

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NO. 40599-7 II

CLARK COUNTY SUPERIOR COURT Case No. 09 2 00506 4

Ralla Klepak

Plaintiff,

v.

Thorsten Lundsgaarde

Respondent.

Brief of Appellant/Responent

Gideon Caron
Attorney for Respondent Lundsgaarde
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

FILED
COURT REPORTERS
10 JUN 24 PM 2:01
STATE OF WASHINGTON
BY _____

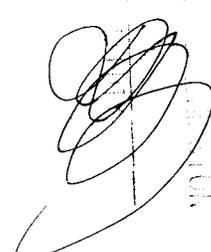


Table of Contents

INTRODUCTION	1
ASSIGNMENT OF ERROR	1
STATEMENT OF CASE	2
ARGUMENT	4
A. Standard of Review	4
ASSIGNMENT OF ERROR #1	4
A. Award of Attorney fees is mandatory, and the trial Court should have awarded them to Dr. Lundsgaarde when it Quashed the first writ	4
ASSIGNMENT OF ERROR #2	7
A. RCW Ch. 6.36. Violation	7
B. Service of the Second Writ was Invalid	9
RAP 18.1 STATEMENT	11
CONCLUSION	11
APPENDIX	12

Table of Authorities

<u>Klepak v. Lundsgaarde</u> , NO. 39719-6-II	1
<u>Burr v. Lane</u> , 10 Wash.App. 661, 517 P.2d 988 (1974)	5
<u>Snyder v. Cox</u> , 1 Wash.App. 457, 462, 462 P.2d 573 (1969), <i>review denied</i> , 77 Wash.2d 962 (1970)	5
<u>Blair v. GIM Corp., Inc.</u> 88 Wash.App. 475, 480-481, 945 P.2d 1149,1152 (1997)	5
<u>Caplan v. Sullivan</u> , 37 Wash.App. 289, 679 P.2d 949 (1984)	5
<u>Caplan v. Sullivan</u> , 37 Wash.App. 289, 295 679 P.2d 949, 953(1984)7	7
<u>Boundary Dam Constructors v. Lawco</u> , 9 Wash.App. 21 (1973)	8
<u>Watkins v. Peterson Enterprises, Inc.</u> 137 Wash. 2d 632 (1999)	8
<u>Blair v. GIM Corp., Inc.</u> 88 Wash.App. 475, 480-481, 945 P.2d 1149,1152 (1997)	9
Statutes	
RCW 6.36	2
RCW 6.27	2
RCW 6.27.230	5
RCW 7.33.290	5
RCW 6.27.210	6
RCW 6.36.035	7
RCW Title 6	8
RCW 6.27.110	9
RCW 4.28.080 (9)	9
RCW 4.28.080 (10)	10

INTRODUCTION

This case concerns the validity of two writs of garnishment issued by Ralla Klepak, who registered foreign judgments in Washington. The validity of the underlying judgments is the subject of a pending appeal in Klepak v. Lundsgaarde, NO. 39719-6-II.

The trial court summarily determined that the first writ of garnishment was unenforceable, but denied Lundsgaarde's claim for attorney fees. It further summarily determined that the second writ of garnishment was enforceable, and awarded the Klepak's attorney fees.

ASSIGNMENTS OF ERROR

1. The trial court erred in failing to award Attorney fees in quashing the first writ.
2. The trial court erred in failing to quash the second writ.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Once it is determined that a writ of garnishment is invalid as outside the territorial jurisdiction of the State of Washington, does the court have the discretion to deny the garnishee's attorney fees in controverting the writ?

2. Should the court have allowed a writ of garnishment, over objection of the garnishee, when it was served in violation of RCW 6.36 and RCW 6.27?

STATEMENT OF THE CASE

After registering a Cook County, Illinois judgment in Clark County, Washington, plaintiff had Dr. Lundsgaarde personally served with the Affidavit of Foreign Judgment on March 9, 2009. (CP 6). At no time, did plaintiff mail the Affidavit of Foreign judgment, however.

Plaintiff subsequently commenced garnishment. [Various hearings relating to the validity of the Cook County decrees had occurred in the interim, some of which are the subject of Klepak v. Lundsgaarde, NO. 39719-6-II.]

On October 6, 2009, plaintiff sent a writ of garnishment to N.W. Permanente P.C., which is an Oregon corporation. The sole method of service of this writ was delivery to the address in Portland, Oregon. (CP 7). On October 13, 2009, Dr. Lundsgaarde filed a Motion to Quash based on the failure to comply with RCW 6.36 as well as the lack of the court's jurisdiction to seize out-of-state property. (CP 12-15).

Connected to the motion was a Declaration of Dr. Lundsgaarde
that the

Payroll of NW Permanente PC (his employer) is processed in Oregon.
(CP 24-25).

On November 6, 2009, NW Permanente determined that it would
not comply with the writ on the basis that the writ did not comply with
Oregon garnishment laws. (CP 35).

Then, on December 18, 2009, Klepak served a second Writ of
Garnishment. (CP. 26). This time, she sent it to a workplace in
Washington, but not to the registered agent or any person authorized to
accept service for the Oregon corporate defendant. (CP 143-144). Just as
with the first writ, plaintiff failed to mail Dr. Lundsgaarde the Affidavit of
Foreign Judgment at least 10 days before filing.

Again, Dr. Lundsgaarde filed an objection. This was on December
23, 2009. (CP 31-36).

The employer withheld wages on this second writ and filed its
Answer on January 12, 2010. (CP 37-39). The following day, Dr.
Lundsgaarde filed a Controversion. (CP 40-41).

On February 5, 2010 the trial court entered an order that it lacks
“authority to rule on the motions to quash” and only the Court of Appeals

had said authority. (CP 46-47). Dr. Lundsgaarde filed a motion in Klepak v. Lundsgaarde, in this court under cause NO. 39719-6-II regarding the above ruling.

Essentially agreeing with Dr. Lundsgaarde, the Court of Appeals ruled that the trial court does, indeed, have continuing authority to rule on the motions. (See Appendix 1).

The trial court subsequently summarily determined that the first writ of garnishment was unenforceable, but denied Lundsgaarde's claim for attorney fees. It further summarily determined that the second writ of garnishment was enforceable, and awarded the Klepak's attorney fees. (CP 50-51).

ARGUMENT

Standard of Review

This is a review of interpretation of RCW 6.36 (foreign judgment enforcement act) as well as RCW 6.27 (garnishment statute). Interpretation of a statute is reviewed *de novo*.

ASSIGNMENT OF ERROR #1

- A. *Award of Attorney fees is Mandatory, and the trial court should have awarded them to Dr. Lundsgaarde when it quashed the first writ .*

In Washington, if a motion to quash a garnishment is granted, Attorney fees are mandatory, not discretionary.

The award of attorney fees for a prevailing party under RCW 6.27.230 is mandatory. The word “shall” in RCW 6.27.230 is not permissive when examining the legislative intent. Burr v. Lane, 10 Wash.App. 661, 517 P.2d 988 (1974). The word “shall” is not directory in the context of this case, as it is used not as a guide for orderly procedure but as an imperative to the trial court when considering the issue of attorney fees for a successfully prevailing controverting party in a contested garnishment proceeding. Snyder v. Cox, 1 Wash.App. 457, 462, 462 P.2d 573 (1969), *review denied*, 77 Wash.2d 962 (1970).

Blair v. GIM Corp., Inc. 88 Wash.App. 475, 480-481, 945 P.2d 1149, 1152 (1997)

Indeed, the Blair court itself, relied on Caplan v. Sullivan, 37 Wash.App. 289, 679 P.2d 949 (1984) which also supports this interpretation.

In that case, Mr. Caplan filed a writ of garnishment after obtaining a default judgment against Mr. Sullivan. *Id.* at 290, 679 P.2d 949. The trial court then denied Mr. Sullivan's motion to quash the writ. *Id.* Stating that “[a] liberal construction of RCW 7.33.290 is necessary to insure that parties injured by wrongful writs of garnishment will not be discouraged from pursuing their statutory remedies,” the appellate court reversed and awarded Mr. Sullivan attorney fees at trial and on appeal. *Id.* at 295, 679 P.2d 953.

In this case, Lundsgaarde filed a motion to quash the first writ on October 13, 2009. One of the arguments raised in his motion was the lack of jurisdiction to enforce garnishment in Oregon, a position which the employer also took in refusing to withhold wages on that writ. While the court initially refused to enter any ruling on the validity of the writ until directed by the Court of Appeals, when it did so, it correctly determined the writ to be invalid.

Plaintiff will undoubtedly argue that denial of Dr. Lundsgaarde's attorney fee was proper because NW Permanente did not honor the first writ. However, that is not relevant. Once the writ was sent by the creditor (Klepak), a motion to quash was filed by the debtor (Lundsgaarde). A similar argument was made by the creditor in Blair and rejected. In that case, the debtor failed to file a controversion under RCW 6.27.210, and, rather, filed a motion to quash. The creditor argued that by not following the controversion procedure, the debtor was not entitled to attorney fees. The Court of Appeals reasoned that either procedure was acceptable, again pointing to the case law liberally construing the statute in favor of parties injured by wrongful writs.

The court correctly quashed the first writ. It erred in denying attorney fees. Attorney fees should be awarded both for the services at the

trial court level on this issue and on appeal. Caplan v. Sullivan, 37 Wash.App. 289, 295 679 P.2d 949, 953 (1984).

ASSIGNMENT OF ERROR #2

A. RCW Ch. 6.36. Violation

This case involves an Illinois decree filed in Washington under RCW 6.36.

RCW 6.36035 provides:

1) At the time of the filing of the foreign judgment, the judgment creditor or the judgment creditor's lawyer shall make and file with the clerk of court an affidavit setting forth the name and last known post office address of the judgment debtor, the judgment creditor, and the filing and expiration date of the judgment in the originating jurisdiction.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the judgment creditor shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer if any in this state. In addition, the judgment creditor shall file proof of mailing with the clerk.

(3)(a) No execution or other process for enforcement of a foreign judgment filed in the office of the clerk of a superior court shall be allowed until ten days after the proof of mailing has been filed with the clerk by the judgment creditor.

It is undeniable in this case that the judgment creditor (Klepak) did not mail the notice of filing of the foreign judgment to the judgment debtor. Instead, she caused the debtor to be personally served with: Summons, Affidavit of Foreign Judgment, Judgment Summary; Order

Directing Thorsten Lundsgaarde to Appear for Examination and Affidavit for Order of Examination of Judgment Debtor. (CP 6). This does not comply with RCW 6.36.035.

Subsection (3)(a) forbids any enforcement of the foreign judgment until ten days after filing proof of mailing of the notice of filing of the foreign judgment. The process of enforcement utilized by Klepak was garnishment pursuant to RCW Title 6 (titled "Enforcement of Judgment"). By issuing the writ on December 18, 2009 without having ever mailed the required notice, Klepak violated RCW 6.36.035.

The creditor will likely argue that by serving plaintiff with the various papers on February 10, 2009, she substantially complied with the statute. A writ is garnishment is a statutory remedy, however, and the requirements of the statute must be strictly followed. Boundary Dam Constructors v. Lawco, 9 Wash.App. 21 (1973), Watkins v. Peterson Enterprises, Inc. 137 Wash. 2d 632 (1999).

The papers which were delivered did not include the required Notice. The statute makes clear that the Notice is a separate and distinct document from the Affidavit. Further, service was not in the method permitted by statute. For both these reasons, the December 18, 2009 writ was invalid. As a matter of law, the trial court erred in refusing to quash

the writ. As a consequence, defendant should have also been awarded Attorney fees under the authority discussed in regard to Error #1. [Blair v. GIM Corp., Inc. 88 Wash.App. 475, 480-481, 945 P.2d 1149, 1152 (1997)]

B. Service of the Second Writ was Invalid

Even though the creditor was fully aware that the debtor's payroll was prepared in Portland Oregon (CP 24), it sought to accomplish garnishment by delivery of the writ in Washington.

The applicable statute, RCW 6.27.110, requires that the writ be sent—certified mail—“addressed in the same manner as a summons in a civil action”. The summons in civil action, in turn, is governed by RCW 4.28.080 (9), which states:

If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, [service must be] to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

The Dec. 18, 2009 affidavit of mailing attached to the Writ (CP 143-144) shows that it was sent to:

NW Permanente, PC
SW WA Medical Center, 4th Floor
400 NE Mother Joseph Place
Vancouver, WA 98664

There is no indication that such address is that of a registered agent, secretary to the president or other head of NW Permanente PC. On the contrary, this is simply a floor of Southwest Washington Medical Center.

By December, 2009, Klepak and her counsel knew very well that NW Permanente PC's registered agent is Molly Burns at 500 NE Multnomah, Suite 100, Portland. (CP 19). Indeed, this is the very address which it sent the first writ. (CP 7).

To the extent that NW Permanente PC is a foreign corporation doing business in the State of Washington without a registered agent, service could have been accomplished under RCW 4.28.080 (10), which allows it upon any "agent, cashier or secretary thereof."¹ Again, mere delivery to simply a floor of Southwest Washington Medical Center does not suffice.

¹ Mailing the writ to the secretary of state was also an available option to the creditor. RCW 23B.15.100. The creditor did not avail herself of that option.

Since the service of the second writ was invalid, for this additional reason, the trial court erred in failing to grant the motion to quash the second writ. This court should reverse the trial court, order the garnished funds disgorged and award attorney fees to Dr. Lundsgaarde. Blair v. GIM Corp., Inc. 88 Wash.App. 475, 480-481, 945 P.2d 1149, 1152 (1997).

RAP 18.1 Statement

Dr. Lundsgaarde requests an award of reasonable attorney fees on this appeal. Caplan v. Sullivan, 37 Wash.App. 289, 295 679 P.2d 949, 953 (1984).

CONCLUSION

The trial court erred in failing to award Dr. Lundsgaarde Attorney fees regarding quashing the first writ and in failing to quash the second. The garnished funds should be disgorged due to the invalidity of the writ. Attorney fees should be awarded to Dr. Lundsgaarde.

RESPECTFULLY SUBMITTED this 22 day of June, 2010.



GIDEON CARON, WSB #18707
Of Attorneys for Appellant



Washington State Court of Appeals
Division Two

COPY
ORIGINAL FILED
MAR 03 2010

Sherry W. Parker, Clerk, Clark Co.

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

March 1, 2010

Gideon D. Caron
Caron Colven Robison & Shafton PS
900 Washington St Ste 1000
Vancouver, WA 98660-3455

Diana C Tehrani
Law offices of Diana C Tehrani
1409 Franklin St Ste 200
Vancouver, WA 98660-2824

CASE #: 39719-6-II
Thorsten Lundsgaarde, Appellant v Ralla Klepak, Respondent

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SKERLEC:

The trial court has authority to consider a motion to quash pursuant to RAP 7.2(e).

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NO. 40599-7 II

CLARK COUNTY SUPERIOR COURT Case No. 09 2 00506 4

Ralla Klepak

Plaintiff,

v.

Thorsten Lundsgaarde

Respondent.

Certificate of Service

**Gideon Caron
Attorney for Respondent Lundsgaarde
Caron, Colven, Robison & Shafon
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001**

10 JUN 24 PM 2:02
STATE OF WASHINGTON
BY _____

FILED
COURT OF APPEALS

CERTIFICATE OF SERVICE

I hereby certify that I served brief of Appellant/Respondent on the following named person(s) mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below:

Diana C. Tehrani
Attorney at law
1409 Franklin Street Suite 200
Vancouver, WA 98660-2824

Dated this 22 day of June, 2010



Gideon Caron