160(2), RCW 6.27.200 and RCW 6.27.230.

F. Gibson Is Not Entitled to Fees on Appeal.

If the money judgment vacated in the Unpublished Opinion in Case No. 66833-1-I is upheld and/or reinstated, Pagh is entitled to costs and reasonable attorney’s fees as the prevailing party. *See* RAP 14.2; RAP 14.3; RAP 18.1; RCW 6.27.030; *Caplan v. Sullivan*, 37 Wn. App. 289, 294, 679 P.2d 949 (Div.1 1984) (Court of Appeals has power to award attorney fees in controversion

appeal). The legal fees incurred in controverting the garnishment and now defending this appeal outweigh the \$5,000 garnishment amount. Without an award of attorney's fees, any gain Pagh made in recovering \$5,000 of the total of \$45,876.48 owed would be erased by legal bills. In such event, Pagh requests that the Court schedule a separate hearing on the issues of attorney fees. However, if instead the money judgment upon which the garnishment is based remains vacated, the court should dismiss this appeal as moot and not award attorney fees on appeal to either party.

Gibson is not entitled to fees under RCW 4.84.185 or any other statute because as Pagh's contest of Garnishee's Answer to the Writ of Garnishment was clearly not frivolous. As is evident from the unreported case before the Court earlier this year,⁶ garnishing a lawyer's trust account is not a novel concept. The garnishment statute provides a way for judgment creditors to seek enforcement of obligations a debtor failed to honor. Pagh was a judgment creditor and Gibson the debtor on that judgment. Pagh's pursuing the garnishment was not frivolous.

VI. CONCLUSION

⁶ *Mayers, supra*, 167 Wn. App. 1039.

The advanced fee deposit held in Garnishee's trust account was owned by Gibson on November 29, 2011, the day the Garnishee received the Writ of Garnishment Gibson's opposition to Pagh's controversion of Garnishee's Answer to the Writ of Garnishment was wholly without merit.

If the money judgment vacated in the Unpublished Opinion in Case No. 66833-1-I is upheld and/or reinstated, Gibson's appeal should be denied and Pagh awarded costs and reasonable attorney's fees on appeal. If the money judgment remains vacated, this appeal should be dismissed without costs or fees to either party.

Respectfully submitted this 31st day of December, 2012.

HELSELL FETTERMAN LLP

By 

Mark Rising, WSBA #14096

Lauren D. Parris, WSBA # 44064

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Melissa Glazier, an employee of Helsell Fetterman LLP, attorneys for Respondent Pagh certify that:

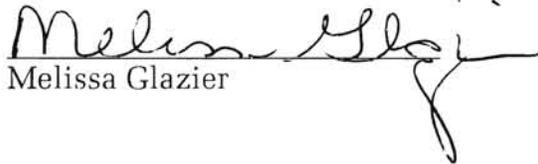
I am now, and at all times herein mentioned was, a resident of the State of Washington, a citizen of the United States, and over the age of eighteen years.

On this 31st December, 2012, I caused to be sent via Legal Messenger addressed and stamped envelopes, a true and correct copy of Brief of Respondent in the above-captioned case to:

Laura Christensen Colberg
Michael Bugni & Associates
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125

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

DATED this 31st day of December, 2012, at Seattle,
Washington.


Melissa Glazier