

No. 35117-0

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION II

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CITYBANK, a Washington chartered bank,

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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BRIEF OF RESPONDENT

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STATE OF WASHINGTON  
COURT OF APPEALS  
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**ORIGINAL**

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## I. INTRODUCTION

This case arises from the continuing effort of appellant Colony Insurance Company (Colony) to avoid its obligation under a Storage Tank Pollution Liability Insurance policy to fund the cost of responding to release of petroleum into the environment from a tank owned and operated by its policyholder, S & Hy Corporation (S & Hy). The policyholder notified Colony of the release of contamination within the policy period, in accordance with the policy provisions. Following an initial “reservation of rights” letter, however, Colony did not honor its coverage obligation, or communicate further with its insured, who subsequently went out of business.

Respondent CityBank, a creditor of S & Hy, foreclosed on the contaminated property and incurred expenses responding to the contamination. On learning of the outstanding coverage obligation to S & Hy, CityBank contacted Colony to confirm that the insurer would discharge this commitment. Colony, however, refused to honor its obligation, or to communicate meaningfully with CityBank on the subject, necessitating that CityBank file the present

action, for the sole purpose of accessing the insurance obligation owed by Colony to its insured, S & Hy Corporation.

It appears that Colony viewed the business failure of its legally unsophisticated insured as a potential windfall. Colony attempted, by refusing to communicate, to effectively terminate its clear obligation under the Storage Tank Pollution Liability policy. The insurer adopted a calculated strategy of non-communication, first failing to advise its insured of its coverage determination, subsequently refusing to provide any information to CityBank, and continuing through garnishment proceedings, declining to provide the court with information pertaining to its coverage obligation, leading inevitably to the Judgment on Writ of Garnishment that is the subject of the present appeal.

Unfortunately, after the inevitable failure of this questionable strategy, Colony now wants to start the process over with a new gambit, relying on a report that, prior to entry of the judgment, it had not shown to anyone, including its insured. It is extremely doubtful that the report would have ever justified denial of coverage, which is plainly the reason that Colony kept it hidden. The immediate and dispositive point, however, is that it is far too late for the insurer to

bring the report before the Court as a basis for refusing coverage. The Court of Appeals should affirm the decision of the Superior Court.

## II. COUNTER-STATEMENT OF THE CASE

In 1997, S & Hy purchased a gasoline service station in Aberdeen, which it subsequently upgraded and operated, doing business as Park Street Shell. (CP 60) In April of 2001, Colony Insurance Company issued a Storage Tank Pollution Liability insurance policy to S & Hy. (CP 161, 177) The policy obligated Colony to pay "Corrective Action Costs," which include costs to "evaluate, analyze, remedy, remove, abate, neutralize or monitor" a release of petroleum from a storage tank reported during the policy period, which was April 22, 2001 to April 22, 2002. (CP 163, 177) In November of 2001, S & Hy reported a release of petroleum from one or more of the insured storage tanks, seeking coverage under the policy. (CP 164) By letter dated January 2, 2002, Colony acknowledged the claim, reserving their rights under the policy without making a coverage determination. (CP 60-66) Colony

evidently did not communicate further with S & Hy concerning its coverage obligation.<sup>1</sup>

S & Hy had borrowed money from CityBank, secured by the Aberdeen property. In the absence of support from its insurer in responding to the contamination on the property, the corporation went out of business, defaulting on its loan obligation, causing CityBank to foreclose on the property. (CP 12-13) Following the foreclosure, CityBank learned of the release of contamination, referred to above. (Id.) Responding to the contamination, CityBank incurred \$126,130 in costs as of February of 2006. (Id.)

On investigating its options for recovering this sum, CityBank determined that S & Hy was legally responsible for the cost of responding to the contamination, but insolvent. (CP 29-66) CityBank also determined, however, that S & Hy had insurance covering this liability, and that the company had properly tendered the claim to its insurer, Colony, in 2001, as stated above. (Id.)

By letter dated May 2, 2005, counsel for CityBank sent Colony further documentation of the release of contamination and

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<sup>1</sup> It is notable that Colony states that it “denied coverage” of this claim, but provides no evidence that it ever informed its policyholder of this denial. (CP 172) It appears that Colony hoped that the claim would simply disappear, possibly due to the lack of legal sophistication on the part of the owners of its insured.

asked the insurer to confirm that it would cover the liability, as provided by its policy. (CP 68-69) By letter dated June 21, 2005, Colony informed counsel that it would not cover the loss, because CityBank was not insured under the policy, ignoring its primary obligation to cover the clear liability of its policyholder, S & Hy. (CP 71) By letter dated January 10, 2006, counsel for CityBank provided Colony a copy of the summons and complaint commencing the present action, and advised the insurer as follows:

We filed this action primarily in response to your refusal to respond to the environmental liability of your insured at this site. We intend to obtain a judgment against defendants [S & Hy Corporation] and execute on the proceeds of the insurance policy. The judgment will include our fees and costs.

The liability of your insured is very clear, as is your coverage obligation. It is unfortunate that you are effectively requiring that we enforce your clear legal duty through litigation.

(CP 73)

Colony ignored the letter, with the result that on February 2, 2006, CityBank obtained a judgment against S & Hy Corporation. (CP 10-19, 165) On March 29, 2006, the trial court issued a Writ of Garnishment of the insurance policy, which CityBank served upon Colony, as provided in RCW 6.27.060 et seq. (CP 23-25, 165) On April 25, 2006, Colony filed an Answer to Writ of Garnishment,

stating that a claim was not filed within the policy period as its only ground for denying its coverage obligation. (CP 26-28) On May 3, 2006, CityBank filed a declaration, as provided by RCW 6.27.210, establishing that the Answer was incorrect, in that S &Hy had notified Colony of the claim in November of 2001, squarely within the policy period. (CP 29-75) Colony filed no declaration in response to the declaration filed by CityBank, as provided by RCW 6.27.220, concluding that it was to its strategic advantage to withhold additional information in its possession from the court. (6/30/06 VRP at 11-12 )

On May 26, 2006, CityBank noted the case for hearing before the trial court on June 9, 2006, in accordance with RCW 6.27.220. (CP 154) On June 9, 2006, in accordance with RCW 6.27.220, the court found that there was no issue requiring trial, in that the uncontroverted evidence established that Colony owed the garnished obligation to the judgment debtor. (6/9/06 VRP at 15 ) On June 16, 2006, in accordance with this determination, the court entered the Judgment on Writ of Garnishment that is the subject of the present appeal. (CP 236-239)

On June 19, 2006, Colony moved for reconsideration of the Judgment on Writ of Garnishment. (CP 160) In support of the motion Colony filed a report by KHM Environmental Management, Inc., based upon which Colony purported to justify denying coverage to its policyholder. Colony had not previously provided this information to the trial court. (6/30/06 VRP at 11-12) Colony, in fact, viewed release of the report as prejudicial to its own interests and had not previously provided the information to anyone, including its insured, S & Hy Corporation. (6/30/06 VRP at 12) In argument to the lower court, Colony acknowledged that it had withheld the report from CityBank and the court for “strategic” reasons. (6/30/06 VRP at 11-12) On June 30, 2006, the trial court denied Colony’s Motion for Reconsideration. (CP 241-242)

### III. ARGUMENT

#### A. The Trial Court Correctly Interpreted and Applied RCW 6.27.

Contrary to the argument advanced by Colony, the trial court adhered closely to the procedure governing garnishment, set forth in RCW Chapter 6.27. On issuance and service of a Writ of Garnishment, RCW 6.27.190 requires the garnishee to provide an answer, signed by or on behalf of the garnishee on penalty of

perjury, acknowledging or denying a debt owed to the defendant/judgment debtor, or explaining why there “is uncertainty as to the answer.” Under RCW 6.27.210, if the garnishee files an answer, the plaintiff may controvert the answer, within twenty days, by filing a declaration setting forth the particulars with respect to which the answer is incorrect. If the answer is controverted, then, under RCW 6.27.220 the garnishee may file a responding declaration within twenty days. If the garnishee does not file a responding declaration, RCW 6.27.220 permits any party to note the matter for hearing, for determination by the court whether a trial is necessary. RCW 6.27.250 provides that, “[i]f it appears from the answer of the garnishee or if it is otherwise made to appear that the garnishee was indebted to the defendant in any amount” when the writ of garnishment was served, “the court shall render judgment for the plaintiff against the garnishee.” No trial is necessary if there is no issue of fact.

It is undisputed that CityBank properly obtained and served the present Writ of Garnishment in accordance with RCW Chapter 6.27. In its answer to the Writ, Colony denied that it owed a debt to the judgment debtor, based solely on the incorrect statement that

its insured had not provided notice of the claim within the policy period. Consequently, at this well defined juncture in the proceedings, Colony had both the opportunity and the obligation to describe any factual basis for denial or uncertainty with respect to its debt to the defendant, and failed to provide any information, except the easily and quickly rebutted misstatement regarding the notice of claim.

In compliance with RCW 6.27.210, CityBank, within twenty days, filed a declaration correcting the misinformation contained in the answer. Under RCW 6.27.220, Colony again had an opportunity, clearly provided by statute, to present information to the court, in response to the declaration filed on behalf of CityBank. Again, however, Colony failed to provide any factually supported basis for denial of coverage, declining to file a responsive declaration.

CityBank noted the matter for hearing, held on June 9, 2006. In accordance with RCW 6.27.220, the trial court, based upon the pleadings filed by the parties, properly determined that the case presented no issue requiring trial. On that basis, Judge Cuthbertson informed counsel that he would enter a judgment, to

be prepared by counsel for CityBank, on the following Friday, June 16, 2006. Judgment was properly entered on that date, and is now the subject of this appeal.

**B. The Trial Court had the Right and Obligation to Make Its Determination under the Statute Based upon the Record.**

Colony relies heavily on the simple and unexceptional premise that RCW 6.27.220 permits but does not require the garnishee to file a declaration in response to the declaration of the plaintiff. Colony, however, ignores the point that the trial court has the right and obligation to make its determination based upon the facts before it. As in any proceeding, a garnishee is not required to present evidence. This obviously does not imply that in a garnishment proceeding the court can or should make its determination based upon evidence that has not been presented.

In the present case, Colony chose to answer the writ of garnishment with a statement that was demonstrably false. Predictably, CityBank responded by filing a declaration that clearly proved the falsity of the statement, establishing that there was no issue as to the obligation of the insurer to S & Hy. At that juncture in the proceeding Colony had an opportunity, a second opportunity,

to file a declaration showing that it did not have such an obligation, or at least creating a factual issue on that point. Colony, for misguided strategic reasons, chose not to take advantage of this opportunity. The company, for reasons of its own, essentially chose a gambit that could succeed only if the trial judge did not understand, or chose not to implement, the procedures governing garnishment. Fortunately, the trial judge understood the procedures very well. In accordance with the governing statute he determined, based upon the evidence before him, that there was no issue requiring trial, and he entered judgment accordingly.

**C. The Case and Principles Cited by Colony do not Support its Position.**

In the text of their argument, appellant discusses only one case, Bartel v. Zuckriegel, 112 Wn. App. 55 (Div. 3, 2002), a decision that does not remotely support its position. In that case, which involved possible collusion between the judgment debtor and the garnishee, the Court of Appeals discussed and affirmed findings reached by the lower court at trial on the issue. The Bartel court reviewed the findings reached at trial, not the procedure leading to the trial, which is the issue raised by Colony in the present appeal. The decision does not in any way imply that every

garnishment should proceed to trial, particularly a case such as this, in which the garnishee has made a deliberate decision not to provide a factually based ground for denying the garnished debt.

The appellant cites the precept that garnishment is a harsh remedy, which should be construed against the garnishing party. This guideline obviously is intended to provide protection for a debtor, not a garnishee. It emphatically has no application in a situation where the debtor is not challenging the primary debt, and the garnishee is in fact attempting to avoid an obligation that it owed to the debtor. Moreover, the principle is invoked to assure adherence to statutory procedures, which were, in fact, carefully followed in this case.

**D. CityBank Established the Clear Coverage Obligation of Colony Based upon Undisputed Facts.**

Contrary to the argument of appellant, CityBank clearly established the coverage obligation that Colony owed to its insured, S & Hy, based upon detailed and uncontroverted information provided to the court. Specifically, CityBank established the following facts, none of which were disputed by Colony:

1. Colony issued a Storage Tank Pollution Liability insurance policy to S & Hy Corporation. (CP 161)

2. The policy obligated Colony to pay “Corrective Action Costs,” which include costs to “evaluate, analyze, remedy, remove, abate, neutralize or monitor” a release of petroleum from a storage tank reported during the policy period, which was April 22, 2001 to April 22, 2002. (CP 163)
3. S & Hy reported a release of petroleum from a covered storage tank in November of 2001. (CP 164)
4. Colony did not pay for the Corrective Action Costs related to the release. (CP 165)

These facts clearly establish the garnished coverage obligation. Moreover, the facts were and are undisputed, and Colony chose not to use its statutory right to controvert or comment on these facts in any way at the time that the matter was noted for hearing, Judge Cuthbertson could reach only one conclusion: CityBank had established the coverage obligation of Colony and there was no issue requiring trial.

At the risk of belaboring the obvious, it should be noted that Colony did not “controvert” any of the facts set forth above by the conclusory statement that “Colony owed Defendants nothing”

contained in its Answer to Writ of Garnishment. Furthermore, it did not controvert the facts by referring to the irrelevant point that the CityBank claim did not arise until after the expiration of the policy. The timing of the CityBank claim against S & Hy has nothing to do with the obligation of Colony to its insured to pay the costs resulting from the release of petroleum from the covered tanks. S & Hy undisputedly notified Colony of the petroleum release within policy period, triggering the obligation of Colony to pay the Corrective Action Costs. That is the obligation that has been garnished in this action. If Colony was confused on this point at the outset, which is highly doubtful, it could not possibly have remained confused after CityBank filed its declaration with attached letter from the insurer to S & Hy establishing tender of the claim within the policy period. At that juncture, if Colony believed that they possessed information to rebut the undisputed facts establishing coverage, it had one more opportunity to present the information to the court, under RCW 6.27.220. Colony chose not to present any further information, however, apparently due to misguided strategic calculation.

**E. S & Hy Timely Submitted its Claim Establishing the Garnished Obligation**

In a continuing effort to create confusion out of simple and

well understood facts, a pattern of argument that is becoming tiresome, Colony states that CityBank did not show that “its claim had been reported during the Colony policy period ... [but had] showed only that a claim” had been reported during the policy period.<sup>2</sup> There is only one claim at issue. That is the claim that S & Hy incontestably submitted to Colony within the policy period, establishing the garnished obligation of Colony. As discussed above, garnishment of that obligation was executed in complete compliance with the governing statute. If Colony had a factual basis to dispute that it owed the garnished obligation, they had at least two opportunities to present that information, but failed to do so, as also discussed above.

**F. Colony is not Entitled to Rely upon Evidence Introduced on a Motion for Reconsideration.**

After Judge Cuthbertson, based upon uncontroverted evidence, correctly found that there was no issue requiring trial and entered judgment on the garnishment, Colony, on a motion for reconsideration, for the first time advanced its argument that there was no coverage, because it claims there had been no release of

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<sup>2</sup> Opening Brief of Appellant at 17.

petroleum within the policy period. As noted, Colony withheld this information previously, based upon an ill-conceived strategic gambit. A casual review of the evidence before the Court suggests why Colony did not previously advance this position: It is wildly implausible. The implausibility of their present position, however, is not relevant and is not the basis upon which Judge Cuthbertson made his decision, and upon which basis he must be affirmed. It is simply too late to bring new evidence before the Court, on a motion for reconsideration after entry of judgment.

#### **IV. REQUEST FOR ATTORNEY'S FEES AND COSTS**

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's fees incurred on appeal.<sup>3</sup> In this case, CityBank controverted the answer filed by Colony. The Court of Appeals should affirm the decision of the lower court in favor of CityBank. In accordance with RCW 6.27.230 and RAP 18.1, CityBank respectfully requests that this Court award Respondent attorney's fees and costs incurred in this appeal.

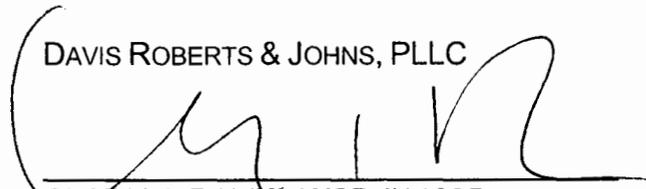
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<sup>3</sup> Bartel, supra, 112 Wn. App. at 67.

V. CONCLUSION

For the reasons stated above, the decision of the lower court should be affirmed.

Respectfully submitted this 7<sup>th</sup> day of February, 2007.

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Attorneys for Respondent

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON     )  
  ) ss.  
County of Pierce         )

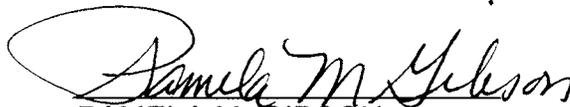
PAMELA M. GIBSON, being first duly sworn on oath,  
deposes and says:

That on the 9th day of February, 2007, she delivered to:

**ORIGINAL**

Jerret E. Sale  
Bullivant, Houser Bailery, P.C.  
1601 Fifth Avenue, Suite 2300  
Seattle, WA 98101-1618

the following items: **Respondent's Brief** by depositing the same in  
a receptacle for ABC Legal Messenger Service to be delivered on  
February 9, 2007.

  
PAMELA M. GIBSON

SIGNED AND SWORN to before me this 8<sup>th</sup> day of  
February, 2007.

  
NOTARY PUBLIC in and for the  
State of Washington, residing at  
Yelm, WA  
My Commission Expires: 9-4-09

