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No. 92565-8

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA M. CARTER,

Plaintiff,

v.

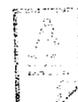
PETERSON ENTERPRISES, INC.,

Defendant.

AMICUS CURIAE BRIEF (REVISED) OF
NORTHWEST JUSTICE PROJECT

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I. INTRODUCTION

The United States District Court for the Eastern District of Washington certified to this Court the question of whether an attorney for a judgment creditor can legally issue a writ of garnishment in a district court without filing an application by affidavit under RCW 6.27.060, and without making the required statement, under oath, that the plaintiff has “reason to believe and does believe” that the garnishee defendant has possession of non-exempt property of the judgment debtor. Inherent to this question is an inquiry into the legislative intent of first requiring a judgment creditor to have a “reason to believe” property is not exempt leading to an actual belief of the same; and then what “reason” can fairly support the true belief that property is not exempt?

The answer to this question affects many clients of the Northwest Justice Project (“NJP”), and for the reasons set forth in the brief of the Plaintiff, and for the additional reasons set forth below, the certified question should be answered in the affirmative – yes, the requirements of RCW 6.27.060 are a fundamental pre-deprivation procedural protection against the “extraordinarily harsh remedy” of garnishment and are not obviated by the privileges of RCW 6.27.020(2) (which allows attorneys to

sign writs of garnishment in district courts).¹ The Court should clarify that, as part of the requirements under RCW 6.27.060(3), the judgment creditor's statement has a "reason to believe and does believe" that the garnishee holds property of the debtor in excess of any exempt amount means that the judgment creditor has "a basis" to have "confidence in the truth, existence, or reliability" that the garnishee defendant is holding non-exempt property.

II. INTEREST AND IDENTITY OF AMICI

NJP is a statewide not-for-profit organization that provides free civil legal services to low income people throughout the state of Washington. In the past five years, the Northwest Justice Project has provided legal assistance in 6,744 cases involving some aspect of collection/garnishment/repossession and assisted 354 people with cases specifically related to garnishment; in many which the debtor substantially or entirely subsisted on exempt income. As a result, NJP has a significant interest in the outcome of this case, given the significant amount of its clients, and an untold number of other low income Washingtonians, that have had exempt income garnished (including some by Peterson

¹ See *Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 650, 973 P.2d 1037, 1049 (1999).

Enterprises, Inc.), where the judgment creditor explicitly or substantively failed to comply with the pre-issuance protections at RCW 6.27.060.

This brief is being submitted pursuant to RAP 10.1(e), 10.6 and 13.4(h).

III. ARGUMENT

Washington's garnishment statute provides judgment debtors with two fundamental safeguards against the garnishment of exempt property. First, the statute provides a pre-deprivation procedural safeguard by requiring a judgment creditor to declare by affidavit that it has a "reason to believe and does believe" that the garnishee defendant is holding property of the judgment debtor in excess of any amount exempted under state and federal law.^{2,3} The second is the statutory exemption claim process, which

² RCW 6.27.060(3).

³ In March 2011, the United States Department of the Treasury responded to the crisis of exempt income being routinely garnished by amending its banking regulations to require certain banks to protect certain exempt federal funds from garnishment. *See* 31 C.F.R § 212.1-12. However, the protection only extends to exempt benefits held by state or federally chartered banks and paid by the Social Security Administration, the Department of Veteran's Affairs, the Railroad Retirement Board, and the civil service benefits paid by the federal Office of Personnel Management. All other forms of exempt income, including those protected under Washington law at RCW 6.15.010, as well as other state and federal statutes, are not protected by the Treasury Dept.'s amendment. Since the adoption of this rule, NJP has seen a decline in the number of cases where exempt assets are frozen; however, banks still charge garnishment fees to the debtor for processing each of the unsuccessful garnishments.

occurs only after a writ of garnishment has attached to property and often takes in excess of one month to resolve.⁴ The issue presently before the Court concerns the former. However, it is the first procedural safeguard that is essential in preserving exempt property of low income individuals and families and is the safeguard well often ignored by judgment creditors.

A. WASHINGTON'S GARNISHMENT STATUTE IS AN EXTRAORDINARILY HARSH REMEDY REQUIRING STRICT ADHERANCE TO ITS STATUORY PROCEDURES.

In *Watkins*,⁵ this court recognized that “garnishment is an extraordinarily harsh remedy, with specific procedures relating to filing, notice, and enforcement, the party seeking the remedy must follow those exclusive methods provided in the statute.” Further finding, “garnishment statutes have traditionally been construed against the party resorting to such action. Enforcement of the garnishment statute requires strict adherence to its statutory procedures.”⁶

When the language of a statutory provision is clear and

⁴ See RCW 6.27.160(2) (20 days to assert claim); RCW 6.27.160(2) (requiring a hearing on contested exemption claims to be held within 14 days after the exemption claim). Though the requirement for a hearing within 14 days is sometimes disregarded for various reasons, including court schedule and creditor attorney convenience.

⁵ *Watkins v. Peterson Enterprises, Inc.*, 137 Wn.2d 632, 650, 973 P.2d 1037, 1049 (1999).

⁶ *Id.* at 650.

unambiguous, a court must derive its meaning from the wording of the provision alone.⁷ “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”⁸ If a term is defined in a statute, that definition is used. Absent a statutory definition, the term is generally accorded its plain and ordinary meaning unless a contrary legislative intent appears.⁹ “In construing statutes, the primary objective is to ascertain the intent of the Legislature.”¹⁰ Clear language will be given effect.¹¹

The relevant portion of the Garnishment Statute in this case, RCW 6.27.060, is clear that a judgment creditor as a garnishment plaintiff has a duty to swear by affidavit to the existence of four facts:

The judgment creditor as the plaintiff ... shall apply for a writ of garnishment by affidavit, stating the following facts: (1) The plaintiff has a judgment wholly or partially unsatisfied in the court from which the writ is sought; (2) the amount alleged to be due under that judgment; (3) the

⁷ *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

⁸ *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

⁹ *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 479–80, 745 P.2d 1295 (1987).

¹⁰ *Martin v. Meier*, 111 Wn.2d 471, 479, 760 P.2d 925 (1988).

¹¹ *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985).

plaintiff has reason to believe, and does believe that the garnishee, ... is indebted to the defendant in amounts exceeding those exempted from garnishment by any state or federal law, ... ; and (4) whether or not the garnishee is the employer of the judgment debtor.¹²

RCW 6.27.060 provides that a judgment creditor as a garnishment plaintiff "shall" apply for a writ of garnishment by affidavit and make each of the four RCW 6.27.060 statements of fact. No portion of the Garnishment Statute explicitly or implicitly excuses a judgment creditor from the duty to swear to any one, or all, of the four mandatory statements.

Instead of meeting this requirement, Peterson Enterprise, Inc.'s computer-generated form application affidavit swears only to the following, in its entirety:

The undersigned, first being duly sworn on oath, deposes and says: That he/she is an employee of Plaintiff corporation and makes this affidavit as such;

The Plaintiff holds a judgment, by assignment, against Defendant/s in the sum of \$[amount identified]. The garnishment costs are \$[amount identified]. The interest is \$[amount identified]. The funds received before this garnishment are \$[amount identified]. That garnishment is not out to injure either Defendant/s or the Garnishee. That the Plaintiff has good reason to believe and does believe that the Garnishee: [Garnishee identified] is/are indebted to the Defendant/s, or either of them has possession of, or has control of personal property or effects belonging to the

¹² RCW 6.27.060

Defendant/s, or is a corporation and that the defendant/s is/are owner/s of share thereof.¹³

Peterson Enterprise, Inc.'s substitute for the mandatory affidavit under RCW 6.27.060 may, in substance, swear to the facts required by subparts (1) and (2), but it fails entirely to swear that (3) "the plaintiff has reason to believe, and does believe that the garnishee, ... is indebted to the defendant in amounts exceeding those exempted from garnishment by any state or federal law" or that (4) garnishee defendant is not an employer of the judgment debtor.

"The word 'shall' in a statute is presumptively imperative and operates to create a duty."¹⁴ Therefore, the legislature's use of the word "shall" in RCW 6.27.060 creates an affirmative duty to not only unequivocally make the mandatory sworn statements, but to have an actual "reason to believe" a garnishee defendant is holding non-exempt property before a writ may ever issue.

No court has reviewed the scope of a judgment creditor's duty to have a "reason to believe" or what level of inquiry or review is sufficient

¹³ ECF No. 12, p. 2, *Carter v. Peterson Enterprises*, U.S. Dist. Ct. E.D.Wa. Case No. 2:15-CV-257-RMP, "Certification to Supreme Court of Washington ("the Court certifies that the following shall constitute the 'record' pursuant to RCW 2.60.010(4) and 2.60.030(2)).

¹⁴ *Crown Cascade, Inc. v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983).

to form a legitimate belief a garnishee defendant is holding non-exempt property. Similarly, the effect of failing to comply with the statutory duty to swear to this statement, or what reasonable or qualifying “reason” is sufficient to satisfy the initial procedural safeguard against the garnishment of exempt funds, has not before been addressed.

1. Ordinary Meaning of “Reason to Believe.”

“Reason to believe” is not defined within the statute and should be accorded its plain and ordinary meaning. The words “reason” and “believe” have well-accepted, ordinary meanings.

A reason is “a basis or cause, as for some belief . . .”¹⁵ To believe means “to have confidence in the truth, the existence, or the reliability of something, although without absolute proof that one is right in doing so.”¹⁶ Read together, a judgment creditor must have “a basis” to have “confidence in the truth, the existence, or reliability,” but may fall

¹⁵ Dictionary.com, (2016) *available at* <http://www.dictionary.com/browse/reason>

¹⁶ Dictionary.com, (2016) *available at* <http://www.dictionary.com/browse/believe>

somewhere short of “absolute proof” that a garnishee defendant is holding non-exempt income.

2. Creditors Frequently Fail to Review Accounts Before “De Facto” Use of Garnishment.

Unfortunately, in practice it is the experience of NJP and its clients that creditors make minimal, if any, inquiry into the exempt status of property prior to initiating a garnishment proceeding.¹⁷ Indeed, in many NJP cases, despite actual notice to creditors that assets are exempt, some clients have still had their exempt assets garnished.

¹⁷ A superseded version of Ohio Revised Code § 2716.11 required a judgment creditor to apply by affidavit swearing to have, “a reasonable basis to believe” funds were not exempt. *See Lee v. Javitch, Block & Rathbone, LLP*, 601 F.3d 654 (6th Cir. 2010). In *Lee*, the 6th Circuit addressed that language and affirmed a jury verdict that the affiant did not have “a reasonable basis to believe.” The facts of *Lee* are representative of both Ms. Carter’s situation in this matter, and a significant volume of the low income people NJP provides assistance:

In *Lee*, the court found that the affiant “had not conducted any investigation into Lee’s account before signing the affidavit; instead he relied on the investigation done by [other staff]” and “that on some days he might sign as many as thirty or forty non-wage garnishment affidavits of this type.” Nevertheless, the affiant in *Lee* made the statutorily required statement that he had “a reasonable basis to believe” the money in the bank account was not exempt. Naturally, the affidavit resulted in the issuance of a writ of garnishment and the writ was served on the bank. As was the case in this matter, the bank account contained entirely exempt funds; in Ms. Lee’s case, social security disability because of complications with breast cancer surgery. Ms. Lee’s exempt funds were then frozen for roughly a month during the exemption claim process. During this time, she incurred significant fees from bounced checks and was unable to access her bank and suffered stress-related illnesses.

Garnishment has become the de facto method for many collection agencies to obtain a payment given the ease at which collection agencies are now able to obtain massive amounts of default judgments against debtors who simply have no funds to voluntarily pay.¹⁸ In *Junk Justice*, Peter Holland of the Maryland Francis King Carey School of Law writes, “short of voluntary payment, the primary goal of debt-buyer lawsuits is to turn unsecured debt into court judgments, fully secured and fully collectable through garnishment and other enforcement proceedings.”¹⁹

In a recent report, Human Rights Watch found:

An uneven patchwork of federal and state laws does protect a minimum core of poor defendants’ income from garnishment or seizure by debt buyers or other creditors. But this legal framework is inadequate, and its protections often add up to far less than what a family needs to keep from being pushed deeper into poverty and financial instability by an adverse judgment. For example, federal

¹⁸ In 2009, the Federal Trade Commission convened a series of roundtables to examine debt collection litigation. See FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT LITIGATION AND ARBITRATION, ii (2010) available at: <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>. According to the panelists participating in these roundtables, 60 to 65 percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to 90 percent. See *id.* at 7. These national statistics are consistent with NJP’s observations in Washington.

¹⁹ Holland, Peter, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers* (2014), *Loyola Consumer Law Review*, Vol. 26, No. 1, 2014. p. 179, available at <http://ssrn.com/abstract=2406289>

law prohibits creditors from garnishing a debtor's social security payments, caps wage garnishments at 25 percent of a debtor's disposable income, and protects people's directly deposited federal benefits.

The laws in some US states provide additional protections, but a comprehensive study by the National Consumer Law Center found that 'despite the importance of exemptions laws, not one US state meets five basic standards' to prevent garnishment and property seizures from destroying debtors' ability to earn a livelihood, pay basic utilities, housing, and transportation costs, and maintain a living wage.²⁰

This is an issue of special importance to NJP as a substantial portion of the low income population it serves suffers the crippling consequences of a garnishment despite - like Ms. Carter in this matter - receiving income that is 100% exempt from garnishment. The pre-garnishment protections are intended to safeguard people and their families with exempt income and often the sole means to secure food, shelter and safety.

A declaration from this court interpreting the minimum diligence or inquiry a creditor must make into the exempt status of funds before

²⁰ HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE, US COURTS, DEBT BUYING CORPORATIONS AND THE POOR (2016), p. 23, available at: <https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor>. Citing National Consumer Law Center, "No Fresh Start: How States Let Debt Collectors Push Families into Poverty," October 2013, <http://www.nclc.org/issues/no-fresh-start.html>, p. 3.

forming a “reason to believe” that funds are not exempt would serve to restore the intended effect of the legislature when it created pre-deprivation procedural protection before a judgment creditor can employ the “extraordinarily harsh remedy of garnishment.”²¹

B. THE REQUIRMENT THAT A JUDGMENT CREDITOR HAVE A “REASON TO BELIEVE” FUNDS ARE NOT FULLY EXEMPT IS A FUNDAMENTAL PRE-DEPRIVATION PROCEDURAL PROTECTION AGAINST GARNISHMENT OF EXEMPT INCOME.

To the low income individuals and families across Washington who subsist on fixed exempt incomes, the Court’s interpretation of what constitutes a “reason to believe and does believe” is the only way a debtor can avoid the significant financial costs of having a writ issued against their exempt property.

The exemption claim process, even when most efficiently exercised, fails to provide meaningful protection to the state’s most desperate debtors surviving on a modest level of exempt income because it still deprives individuals and families access to their funds pending the outcome. The mere attachment of a writ of garnishment triggers the bank to assess a garnishment fee, typically in excess of \$50.00. It is also common among NJP’s clients that an attachment of a writ to a bank account freezes the debtor’s money causing any outstanding checks to be

²¹ *Watkins*, 137 Wn. 2d at 650.

dishonored and other bills not to be timely paid. For each bounced check, a debtor is liable for a “non-sufficient funds fee” imposed by the merchant along with a statutory collection fee of up to \$40.00. If these fees go unpaid, and the NSF check claim is assigned to a collection agency, a “reasonable handling fee” plus additional costs and attorney’s fees, if a lawsuit is filed to collect the balance, are also assessed.²² Late payments cause an array of other harm ranging from default interest rates on credit cards, issuance of 3-day notices to pay rent or vacate,²³ or negative credit history and default repossession rights of vehicles and other personal property. Thus, even if the exempt funds are returned following the exemption claim process, the debtor is placed even further in debt in an amount almost always beyond their means. For individuals and families existing on exempt incomes, it is an extraordinarily deep hole to recover from. In other words, despite the intent of the exemption claim process to be a procedural safeguard, it often results in the debtor losing significant amounts of unrecoverable money and suffering extraordinary stress, even when resolved in their favor.

Therefore, the pre-writ application and affidavit requirements of RCW 6.27.060 are a critical pre-deprivation procedural safeguard for

²² See RCW 62A.3-515; RCW 62A.3-530.

debtors with exempt income that when not respected, results in substantial harm to society's most vulnerable people.

In one example, in a case handled by NJP's Coordinated Legal Education, Advice and Referral hotline ("CLEAR"), a client living entirely on exempt income was sued by a collection agency. Before a default was ever entered, a CLEAR attorney reviewed the continuing and persistent nature of the client's exempt income source and advised the client to file an affidavit of exempt income with the court and serve it on the collection agency's attorney. Despite this, soon after a judgment was entered, the client's credit union account was garnished anyway. The client incurred bank garnishment fees; one bounced check and was late on his rent. This created an emergency situation for the client due to a high probability of the client becoming homeless. The client was referred to an NJP field office for immediate legal representation on the branching legal needs related to every penny of the client's exempt money being tied up while the exemption claim process played out over the course of four weeks. This situation is not atypical.

Most clients with exempt income are either disabled or seniors or both. The fear of losing the small amount of exempt benefits they receive

²³ See RCW 59.12.030(3).

impacts them physically and emotionally. Even if there is no resulting financial harm, there is a substantial amount of psychological harm to a person who has physical or mental health disabilities, or other impairments due to advanced age. Garnishment of exempt income is also especially difficult for limited English speakers who struggle to understand why their exempt property has been taken from them and how to get it back.

The minimum diligence of a judgment creditor to form “a reason to believe” has never been discussed by a Washington court and the statutory scheme neither requires judgment creditors to identify their “reason to believe” nor provides consequences for failing to have a reasonable, or even tangible, “reason to believe.” There is significant and often realized risk of creditors treating this requirement as an empty formality to be included in the form application and affidavit or, as in this case, disregarded in its entirety.

IV. CONCLUSION

The Court should rule that a judgment creditor has a duty to make the statements of fact by affidavit required by RCW 6.27.060, and in particular RCW 6.27.060(4), before a writ of garnishment may be issued in any Washington court. Amicus further requests that the Court find that the requirement that a judgment creditor “have a reason to believe and

does believe” that property held by a garnishee defendant is not exempt, is a pre-deprivation procedural protection against the garnishment of exempt funds that can only be satisfied after a meaningful investigation which would ordinarily alert a judgment creditor to the existence of exempt property.

RESPECTFULLY SUBMITTED this 28th day of April, 2016.

NORTHWEST JUSTICE PROJECT

By 

Scott M. Kinkley, WSBA #42434

CERTIFICATE OF SERVICE

I certify that I mailed or caused to be mailed a copy of this AMICUS CURIAE BRIEF (REVISED) OF NORTHWEST JUSTICE PROJECT, postage prepaid, via U.S. mail on the 26th day of April, 2016, to the following counsel of record at the following addresses:

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and that the original was mailed to Washington State Supreme Court Clerk's Office, 415 12th Street W., Olympia, WA 98504-0929.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Spokane, Washington, this 26th day of April, 2016.

NORTHWEST JUSTICE PROJECT



Marcy Chicks
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Rec'd 4/26/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Marcy Chicks [mailto:marcyc@nwjustice.org]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Subject: RE: Carter v. Peterson Enterprises, Inc., Supreme Court Cause # 92565-8

Attached please find the Amicus Curiae Brief (Revised) of Northwest Justice Project in Supreme Court Cause No. 92565-8. Upon review of the brief, errors were found. The errors corrected are clerical and not substantive. The changes include the following:

Document name changed from Amicus Curiae Memorandum of Northwest Justice Project to Amicus Curiae Brief (Revised) of Northwest Justice Project

Table of Contents	A and B wording changed to match the headings as they appear in the body of the Brief
Table of Authorities	<i>Crown Cascade</i> moved from p. 8 to p. 7 HUMAN RIGHTS WATCH moved from p. 12 to p. 11
Brief	P. 4 – A. wording changed Fn. 6 on p. 4 Quote on p. 5 – right side indented P. 6 RCW 6.22.060 corrected to RCW 6.27.060 P. 7 <i>Crown Cascade</i> cite moved from p. 8 to 7 P. 8 page break entered, which shifted remaining pages P. 12 – B. spelling corrected

Please exchange the Brief filed yesterday, with this revised Brief, as with the corrections and revisions mentioned the entire brief layout has changed.

Thank you and I apologize for not catching the errors before initially sending.

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