

COA No. 42906-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:

ROBERT ROSS,

Respondent,

v.

TONI HAMILTON,

Appellant.

REPLY BRIEF OF APPELLANT

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I. Contrary to respondent Robert Ross's contention, the trial court ordered the release of all remaining funds held in the Clerk's trust account to Mr. Ross's attorney.

On December 12, 2011, the trial court ordered the Wahkiakum County Clerk to "forthwith release all remaining funds held in the Clerk's Trust Account . . . to Craig M. McReary, P.S., Attorney at Law." (CP 61). The court did so even though it was aware its \$17,500 award to Mr. Ross had been reversed on appeal. (11/7/11 RP 68-69, 77). The record shows that the funds in the registry did include the \$17,500 award that was reversed. (CP 136). Ms. Hamilton appealed that order. (CP 66). She also filed a notice of cash supersedeas. (CP 69).

Mr. Ross then filed a motion for order limiting application of stay, reject supersedeas, and for CR 11 sanctions. (CP 75). The court entered an order on the motion directing immediate disbursement of all money held in the court registry except for \$137,000 and the \$25,000 cash supersedeas to remain in the registry. (CP 80-81).

Ms. Hamilton filed an amended notice of appeal to include

the order limiting application of stay. (CP 83). This Court, however, considered the amended notice to be an objection to a supersedeas decision of the trial court, whereupon the Commissioner let stand the order limiting application of stay. (2/14/12 Commissioner's Ruling). The effect of the ruling was that this appeal involves only the order releasing all funds. The supersedeas decision of the trial court simply determined that Ms. Hamilton's notice of cash supersedeas did not stay the transfer of all the funds, but only a portion of it: \$137,000 and the \$25,000 cash supersedeas. (*Id.*).

The trial court clearly ordered the release of all funds held in the Clerk's Trust Account and only the cash supersedeas prevented all the funds from being released. See RAP 2.4, RAP 8.1. The Commissioner upheld the trial court's order limiting application of the stay. Thus, the order releasing all funds is at issue in this appeal.

II. The Court of Appeals has already rejected Mr. Ross's claim that the order releasing all funds was not an appealable order.

Citing RAP 12.7(a), 8.1(b), 8.6, and 7.2(e), Mr. Ross claims

the trial court's December 20, 2011 order releasing all funds was not appealable. He made this same contention in his February 7, 2012 response regarding de facto motion to object to trial court's supersedeas decision. The Commissioner's ruling rejected Mr. Ross's position as the appeal was not dismissed. He did not move to revise that ruling and cannot raise the issue again.

III. This appeal is not frivolous so Mr. Ross is not entitled to attorney fees under RAP 18.1 and RCW 4.84.185.

A case must be frivolous in its entirety before fees can be awarded under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992); *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931, *review denied*, 152 Wn.2d 1029 (2004). That is not this case.

The court ordered the release of all remaining funds even though its award of \$17,500 to Mr. Ross was reversed. The record plainly shows that the \$17,500 was included in the money held in the Clerk's Trust Account. (CP 136). No matter how Mr. Ross chooses to characterize that evidence, he can point to nothing in the record showing the \$17,500 was not part of those funds.

Ms. Hamilton's appeal cannot be frivolous because the court

erred by ordering all funds to be released, including the \$17,500 award reversed on appeal. (CP 61). The trial court's order must be reversed on this ground alone as no such an award can be made when it was vacated. In these circumstances, Mr. Ross is not entitled to attorney fees under RAP 18.1 and RCW 4.84.185.

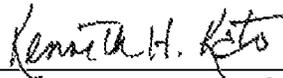
Jeckle, supra.

IV. Ms. Hamilton rests on her opening brief for all other contentions argued by Mr. Ross.

V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Hamilton respectfully urges this Court to reverse the order releasing all remaining funds held by the Clerk and to remand for further proceedings.

DATED this 17th day of July, 2012.



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