

No. 35117-0

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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CITY BANK, a Washington corporation,

Respondent,

v.

S & HY CORPORATION, a Washington corporation; and  
SUNG CHA YI and JUNG JA YI, husband and wife;

Defendants,

and

COLONY INSURANCE COMPANY,

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]* DEPUTY

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OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	3
IV. STATEMENT OF THE CASE .....	5
V. ARGUMENT .....	7
A. The trial court erred in determining the scope of its obligation under RCW 6.27.220. .....	7
B. The trial court erred in entering judgment in favor of City Bank. ....	13
1. Colony Storage Tank Pollution Liability Insurance Policy .....	13
2. Colony's Answer to Writ of Garnishment .....	15
3. City Bank's Controversion .....	15
C. Colony is entitled to recover attorney fees and costs incurred on appeal. ....	20
VI. CONCLUSION .....	21

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Bartel v. Zuckriegel</i> , 112 Wn. App. 55, 47 P.3d 581 (2002) .....	9-10, 20
<i>Boundary Dam Constructors v. Lawco Contractors, Inc.</i> , 9 Wn. App. 21, 510 P.2d 1176 (1973) .....	13
<i>Hinton v. Carmody</i> , 186 Wash. 242, 60 P.2d 1108 (1936) .....	13
<i>McCann v. Reeder</i> , 178 Wash. 126, 34 P.2d 461 (1934) .....	13
<i>Petcu v. State</i> , 121 Wn. App. 36, 86 P.3d 1234 (2004) .....	11
<i>Watkins v. Peterson Enter., Inc.</i> , 137 Wn.2d 632, 973 P.2d 1037 (1999) .....	8
<i>Wolfe v. Hoefke</i> , 124 Wash. 495, 214 P. 1047 (1923) .....	9, 13
<b>Statutes and Rules</b>	
CR 56 .....	11
CR 56(c) .....	18
Pierce County Local Rule 1(i) .....	10
RAP 18.1 .....	20
RCW 6.27 .....	7
RCW 6.27.070 .....	7
RCW 6.27.210 .....	7, 10
RCW 6.27.220 .....	7, 8, 11, 12
RCW 6.27.230 .....	20

**Other Authorities**

15 LEWIS H. ORLAND & KARL B. TEGLAND,  
WASHINGTON PRACTICE: TRIAL PRACTICE:  
CIVIL  
§ 541 (5<sup>th</sup> ed. 1996) ..... 8

15 LEWIS H. ORLAND & KARL B. TEGLAND,  
WASHINGTON PRACTICE: TRIAL PRACTICE:  
CIVIL  
§ 543 (5<sup>th</sup> ed. 1996) ..... 9

## **I. INTRODUCTION**

Respondent, City Bank, allegedly incurred expenses cleaning up a release of pollutants from an underground storage tank on property formerly owned by defendant S & Hy Corporation. City Bank claims it had to pay for the cleanup after it foreclosed on the corporation's property.

After obtaining a default judgment against S & Hy, City Bank filed a writ of garnishment against appellant, Colony Insurance Company ("Colony"). Colony issued a storage tank pollution liability policy to S & Hy that provided coverage for claims reported to Colony during the policy period. In its answer to City Bank's writ of garnishment, Colony explained that, because City Bank did not submit its claim until several years after the policy expired, the claim was not covered. In response, City Bank cited a previous claim against S & Hy and implied that its claim was the same as the earlier claim.

Instead of recognizing that the dispute between the parties created an issue for trial, in accordance with the procedures set forth in the garnishment statutes, the trial

court elected to treat City Bank's pleadings as a motion for summary judgment. The court granted judgment in favor of City Bank, apparently concluding that, as a matter of law, the Colony policy provided coverage for City Bank's claim.

The trial court erred in two respects. First, the garnishment statutes provide that, when an answer is controverted, the garnishee defendant *may* file a response. The court treated Colony's *option* to file a response as a *requirement* to present evidence sufficient to defeat a motion for summary judgment. When Colony initially did not come forward with such evidence (because it had no obligation under the garnishment statutes to do so), the court granted judgment in favor of City Bank. The court failed to recognize that the dispute between Colony and City Bank necessitated further proceedings and should not have been resolved at the preliminary stage of a controversion hearing.

Second, even if it were proper to decide the coverage issue in a controversion hearing, the trial court's ruling was in error. City Bank did not present admissible evidence

establishing that it was entitled to coverage as a matter of law. Instead, Colony showed that City Bank did not submit its claim until after the expiration of the policy period, thus precluding coverage. If any party was entitled to summary judgment, it was Colony, not City Bank.

Colony respectfully requests that the trial court's rulings granting judgment in favor of City Bank be reversed and that either (1) the case be remanded for further proceedings in the trial court, or (2) judgment be entered in favor of Colony.

## **II. ASSIGNMENTS OF ERROR**

Colony assigns error to the June 16, 2006, Judgment on Writ of Garnishment and the June 30, 2006, Order Denying Motion for Reconsideration.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Colony answered City Bank's writ of garnishment by asserting that the insurance policy issued by Colony did not provide coverage for City Bank's claim. City Bank filed an affidavit purporting to controvert this assertion. Did the trial court err in concluding there was no

issue requiring trial and granting judgment in favor of City Bank as a matter of law?

2. The Colony policy provided coverage for damages caused by the “release” of a “petroleum product” if the claim for such damages was first reported to Colony during the policy period. The evidence submitted by City Bank (1) showed its claim was first reported only after the policy had expired and (2) did not show there had been a “release” of a “petroleum product.” If the trial court had authority to enter summary judgment, did the court err in holding that City Bank established coverage as a matter of law?

3. City Bank also presented evidence of a different claim submitted to Colony during the policy period. Colony presented evidence establishing that there was no “release” of a “petroleum product” with respect to that claim and it therefore was not subject to coverage. The evidence also established that City Bank’s subsequent claim was submitted after the policy expired and therefore was not subject to coverage. If the trial court had authority

to enter summary judgment, did the court err in failing to hold that, as a matter of law, there was no coverage for City Bank's claim?

#### **IV. STATEMENT OF THE CASE**

On January 4, 2006, City Bank filed suit against S & Hy Corporation, Sung Cha Yi, and Jung Ja Yi.<sup>1</sup> (CP 1-7) The complaint alleged that defendants owned and operated a gas station and that City Bank extended credit to defendants secured by a deed of trust on the gas station property. (CP 3) The complaint further alleged that a petroleum release occurred on the property and defendants failed to clean up the release. (*Id.*) After defendants defaulted on their debt, City Bank foreclosed on the property. (*Id.*) The complaint alleged that, as a result of the foreclosure, City Bank incurred costs in remediating the petroleum spill. (*Id.*)

Defendants did not respond to the complaint, and City Bank obtained a default judgment against S & Hy in

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<sup>1</sup> According to City Bank's complaint, the Yis were the sole or controlling shareholders in S & Hy. (CP 3)

the amount of \$126,419,43. (CP 17-19) Thereafter, City Bank obtained a writ of garnishment against Colony, S & Hy's insurer. (CP 23-25)

Colony filed an answer to the writ of garnishment. The answer explained that, while Colony had issued a storage tank pollution liability policy to S & Hy, that policy did not cover City Bank's claim. (CP 26-28) In particular, the policy provided coverage only for claims made during the policy period, and City Bank did not submit its claim until several years after the policy expired. (CP 28)

City Bank responded with an affidavit purporting to show that City Bank's claim had, in fact, been made during the Colony policy period. (CP 29-75) On May 26, 2006, City Bank filed a note for motion docket noting a hearing on June 9 for a motion for "Determination [of] Adequate Cause Pursuant to RCW 6.27.210." (CP 154) At that hearing, the trial court found that no trial was required and ordered judgment against Colony on City Bank's writ of

garnishment. (6/9/06 VRP at 15) The court subsequently entered an order memorializing its oral ruling. (CP 78-81)

Colony filed a motion for reconsideration and submitted additional information showing that the Colony policy did not provide coverage for City Bank's claim. (CP 160-210) The court denied Colony's motion, and this timely appeal followed. (CP 230-31, 232-42)

## V. ARGUMENT

### A. The trial court erred in determining the scope of its obligation under RCW 6.27.220.

Garnishment proceedings in Washington are governed by the procedures set forth in RCW ch. 6.27. After the judgment creditor (in this case, City Bank) obtains a writ of garnishment, the garnishee defendant (in this case, Colony) has 20 days to file an answer.<sup>2</sup> The judgment creditor can then file an affidavit controverting the answer and stating in detail why the affiant believes the answer is incorrect.<sup>3</sup> If the answer is controverted, the garnishee *may* file a

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<sup>2</sup> RCW 6.27.070.

<sup>3</sup> RCW 6.27.210.

response, but it is not required to do so.<sup>4</sup> Thereafter, the matter may be noted for hearing “for a determination whether an issue is presented that requires a trial.”<sup>5</sup> If a trial is required, it shall be noted as in any other case.<sup>6</sup>

The Washington Supreme Court has recognized that “[g]arnishment is an extraordinarily harsh remedy and the garnishment statutes have traditionally been construed against the party resorting to such action.”<sup>7</sup> When, as here, the plaintiff controverts the garnishee’s answer, an issue of fact is created that will have to be determined in the garnishment action.<sup>8</sup> In such circumstances the plaintiff bears the burden of proving the garnishee is indebted to the

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<sup>4</sup> RCW 6.27.220.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* However, “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.” *Id.*

<sup>7</sup> *Watkins v. Peterson Enter., Inc.*, 137 Wn.2d 632, 650, 973 P.2d 1037 (1999).

<sup>8</sup> 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE: CIVIL § 541 (5<sup>th</sup> ed. 1996).

defendant.<sup>9</sup> “In the absence of a default, judgment may be entered when the garnishee has answered and admitted having possession of money or property of the defendant, or when on the trial of a controverted answer, the court finds that the garnishee had possession of money or property of the defendant.”<sup>10</sup>

The correct procedure is illustrated in a recent decision from Division III, *Bartel v. Zuckriegel*.<sup>11</sup> In that case, the plaintiffs sought to garnish the defendant’s wages at a café where he worked. A dispute arose regarding whether the café improperly reduced the defendant’s wages (while at the same time increasing his wife’s wages) in response to the garnishment. Approximately one year after the plaintiffs filed their writ of garnishment, the court conducted a trial on the issue.<sup>12</sup>

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<sup>9</sup> *Wolfe v. Hoefke*, 124 Wash. 495, 498, 214 P. 1047 (1923).

<sup>10</sup> 15 WASHINGTON PRACTICE § 543.

<sup>11</sup> *Bartel v. Zuckriegel*, 112 Wn. App. 55, 47 P.3d 581 (2002).

<sup>12</sup> *Bartel*, 112 Wn. App. at 59-60.

The court of appeals upheld the trial court's determination that the café owed the defendant more wages than it had reported to the plaintiffs in response to the writ of garnishment.<sup>13</sup> In reaching its conclusion, the appellate court explained:

[The plaintiffs] controverted the Café's answer that it owed [the defendant] \$1,050 for his personal services. The trial court conducted a trial on the disputed issue and determined that the Café owed [the defendant] \$1,600 per month for his personal services. ***This is the process the garnishment statute, and specifically the controversion procedure, accommodates.***<sup>14</sup>

In this case, Colony filed an answer explaining why the insurance policy at issue did not provide coverage for City Bank's claim. City Bank then controverted the answer, as it was entitled to do pursuant to RCW 6.27.210. At that point, instead of recognizing the existence of an issue for trial, the court decided that, as a matter of law,

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<sup>13</sup> *Id.* at 60.

<sup>14</sup> *Id.* at 65 (emphasis added). In addition, Pierce County Local Rule 1(i) sets forth the procedure to be followed where trial is by affidavit, as may be the case in a garnishment proceeding. The rule states the trial shall be held 20 weeks after filing. Pierce County Local Rule 1(i).

the Colony policy provided coverage for City Bank's claim. The trial court did not follow the procedure set forth in the garnishment statutes and explained in *Bartel*. Instead, the trial court treated the controversion hearing as a summary judgment hearing. In doing so, the court apparently concluded Colony was *required* to come forward with evidence establishing that the policy did not provide coverage. However, the plain language of RCW 6.27.220 states that the garnishee *may* file a response to a controverting affidavit.

The fact that Colony elected not to file a response to City Bank's controverting affidavit did not entitle the trial court to effectively enter summary judgment in favor of City Bank. If City Bank had filed (and properly noted) a motion for summary judgment in accordance with CR 56, Colony would have been required to come forward with evidence establishing the existence of a genuine issue of material fact.<sup>15</sup> However, the issue before the court at the controversion hearing was not whether City Bank was

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<sup>15</sup> See *Petcu v. State*, 121 Wn. App. 36, 55, 86 P.3d 1234 (2004).

entitled to judgment as a matter of law but whether “an issue [was] presented that require[d] a trial.”<sup>16</sup> Whether that “trial” takes the form of a subsequent summary judgment hearing or an actual trial depends upon the circumstances present in a particular case.

If Colony had conceded an obligation to S & Hy or if City Bank incontrovertibly established the existence of such an obligation, the trial court might have been entitled to enter judgment in City Bank’s favor. However, neither of these circumstances was present here. Instead, the evidence and argument presented to the court at the controversion hearing established the existence of a dispute regarding whether the Colony policy provided coverage for City Bank’s claim. In particular, as discussed in greater detail in Section B below, the fact that S & Hy made an unrelated claim during the policy period did not establish that City Bank’s claim, made several years later, was subject to coverage. A trial was necessary to resolve this dispute, and the trial court erred in concluding otherwise.

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<sup>16</sup> RCW 6.27.220.

**B. The trial court erred in entering judgment in favor of City Bank.**

Even if it were proper to consider the controversion hearing to be a summary judgment hearing, the trial court erred in entering judgment in favor of City Bank. As noted above, City Bank bore the burden of establishing that Colony was indebted to S & Hy.<sup>17</sup> Thus, City Bank had to prove that, as a matter of law, the Colony policy provided coverage for City Bank's claim.<sup>18</sup> City Bank did not meet this obligation, and the trial court erred in granting judgment in City Bank's favor.

**1. Colony Storage Tank Pollution Liability Insurance Policy**

Colony issued a policy to S & Hy that provided coverage for damages the insured became legally obligated

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<sup>17</sup> See *Wolfe*, 124 Wash. at 498.

<sup>18</sup> See *Hinton v. Carmody*, 186 Wash. 242, 248, 60 P.2d 1108 (1936) (garnishing creditor not entitled to recover insurance proceeds where policy did not provide coverage for automobile accident giving rise to judgment); *McCann v. Reeder*, 178 Wash. 126, 139, 34 P.2d 461 (1934) (garnishing creditor not entitled to recover insurance proceeds where insured's misrepresentations to insurer precluded coverage); *Boundary Dam Constructors v. Lawco Contractors, Inc.*, 9 Wn. App. 21, 26, 510 P.2d 1176 (1973) (to support garnishment, garnishee must be liable to defendant).

to pay caused by a “release” of a “petroleum product.” (CP 51) The policy defined “release” as a “sudden and accidental or gradual spilling, leaking, emitting, discharging, escaping, or leaching from a **Storage Tank System** at a **Scheduled Facility.**”<sup>19</sup> (CP 53)

Coverage extended to claims first reported to Colony during the policy period, which ran from April 21, 2001, to April 21, 2002. (CP 34, 51) The claim had to be reported in accordance with the procedures set forth in the policy, including notification by the “insured.” (CP 183) The policy also covered “corrective action costs,” which included “expenses to evaluate, analyze, remedy, remove, abate, neutralize, or monitor a **Release.**” (CP 53) A claim for corrective costs also had to be reported to Colony during the policy period. (CP 51)

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<sup>19</sup> The policy defined “petroleum products” as “crude oil or any fraction thereof that is liquid at 60 degrees Fahrenheit and 14.7 pounds per square inch absolute, and any product which is derived therefrom.” (CP 53)

## **2. Colony's Answer to Writ of Garnishment**

In its answer, Colony explained:

- Colony issued a storage tank pollution liability policy to S & Hy effective April 22, 2001, to April 22, 2002.
- The policy provided coverage for claims first reported to Colony during the policy period.
- City Bank's claim was not reported to Colony until several years after the policy expired.
- Therefore, the policy did not provide coverage, and Colony held no funds subject to garnishment.

(CP 28)

## **3. City Bank's Controversion**

City Bank controverted the answer with an affidavit purporting to show that City Bank's claim had been made during the policy period. (CP 29-75) City Bank attached to the affidavit a copy of a letter from Colony to S & Hy dated January 2, 2002, referencing a loss discovered October 26, 2001, and reported to Colony in November 2001. (CP 60-66, 172) The letter notes that the claim involved complaints by customers that gas purchased from

S & Hy contained water, which damaged their gas tanks. (CP 60) The letter further notes that, although the underground tank had been tested several times and passed each time, S & Hy believed approximately 3,000 gallons of fuel was missing. (CP 60-61)

On May 2, 2005, City Bank's attorney wrote a letter to Colony enclosing a copy of an Underground Storage Tank Closure Report dated January 20, 2005. (CP 68-69) The report is not attached to the copy of the letter filed in the trial court. The letter states that the January 20 report documents a release from the S & Hy tank and requests confirmation that Colony will provide coverage for expenses incurred by City Bank in cleaning up the release. (CP 68) Colony declined to respond to City Bank's request, as City Bank was not an insured under the S & Hy policy. (CP 71) As noted above, the policy provided coverage to claims reported to Colony *by the insured*. (CP 183)

On January 10, 2006, City Bank's attorney wrote to Colony enclosing a copy of the summons and complaint

filed against S & Hy. (CP 73) City Bank again demanded that Colony pay the cleanup expenses incurred by City Bank. (*Id.*) On February 15, 2006, City Bank's attorney forwarded a copy of the default judgment against S & Hy to Colony and demanded payment of the judgment. (CP 75)

The primary issue before the trial court was whether City Bank's claim had been reported to Colony during the policy period. Colony argued that it had not; City Bank argued that it had. City Bank did not, however, present sufficient evidence to establish that, as a matter of law, its claim had been reported during the Colony policy period.<sup>20</sup> Instead, City Bank showed only that *a* claim, for alleged damage to S & Hy's customers' gas tanks, had been reported during the policy period. City Bank made *no* showing that *its* claim was reported during the policy period. In fact, City Bank's own evidence establishes the claim was made in May 2005, over three years after the Colony policy expired.

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<sup>20</sup> Nor did City Bank show that the claim had been reported by the insured, as required by the policy.

Nor did City Bank present evidence showing that either its claim or the earlier claim involved a “release” of “petroleum products.” The 2002 letter from Colony to S & Hy does not establish the existence of a release. In fact, it notes that testing of the site did *not* show a release. (CP 60-61) And, the 2005 letter from City Bank to S & Hy, without more, does not establish that a release occurred. It simply cites a report, which is not attached, that allegedly states a release occurred. This does not constitute admissible evidence as required by CR 56(c).

After it became clear that the trial court considered the controversion hearing to constitute a summary judgment hearing, Colony submitted evidence to rebut City Bank’s assertions. In particular, Colony provided a copy of a report prepared for Colony by KHM Environmental Management, Inc., following the November 2001 claim. (*See* CP 200-10) KHM performed a site investigation, including groundwater testing, in January 2002 to determine whether there had been a release. (CP 200) KHM performed a second round of testing in April 2002.

(CP 201) KHM concluded, “Based on tank tightness testing results and on the findings from both the prior investigation and the recent groundwater monitoring event, there is no evidence that confirms a release from the UST system.”

(CP 202)

In sum, City Bank failed to establish that its claim was reported to Colony during the policy period or that there was a “release” of pollutants at any time. It presented only conclusory assertions and did not establish any link between the 2001 claim arising from complaints by S & Hy’s customers and the May 2005 claim submitted to Colony by City Bank. Moreover, Colony presented evidence establishing there had *not* been a release in 2001. Under these circumstances, the trial court erred in concluding the Colony policy provided coverage for City Bank’s claim, thereby entitling City Bank to garnishment of the Colony policy. Instead, the undisputed *evidence* establishes that City Bank’s claim was untimely, thus precluding coverage. If the trial court had the authority to

enter summary judgment, Colony, not City Bank, was entitled to a ruling in its favor.

**C. Colony is entitled to recover attorney fees and costs incurred on appeal.**

RCW 6.27.230 provides, “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.” Such an award includes costs and attorney fees incurred on appeal.<sup>21</sup> In this case, City Bank controverted the answer filed by Colony. As explained above, Colony is entitled to prevail because the evidence establishes that Colony’s policy did not provide coverage for City Bank’s claim. Thus, in accordance with RCW 6.27.230 and RAP 18.1, Colony respectfully requests an award of attorney fees incurred in this appeal.

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<sup>21</sup> *Bartel*, 112 Wn. App. at 67.

**VI. CONCLUSION**

For the reasons set forth above, Colony respectfully requests that the trial court's judgment in favor of City Bank be REVERSED.

DATED this 8th day of January, 2007.

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By *Deborah L. Carstens*  
Jerret E. Sale, WSBA #14101  
Deborah L. Carstens, WSBA #17494

Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 9<sup>th</sup> day of  
January, 2007, I caused to be served this document to:

Clark J. Davis  via hand delivery.  
Davis Roberts & Johns, PLLC  via first class mail.  
7525 Pioneer Way, Ste. 202  via facsimile.  
Gig Harbor, WA 98335

I declare under penalty of perjury under the laws of  
the state of Washington this 9<sup>th</sup> day of January, 2007, at  
Seattle, Washington.

  
\_\_\_\_\_  
Kim Fergin

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