

RECORD NO. 53163-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

ARMSTRONG MARINE, INC,

Plaintiff-Respondent,

v.

MICHAEL P. WILEY, JR.

Defendant-Appellant

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

Appeal from the Superior Court, Clallam County

No. 16-2-00437-0 ◇ The Honorable Brian P. Coughenour

**RESPONSE BRIEF OF US WORKBOATS, INC., f/k/a Armstrong Marine,
Inc.**

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ISSUE FOR REVIEW

Did the lower court properly deny attorney Joseph Wolfley's motion for an award of attorney's fees and for entry of judgment, where 1) the motion was based on RCW 60.04.010, the attorney's lien statute; 2) at the time the motion was filed, the case had already been dismissed for lack of prosecution; 3) by the time the motion was filed, lien claimant Joseph Wolfley had long since withdrawn as counsel to Defendant Michael Wiley; 4) Joseph Wolfley was not a party to the case at any time; 5) no identifiable cash proceeds were received by either party to the case at any time; and, 6) where lien claimant Joseph Wolfley attempted to cure his lack of standing to pursue his attorney's fee lien claim in the dismissed case between Armstrong Marine, Inc. and Michael Wiley by proffering during the hearing on his motion a declaration from his former client Michael Wiley purporting to adopt, after-the-fact, lien claimant Joseph Wolfley's motion?

STATEMENT OF THE CASE

This case arose from Michael Wiley's breach of the covenants of confidentiality and not to compete when he left his employment with Armstrong Marine, Inc. (now known as US Workboats, Inc.) and went to work for a competitor. Defendant/Appellant Wiley moved for summary judgment of dismissal, arguing there was no independent consideration for the referenced covenants. CP 131. Plaintiff/Respondent opposed the motion, and demonstrated that in fact the referenced covenants were supported by independent consideration and therefore are enforceable. CP 122. Defendant's motion was denied. CP 96. Defendant's motion for reconsideration also was denied. CP 84.

Plaintiff/Respondent filed a motion to compel discovery, CP 77, which was granted. CP 40. Sanctions against Defendant/Appellant were held in abeyance, subject to Defendant's compliance with this Court's Order compelling discovery. CP 40. Meanwhile, Defendant's counsel Wolfley withdrew from the case and filed a lien on any recovery Defendant might receive in the case, under RCW 60.40.010, et seq. CP 30. Plaintiff continued to pursue discovery from Defendant, ultimately receiving further inadequate and incomplete responses. Rather than pursue the matter, however, in view of Defendant's financial situation and the likelihood that Defendant would not be able to pay an award of sanctions

much less satisfy the liquidated damages that likely would be awarded against him, Plaintiff allowed the case to be dismissed for lack of prosecution pursuant to CR 41 (b)(2). CP 34-36.

Defendant Wiley and his former counsel Joseph Wolfley both received a copy of the Clerk's January 10, 2019 Notice of Dismissal for Want of Prosecution. CP 34-36. Both Defendant Wiley and lien claimant Wolfley elected not to take any action to pursue the matter, including on Defendant's counterclaim for attorney's fees. Consequently, the case was dismissed pursuant to CR41(b)(2) without judgment being entered in favor of either party. CP 34-36.

On February 28, 2019, after the above-captioned case was dismissed, Joseph B. Wolfley, who is not a party to the case and who was no longer representing Michael Wiley, filed a motion in the dismissed case to foreclose a claimed lien for attorney's fees pursuant to RCW 60.04.010 (1) and for entry of judgment. CP 30. Plaintiff/Respondent objected on several bases, including that Joseph Wolfley lacked standing; that the case was already dismissed; that no identifiable proceeds had been received in the case; that Joseph Wolfley had failed to comply with Local Rule 0.7, etc.; and, that the amount of claimed attorney's fees was disputed, in any event. CP 24/38.

The trial court denied the motion, noting *inter alia* that Michael Wiley had received no proceeds in the action, with the result that there was nothing to which the Wolfley lien could attach.

CP 8. The belated assertion that Joseph Wolfley had been re-hired by Michael Wolfley as counsel, after US Workboats, Inc. (f/k/a Armstrong Marine, Inc.) filed and served its opposition to the motion, was not addressed by the trial court. While Mr. Wolfley was allowed to file the untimely Wiley declaration, the trial court stated that the declaration would not be considered.

ARGUMENT

The court below properly denied Joseph Wolfley's motion for an award of attorney's fees and for entry of judgement because the case had already been dismissed and no one had moved to set aside that dismissal or otherwise re-open the case; because Joseph Wolfley had no standing to file his motion in a case in which he was neither a party nor counsel to a party; because both parties to the case had elected to allow the case to be dismissed for want of prosecution after receipt of due notice; because there were no identifiable cash proceeds to which the asserted attorney's fee lien could attach; and because the untimely declaration of Michael Wiley could not retroactively cure the fact that the case was already dismissed and Joseph Wolfley lacked standing to file the motion.

Had Defendant Wiley pursued his counterclaim for attorney's fees in the action, and had he prevailed on that claim, there could have been "proceeds" ... "received in the action" to which the Wolfley lien might attach. RCW 60.40.010 (5). Even then, since Plaintiff/Respondent disputed the amount of the

claimed attorney's fees, lien claimant Joseph Wolfley would have had to comply with LAR 0.7 in order to present a proper request for attorney's fees, and there would have had to be a hearing or trial to determine whether fees should be awarded and if so, in what amount, as Plaintiff/Respondent maintained in the court below. CP 24/38. Obviously, all of the referenced proceedings would have had to occur either before the action was dismissed or in a separate action to foreclose the asserted attorney's fee lien.

Lien claimant Wolfley ignored not only the attorney lien statute itself and the local rule governing application for an award of attorney's fees, but also the controlling precedent with regard to the meaning and operation of RCW 60.40.010 et seq. In *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, 380 P.2d 565 (2016), the Aiken firm filed suit against its former client to enforce a lien for its attorney's fees and costs under RCW 60.040.010 in regards to proceeds received by the former client in a trust action in which the lien was filed. On appeal, the court ruled that "... the attorney's lien extends to any monetary sum Linth receives in the Trust action..." [italics in original].

"'Proceeds' is limited to the monetary sums the client receives in the action." *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, at p. 16. "Thus, the plain language of the statute limits an attorney's lien to the monetary sum received in the action by the client." [citing *Ferguson Firm, PLLC v. Teller & Assocs., PLLC*, 178 Wash. App. 622, 632, 316 P.3d 509 (2013) ("The

plain language of the statute [RCW 60.40.010] establishes that 'any monetary sum received in the action' constitutes 'proceeds.' Ferguson received a monetary sum and, therefore, received 'proceeds' to which the lien attaches"]. *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, at pp. 16-17.

The *Aiken, St. Louis & Siljeg v. Linth* court went on to address whether an attorney may remove or replace the client in the action or otherwise "control the underlying litigation to satisfy the attorney's interest," *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, at p. 17, as lien claimant Wolfley attempted to do here. The court specifically rejected the Aiken firm's argument that the statute allows the attorney to pursue rights and claims in the underlying case so that the attorney can "generate proceeds to satisfy the attorney's lien." *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, at pp. 17-18. The court noted that no authority supports that proposition and that its adoption would lead to the "absurd result where attorneys could commandeer their client's litigation to pursue their own financial interest," *Aiken, St. Louis & Siljeg v. Linth*, 195 Wash. App. 10, at pp. 19-20 – precisely what lien claimant Wolfley attempted to do here.

Appellant's reliance on *Scott Fetzer Co., et al. v. Weeks*, 114 Wn.2d 109 (1990) is misplaced. That case did not involve an attorney's lien and was decided based on a lack of "long arm" jurisdiction, which of course involves a special rule as regards an award of attorney's fees under RCW 4.28.185 (5). Similarly,

Anderson v. Gold Seal Vineyards, 81 Wn.2d 863 (1973), relied upon by Appellant, is unavailing because the dismissal there was a voluntary dismissal under CR 41 (a)(1), which provides for dismissal “upon such terms and conditions as are just,” rather than under CR 41 (b)(2), which provides for dismissal by the clerk “without cost to any party,” as was the case here. Moreover, that case, like *Scott Fetzer*, involved a dismissal specifically for lack of “long arm” jurisdiction over an out-of-state defendant under RCW 4.28.185, unlike here.

Regardless, it is axiomatic that a dismissal by the clerk is not an adjudication on the merits and is not tantamount to a final judgment for either party, but rather leaves the parties as if the action had never been brought. See generally *Allianceone v. Lewis*, 180 Wn.2d 389, 398-399 (2014).

Appellant’s reliance on *Vaughn v. Chung*, 119 Wn.2d 273, 830 P.2d 668 (1992) is misplaced. Vaughn’s case was dismissed by the clerk under CR 41(b)(2) for want of prosecution. Thereafter, Vaughn filed a motion under CR 60 to set aside the default, arguing that the clerk’s notice of the impending dismissal for want of prosecution had not been received. The trial court denied the motion on the basis that such a dismissal cannot be set aside under CR 60. On appeal, Vaughn argued that a trial court has authority to grant such motions, contrary to this Court’s holding in *Nicholson v. Ballard*, 7 Wn. App. 230, 499 P.2d 212 (1972). The Court of Appeals for Division One agreed with Vaughn, ruling that a trial court has authority under CR 60

to exercise its discretion to set aside a dismissal under CR 41(b)(2). On review, our Supreme Court ruled that a trial court has authority to consider a party's CR 60(b) motion to vacate an Order of Dismissal entered pursuant to CR 41(b)(2).

Of course, *Vaughn v. Chung* is inapplicable: Michael Wiley failed to file a CR 60 motion to set aside the dismissal, and lien claimant Joseph B. Wolfley, as a non-party to the case, had no standing to move for vacation of the Order of Dismissal – under CR 60(b) or otherwise¹. Regardless, because the case at bar was dismissed without any judgment or award being made on behalf of either party, there were no funds to which the asserted attorney's lien could attach.

Appellant's contention now that Michael Wiley was entitled to an award of attorney's fees as the prevailing party is an argument that Michael Wiley perhaps should have made in the trial court – before his case was dismissed. Regardless, that was not the basis for Joseph B. Wolfley's motion for an award of attorney's fees; rather, the Wolfley motion was made as a lien claimant, and was based on RCW 60.40.010.

Appellant has adduced no authority for the proposition that someone who was not a party to a case and who is not counsel to a party to a case has standing to file a motion for any relief whatsoever, much less to foreclose a claimed lien for attorney's

¹ And, in any event, failed to do so.

fees under RCW 60.040.10 and for judgment in a dismissed case.

Appellant also has adduced no authority for the proposition that a party to a case may, after dismissal and without an Order setting aside that dismissal, move the court for relief of any kind in that dismissed case.

Nor has Appellant cited any authority for the proposition that a claimed attorney's fee lien asserted under RCW 60.040.10 somehow can be adopted or ratified by a party to a dismissed case as to which such lien is asserted, much less by the untimely filing and service of a declaration.

And, Appellant cites no authority for the proposition that an attorney's fee lien asserted under RCW 60.040.10 can be pursued in a dismissed case or in any case in which there was no monetary award to which the claimed lien could attach.

Finally, Appellant cites no authority for the proposition that a party's claim for entitlement to an award of fees and costs as the prevailing party under a contract can be somehow merged with an action to foreclose an attorney's fee lien, which action was never actually commenced.

Accordingly, this appeal is being pursued without basis in law or in fact and should be denied as such. An award of attorney's fees and costs to Respondent would be appropriate under the circumstances.

III. CONCLUSION

The proposition that a party's former lawyer should be allowed to step into the shoes of his former client and request a judgment in a case after dismissal on a counterclaim that was never pursued so as to generate proceeds to which his lien may attach is not only unprecedented, but is contrary to the controlling authority.

Michael Wiley's case was dismissed under CR 41(b)(2), after proper notice to all concerned, when both sides elected not to pursue their respective claims against each other. Consequently, there were no proceeds to which the Wolfley lien could attach and no jurisdiction over the parties. Lien claimant Wolfley cannot be allowed to step into the shoes of his former client and take up Wiley's already dismissed claim in an effort to generate proceeds to satisfy the claimed attorney's lien—especially after the case was dismissed. Such would be an “absurd result,” and would be to allow lien claimant Wolfley to “commandeer [his] client's litigation to pursue [his] own financial interest,” contrary to the teaching of *Aiken, St. Louis & Siljeg v. Linth*. The result would be equally absurd even if Michael Wiley were somehow regarded as having “adopted” lien claimant Wolfley's motion and this appeal.

Moreover, to grant the instant appeal would be to allow a party to pursue a claim notwithstanding dismissal of the case without a motion to set aside the dismissal and to re-open the case, much less an order to that effect.

Regardless, Claimant Wolfley's failure to adhere to the requirements of LAR 0.7 was fatal to his motion, the resolution of which in any event would require a hearing or trial on the contested issue of entitlement and reasonableness of the claimed fees in an action either no longer pending or in a lien foreclosure action never commenced.

Respectfully submitted this 9th day of August, 2019.

GIBBONS & ASSOCIATES, P.S.

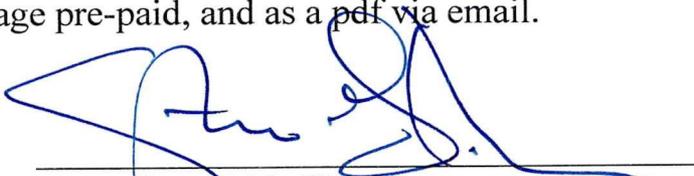
By: 

Steven V. Gibbons, WSBA # 14028

Counsel for Respondent US
Workboats, Inc. (f/k/a Armstrong
Marine, Inc.)

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9 th day of August, 2019, I filed Respondent's Brief in the Clerk's Office of the above-entitled court, at 950 Broadway, Suite 300, MS TB-06, Tacoma, WA 98402-4454, via U.S. Mail, and provided a true copy of the same via U.S. Mail to: Joseph B. Wolfley, WOLFLEY LAW OFFICE, 713 East First Street, Port Angeles, WA 98362, postage pre-paid, and as a pdf via email.


By: Steven V. Gibbons

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