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NO. 687310-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

WILLARD GIBSON

APPELLANT

v.

MARIE-CLAIRE PAGH

RESPONDENT

APPELLANT'S REPLY BRIEF ON APPEAL

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JAN 31 PM 1: 97

Laura Christensen Colberg, WSBA #26434
Attorney for Appellant

MICHAEL W. BUGNI & ASSOCIATES, PLLC
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125
Telephone: (206) 365-5500

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APPELLANT'S REBUTTAL

1. Pagh's response misses the point.

Pagh ignores authority¹ that has addressed the very situation before this court—namely the claim of the attorney on funds held in trust when work has been done to earn those funds, but while awaiting the requisite time period before a transfer is made. Awash in minutiae, form-over-substance arguments, and objections not raised to the court below, the Respondent's brief does not point to any clear-cut authority in support of her position. An attorney's claim to payment for work done results in a question of ownership of funds, subject to resolution if a dispute arises between the client and attorney, not a third party.

2. This case is tied to earlier decision vacating fee judgment.

The Appellant does agree that the final outcome of Case No. 66833-1-I has at least some direct effect on the merits in this matter—if the fee judgment is vacated, the Respondent would have no right to the \$5,000 at stake (the funds garnished). There is equity, however, in addressing the propriety of the Respondent's actions in pursuing the

¹ *Crane v. Paul*, 15 Wn. App. 212, 548 P.2d 337 (1976), *In re the Matter of Sather*, 3 P.3d 403 (2000)—out of Colorado; *Sports Imaging v Meye Hendriks*, 2008 WL 4516397 (Ariz. App. Div. 1).

garnishment, controverting it once an answer was received, and the resulting cost to Gibson to file this appeal for appropriate redress.

Caplan v Sullivan² affirmed the court's policy behind recompensing persons who defend against improper Writs.

3. Correction of fact: MWB was not counsel for Gibson when appeal was filed.

The appeal of the February 2011 trial court judgment³ against Gibson was not filed by the Garnishee in this matter (Michael W. Bugni & Associates). The attorney of record for Gibson was Dave Hawkins. Supplemental Clerk's Papers (docket number 94). The appearance of MWB & Associates to represent Gibson in late May 2011/early June 2011⁴ was initially challenged by Pagh's firm (alleging conflict of interest), a dispute that was not resolved until Judge Doerty's decision on September 19, 2011. Supplemental Clerk's Papers (docket No. 112). Pagh's recounting of the history of representation is either negligently flawed or intentionally misleading. Active work on Gibson's case could not begin until after this decision in mid-

² 37 Wn. App. 289, 679 P.2d 949 (1984)

³ Pagh incorrectly states that she filed her domestic violence case against Gibson in 2011. She filed in 2010. The trial occurred a year later, in early 2011.

⁴ Consultation and analysis of the possible conflict of interest occurred prior to

September (other than work to address and resolve the potential conflict, a decision that resulted in Gibson's favor). The stay in that appeal was lifted in early October 2011. Thus there is no factual or legal merit in the question raised by Pagh at page 7 of her Response Brief.

4. Pagh waived objections to admissibility of evidence by raising no objection to trial court.

Pagh spends much of her response brief articulating areas where either Gibson did not "declare" a fact or his attorney did not do so (as Garnishee). Nowhere in the record below are objections as to authenticity or admissibility of exhibits (i.e., billing summaries or billing statements) made at a time and in a manner where they could be addressed by the trial court and corrected if needed. This cannot be raised for the first time on appeal.⁵ Furthermore, statements by an

actual appearance since the notice of intent to represent Gibson had to first of all address issue.

⁵ Issues raised for the first time on appeal ordinarily will not be considered. **State v. Anderson**, 58 Wn.App. 107, 110, 791 P.2d 547 (1990). A party seeking to raise a claim of error for the first time on appeal must 1) establish that the claimed error is of constitutional magnitude and 2) show how, in the context of the trial, the claimed error actually affected the party's rights. **State v. Williams**, 137 Wn.2d 746, 975 P.2d 963 (1999).

attorney can be attributed to the client,⁶ so there is a difference without a distinction, whether the submissions were signed by counsel on behalf of Gibson or by Gibson himself.

5. **Records provided substantiate billing history.**

There is no gap in the statements provided. The balance due on 11/21/2011 (\$2,919.11) carries over as the previous balance on the 12/22/2011 statement. CP 99-101. The \$5,000 deposited on 11/21/2011 was intended for and applied to the payment owing from the prior month (\$2,919.11) leaving the difference, \$2,080.99 available for work after 11/21/2011. There is no mystery or omission here. In order to determine what funds, if any, remained “unearned” and thus unequivocally owned by Gibson, no further activity was billed to this account after 11/29/2011. CP 80 does not state that a special statement was prepared *for the court*. No court proceeding had yet been filed—that occurred on February 2, 2012 (received on February 6, 2012). CP 1-2. The bifurcation/separation of account activity was necessary to ensure compliance with the Writ—had any funds remained unearned,

⁶ ***Lane v. Brown & Haley***, 81 Wn. App. 102, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028 (1996); ***Hill v. Dept. of Labor & Indus.***, 90 Wn.2d 276, 580 P.2d 636 (1978); ***Haller v. Wallis***, 89 Wn.2d 539, 573 P.2d 1302 (1978)

those would have been the undisputed property of Gibson and would have been held as subject to the Writ.

6. Statements were generated in the normal course for billing purposes.

Nowhere below did Pagh raise this question, or it could have been addressed by the trial court with a supplemental statement if needed. The court's decision was not based on the inadmissibility or unreliability of the records provided. While Pagh argues in her Response brief that the records provided had no reference to "billing"—that's not the case. At CP 34 "Billing records" are referenced, referring to the attached exhibit. (Redactions to protect attorney-client privilege were not raised as problematic below. Pagh now argues "manipulation" and "selectivity" in the information provided. There is no basis for this new claim. It should be disregarded.) Fees and costs "billed to Mr. Gibson" is the basis for MWB's claim that said funds were earned. CP 34. Pagh wants this court to read "billed to Mr. Gibson" as if it does not mean that bills were *sent to* Mr. Gibson. This is a preposterous position to take. Some things "go without saying." If Mr. Gibson was "billed"—that means he was sent a bill! (Otherwise, how would he have known to send in more funds to cover an

outstanding balance?) See also the billing recap at CP 78. And at CP 80 “after allowing the Father required review time” indicates he was sent the bill for review.

7. Pagh ignores terms in Fee Agreement.

While pointing out that the initial rate of billing was \$295, Pagh points out that this was \$20/hour less than actually billed. She ignores the line in the contract: “Our rates can be increased during the period of representation . . .” No dispute was made by Gibson over the rate actually billed. This adds nothing to Pagh’s case.

8. Gibson never asserts the funds were freely his.

With no citation to the record, Pagh argues that Gibson admits that he could get the funds in question back upon request. This is not the case. The only thing ever argued was that *if* there were a basis to request a refund (a) it belonged to Gibson, not to a third party and (b) if there were a dispute, funds would remain in trust until that dispute was resolved (as between Gibson and his attorney).

9. Pagh does not address RPCs about disputes regarding fee deposits.

While asserting the “presumption” language used by Judge Inveen, Pagh does not reconcile that theory of legal rights with the

RPCs that do not give the client any priority of possession of disputed funds in a dispute between attorney and client over fees billed. RPC 1.15A(g) says such funds are to be held in trust. This defeats the notion of presumption of ownership in favor of the client. If anything, it shifts any presumption to that of the law firm, in that funds are to continue to be held by *them* (in trust) until the issue is resolved. At the very least, once charges are billed, there exists a question about ownership that prevents the client unfettered access to the funds deposited into trust. At best, there is a transfer of ownership once services or benefits are rendered to the client, complete ownership still subject to review and approval in order to prevent abuses.

10. **Answer to garnishment was sufficient and in good faith**

Pagh argues that the Answer to the garnishment was deficient, but again, this was not raised in the record below. The purpose of an Answer is to state the Garnishee's position on the issues. The position was stated in the Answer provided, attaching a letter of explanation where "Yes" or "No" would not be a complete response. As the authority provided in Gibson's opening brief demonstrates, there is some ambiguity about the ownership interests in the funds in attorney

trust which have been earned but not yet billed. There were no gaps or unanswered questions in the Answer. Pagh did not like the Answer, but that does not mean it was not adequate or sufficient to inform her of the Garnishee's Answer to the Writ.

11. **"Exemption" was not claimed.**

The Answer provided explained that the funds in question were considered to be the property of the law firm, not Gibson. Later, legal analysis was provided showing the history and timeline by which funds in trust had been earned, thus divesting Gibson entirely of ownership. (Had funds remained in trust above and beyond those earned by MWB at the time of the Writ, those would have remained Gibson's property without question, and would have been held and/or turned over as required by the Writ.) Pagh's response brief repeatedly rests her claim on the contest over an "exemption" when that is not the issue here. The issue is not whether the funds were exempt, but who owned them (and if ownership was in dispute, who has the right to raise that question). RCW 6.27.140 addresses "Exemption" rights, none of which apply to the situation in this case.⁷ There was no "Exemption" Form

⁷ Examples of "Exemptions" are: Wages, TANF benefits, SSI, Social Security,

filled out by the Garnishee because that was not the basis of the answer. Without any claimed “exemption,” the authority of RCW 6.27.160(2) cited by Pagh does not apply. Nor do the remedies associated with the “wrongful assertion of an exemption claim” apply. No exemption was asserted.

12. **Pagh does not distinguish analysis in *Sports Imaging*.**

Gibson’s opening brief cited to the Arizona case, *Sports Imaging v Meye Hendriks*,⁸ with an identical fact pattern insofar as the timing of funds received, work done, and receipt of Writ is concerned. The court there reached the right and fair result—carving out to the attorney that portion of funds to cover work done (fees earned) but allocating the remainder to satisfy the Writ. Had there been any remainder in this case, those funds would have been applied to the Writ. This court is urged to adopt this approach in the absence of Washington case law directly on this point. This also defeats Pagh’s

veterans benefits, unemployment compensation, state or federal pension, IRA or 401(k) funds. Child support payments or income from a stepparent is incorporated—from RCW 26.16.200. RCW 6.15.010 also lists exempt property: \$3,000 in clothing/apparel; \$3,500 in private library materials; pictures and keepsakes; \$6,000 in home furnishings; \$3,000 of other personal property (\$1,500 cash); a motor vehicle; health aids; personal injury award (up to \$20,000); farm equipment (up to \$10,000); professional equipment (up to \$10,000); other trade equipment (up to \$10,000); tuition units

speculative argument that folks would simply “hide” assets in attorney trust accounts and then consider them safe from garnishment. The long list of cases cited in Gibson’s opening brief refute that—all of those attorney trust funds held money for purposes *other than* anticipated fees, and those funds were available for garnishment. Even in ***Sports Imaging***, funds intended for fees but not yet earned (even if not yet billed) were available for garnishment.

It is ludicrous to suggest that floodgates of opportunity for debtors to get out of paying their obligations by dumping money into their attorney trust accounts will result under the result Gibson requests.

13. **Unreported *Mayers* case is distinguishable.**

The unreported case cited by Pagh (***Mayers v Bell***, 167 Wn. App. 1039/Div. I 2012) involved a host of issues and facts that do not apply to the present case. The attorney held funds that were the debtor’s property to begin with. The debtor then asked the attorney to transfer them to his general account as a “nonrefundable retainer” after a judgment was entered against the debtor in favor of third parties. (It was that case the debtor said he wanted the attorney to do work on.)

⁸ 2008 WL 4516397 (Ariz. App. Div. 1)

The attorney said he transferred the funds (leading to a fraudulent transfer action by the judgment creditors). Then the attorney said he hadn't transferred the funds (but was estopped from making that later claim due to reliance by the judgment creditors on his earlier sworn assertion). Pagh's footnote correctly states that the *law firm*, the attorney who had been caught lying red-handed, tried to claim that the funds were always available to the debtor in asserting that no transfer had actually been made. This was not a determination made by the court (the case was remanded, the only finding being that the attorney could not deny the transfer claim).

Nothing in this case mirrors the present one. But one aspect of the court's analysis is useful. In considering whether the transfer had been fraudulent, the court examined whether "consideration of reasonably equivalent value" had been received by the debtor when the transfer was made to the attorney. The amount at stake was \$36,000 and the fees for services actually billed by the attorney (though this too was in question) were \$3,672—and the attorney had not even made an appearance in the case! In the present case, Gibson received "reasonably equivalent value" for the fees deposited—said fees had

been earned almost to the exact amount as of the date of garnishment.

14. Request for terms against Misty Willits under CR 11 was due to misreading of case law.

The reference at CP 32-33 followed a thorough reading of the case cited in support of Pagh's position—namely, that all funds held in attorney trust are subject to garnishment, regardless. The *Graves v Duerden*⁹ case was cited by her for this proposition but the facts in that case are so clearly distinguishable, there is no good faith argument to be made to apply it to this case. As explained therein, payments made to an attorney in lieu of the third party who was due them clearly did not belong to the attorney who held them. No such funds were in MWB's trust account (i.e., payment due Pagh but simply made by Gibson to the attorney instead).

15. Pagh wants court to adopt half the sentence in RCW 6.27.230.

The entitlement to fees for prevailing on a controversion proceeding does not stand alone—PROVIDED is in caps in the statute so as not to allow it to be misconstrued (but Pagh still tries). That "PROVIDED" is the exception Pagh wants the court to ignore. There is no question but

⁹51 Wn. App. 642, 754 P.2d 1027 (1988)

that Gibson is the Defendant in the meaning of this Statute—the one against whom the judgment has entered. Pagh’s creative wording aside, she is not “defending” this action—she is the one asserting the right to be paid. She is the Plaintiff. When a controversy is brought by the Plaintiff, fees and costs cannot be assessed against the Defendant. There is no ambiguity. That is the plain wording in the statute.

16. Case law cited by Pagh does not justify her fee request.

While wanting to skirt the plain language in the statute, Pagh cites to *Caplan v Sullivan*¹⁰ as authority for her position that she is entitled to fees as the prevailing party, notwithstanding the statutory clause that says fees are not to be taxed to the defendant. The court in *Caplan* awarded fees to the party who *defended successfully against* a writ of garnishment, not the person seeking the Writ. It identified the purpose behind the fees allowed under then-codified RCW 7.33.290 (the predecessor to RCW 6.27.230) as “necessary to insure that parties injured by wrongful writs of garnishment will not be discouraged from

¹⁰ 37 Wn. App. 289, 679 P.2d 949 (1984)

pursuing their statutory remedies.”¹¹ It further affirmed the appellate court’s authority to establish an appropriate fee award on appeal: “An appellate court has inherent jurisdiction to fix the amount of attorney fees on appeal when allowable by statute.”¹² Pagh cites no case law that stands for the right of the person seeking the writ to be awarded fees against the defendant, which would be contrary to the language in the statute. The trial court erred in making this award.

IV. CONCLUSION

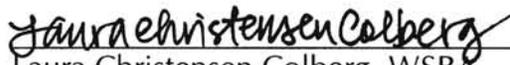
Pagh’s analysis does not inform the court, but spins a web of speculation and hair-splitting about form and process and matters not raised to the trial court below. There is no support for the assertions that Gibson was not billed, that the RPCs were not followed, that charges were not made appropriately—that fees were not earned. This shifted ownership of the funds from Gibson to his attorney. The Answer said as much and when billing statements were generated, it was verified to Pagh that charges exceeded the funds received. This is not a case where there is even a shadow of intent to withhold or hide funds—the payor was Pamela Gibson, and an appellate brief was due in

¹¹ 37 Wn. App. 289, at 295.

a matter of days. The right and fair result is to acknowledge that there were no funds freely available or owed to Gibson from which to pay on the Writ. Pagh's subsequent actions after being provided this accounting were taken at her choice and expense. Gibson's fees (below and on appeal) should be paid by Pagh as the prevailing party. The Orders of March 2012 should be vacated and the funds held by the clerk should be returned to Pam Gibson (Appellant's mother, who paid them). An Affidavit of Fees will be supplied under RAPs.

RESPECTFULLY SUBMITTED this 30th day of January, 2013.

MICHAEL W. BUGNI & ASSOCIATES



Laura Christensen Colberg, WSBA
#26434
Attorney for Appellant/Gibson

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2013, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

¹² Id.

Via US Mail:

Clerk of Court
Court of Appeals, Division 1
600 University Street
Seattle, WA 98101

Attorneys for Petitioner via US Mail:

Mark Rising
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154



Dona Harris