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No. 63567-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ELLIS, LI & McKINSTRY PLLC,
a Washington professional liability company,

Respondent,

v.

EDWARD R. MacDONALD
and the marital community of Edward R. MacDonald
and Susan MacDonald,

Petitioner/Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JULIE SPECTOR

BRIEF OF PETITIONER/APPELLANT

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I. INTRODUCTION

A law firm sued its former client for a disputed contingent fee of over \$1.6 million, based on the contested value of real property the client is entitled to receive in a settlement of probate litigation. Without discovery, trial, a hearing on summary judgment, or any determination on the merits of the law firm's claims, the superior court ordered the client to deliver over \$131,000 cash to the law firm, and held the client in contempt when he failed to immediately do so.

The superior court's prejudgment order directing appellant to immediately deliver funds to his former attorneys without first adjudicating the merits of the underlying claim on which the payment was predicated violates fundamental principles of due process. The superior court compounded its error by holding the client in contempt despite evidence that the client lacked the present ability to comply with the order. This court must reverse.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering its Order on Plaintiff's Motion for Delivery of Dixon Proceeds. (CP 251-52) (Appendix A)

2. The superior court erred in entering its Order Regarding Future Promissory Note Payments and Contempt. (CP 398-400) (Appendix B)

3. The superior court erred in finding that the appellant disobeyed its Order on Plaintiff's Motion for Delivery of Dixon Proceeds, "and in disobeying, [appellant] has failed or refused to perform an act that is yet within his power to perform." (CP 399)

III. STATEMENT OF ISSUES

A. May a court direct a defendant to pay a portion of the plaintiff's claim prior to entry of judgment without first making a judicial determination on the merits of the plaintiff's claim?

B. May a party be held in contempt based upon his failure to comply with an order that exceeded the court's authority and that was entered in violation of the party's right to due process of law?

IV. STATEMENT OF FACTS

A. MacDonald Retained ELM To Represent Him In A Dispute Over His Father's Estate. The Parties Entered Into A Mixed Hourly/Contingent Fee Agreement Giving ELM A 10% Interest In The Value Of Property Recovered.

Appellant Edward MacDonald, age 70, a California resident and retired land use attorney, was a named beneficiary under his

father's will and a beneficiary under trusts funded by his father and stepmother. (CP 73-74) MacDonald's half-brother, Douglas MacDonald, was the personal representative of MacDonald's father's and stepmother's estates and trustee of their testamentary trusts. (CP 74) When Douglas failed to provide MacDonald with an adequate accounting of the trusts, MacDonald hired a California attorney to determine his beneficial interest in the trusts and to obtain an accounting of the trust assets. (CP 75)

After learning that most of the trust assets were located in Washington, including an interest in a 7,500-acre ranch in Benton County, Washington (the "Lewis & Clark Ranch"), MacDonald retained respondent Ellis, Li, & McKinstry, PLLC ("ELM"), a Seattle law firm, in October 2004. (CP 74-75, 79-80; Sub no. 53, Supp. CP ___) On February 14, 2005, MacDonald signed a fee agreement agreeing to pay ELM a contingent fee of 10% of recovered assets, on top of hourly fees capped at \$250,000:

The hourly fees for all non-appellate work through the time that the trial in the Washington lawsuit ends shall be capped at \$250,000.

[For the contingency fee], ELM shall receive cash equal in value to ten percent (10%) of the fair market value of the gross amount of all of the interests that are distributed to you or your children.

(CP 34)

If MacDonald recovered money, MacDonald agreed to “immediately pay 10% of the money to ELM.” (CP 34) In the event the recovered asset was not money, the agreement contained a requirement that the property be appraised if the parties disputed the value:

If you and ELM are unable to agree on the fair market value within 10 days of such distribution, then you and ELM shall jointly select and retain a qualified expert appraiser to determine the fair market value of such assets.

(CP 35)

MacDonald also agreed to pay costs, which ELM anticipated could be “over \$100,000.” (CP 35) ELM would either advance the costs or pay costs with any money paid by MacDonald into ELM’s trust account. (CP 35) Any trust account money used to pay costs would “reduce the amount available to pay ELM hourly fees . . . by an equal amount so that, prior to a distribution of the Interests, your total outlay to ELM for non-appellate work prior to the end of the Washington trial will be \$250,000 or less for hourly fees and costs. . . .” (CP 35) ELM agreed to “make reasonable efforts to discuss any significant cost outlays with [MacDonald] in advance,” but the parties agreed that ELM had “reasonable discretion to decide what

costs are necessary or appropriate,” including fees for other attorneys that ELM believed would be “useful” to the case. (CP 35-36)

Early in the representation, MacDonald paid \$250,000 to ELM. (CP 75) MacDonald later paid an additional \$8,000 to ELM. (CP 27)

B. In The Middle Of The Litigation, ELM Modified The Fee Agreement To Include The Value Of Any Assets Recovered By One Of MacDonald’s Brothers, An Adverse Party, In Calculating Its Contingency Fee.

In May 1988, MacDonald had executed a Declaration of Trust benefiting his brother Dougal MacDonald; MacDonald was trustee. (See CP 40, 75) MacDonald had agreed to the Trust because it appeared that their father and stepmother intended to disinherit Dougal. (CP 75) In July 2005, while the estate litigation was ongoing, ELM partner Mike McKinstry advised MacDonald to revoke Dougal’s Trust, to avoid a demand for distribution by Dougal. (CP 75) MacDonald expressed reservations about revoking the Trust, but followed McKinstry’s legal advice. (CP 75-76) As a result, Dougal sued MacDonald. (CP 76)

On July 8, 2005, ELM presented a letter to MacDonald, purporting to “clarify” the previous fee agreement. (CP 40) Despite

the fact that MacDonald and Dougal were now adverse parties as a result of ELM's advice to revoke Dougal's trust, ELM's "clarification" provided that its contingent fee would be calculated based on any interests that Dougal, as well as MacDonald, received. (CP 40) The letter agreement acknowledged the adversity between MacDonald and Dougal by noting that ELM would represent MacDonald against "any lawsuit that Dougal brings against you as a result of you revoking the May 1, 1988 Declaration of Trust." (CP 40) ELM never discussed with MacDonald ELM's potential or actual conflict of interest if Dougal was adverse to MacDonald as a result of ELM's advice to revoke the Dougal Trust. (CP 76)

C. MacDonald Litigated His Father's Estate In Both Washington And California, And Was Forced To Defend Against A Lawsuit Commenced By His Brother Dougal As A Result Of Advice From ELM. The Estate Litigation Eventually Settled.

In March 2005, ELM filed a lawsuit against MacDonald's half-brother Douglas in Snohomish County Superior Court, seeking an accounting, termination of the trusts, and distribution of the trust assets. (CP 26) In response, Douglas sued MacDonald in California seeking to recover payment on promissory notes that MacDonald had purportedly executed. (CP 26) ELM appeared on

MacDonald's behalf in the California lawsuit along with local California counsel. (CP 26)

In December 2006, ELM also filed an action on behalf of MacDonald in California seeking to remove Douglas as executor of the estate, for an accounting, and for distribution. (CP 27)

In July 2007, after MacDonald revoked his brother Dougal's trust on the advice of ELM, Dougal sued MacDonald in California. (CP 28) ELM represented MacDonald in this lawsuit. (CP 28)

Litigation of the three California actions and the Washington action was settled in September 2008. (CP 28) The settlement agreement, which was subject to court approval, provided that MacDonald receive a one-quarter interest in the 7,600-acre working ranch in Benton County ("the Lewis & Clark Ranch"), three parcels of real property in Snohomish County (the "Jones Property"), and a \$650,000 promissory note secured by commercial real property in Dixon, California. (CP 28; Sub no. 53, Supp. CP ___) The settlement also forgave certain promissory notes purportedly executed by MacDonald. (CP 28)

MacDonald did not immediately receive his portion of the Lewis & Clark Ranch. Instead, further litigation was necessary to

partition the Ranch because one-half of the Ranch is owned by third parties and the remaining one-quarter interest was awarded to Douglas. (Sub no. 53, Supp. CP ___)

D. After The Estate Litigation Settled But Before Court Approval, ELM Sought Payment On The Contingent Portion Of Their Fee Agreement. ELM Sued MacDonald After The Parties Could Not Agree On The Value Of The Settlement.

After the settlement agreement was signed, but before the court approved the settlement, a dispute arose between MacDonald and ELM regarding the valuation of the real property due MacDonald under the settlement for purposes of calculating ELM's contingency fee. (See CP 79; Sub no. 53, Supp. CP ___) ELM claimed that MacDonald's one-quarter interest in the Lewis & Clark Ranch was worth \$5.6 million, that his interest in the Jones property was worth \$785,000, and that the total value of MacDonald's settlement, including the interests in real property, exceeded \$8.4 million. (CP 28-29) ELM also valued Dougal's interest in the settlement in excess of \$8.4 million – the same as MacDonald's – and claimed a contingent fee in the settlement due Dougal, in addition to MacDonald's settlement. (CP 28-29) In total,

ELM claimed a ten percent contingency fee of \$1,684,572, and that it had advanced costs of \$487,440. (CP 29)

MacDonald disputed ELM's claimed value of the settlement, including the value of \$5.6 million that ELM placed on his interest in the Lewis & Clark Ranch that he has not yet received. (CP 77) MacDonald questioned his obligation to pay ELM a fee based upon the value of Dougal's settlement, especially when Dougal had sued MacDonald as a result of ELM's advice that MacDonald revoke the trust in favor of Dougal, Dougal. (CP 77, 79) MacDonald also questioned the reasonableness of ELM's claim that it incurred \$487,000 in "costs," including California counsel's fees, without fully discussing these expenditures with him, and asked for an accounting of ELM's alleged costs. (CP 79, 117-18; Sub no. 15, Supp. CP __)

Although the parties disputed the value of the real property interests due to MacDonald under the settlement agreement, ELM failed to obtain an appraisal as required by the parties' fee agreement. (CP 8, 35) Instead, three months after the settlement agreement was executed and before it was approved by the court, ELM sued MacDonald on December 24, 2008, seeking a money

judgment for its claimed contingent fees and costs. (CP 3-5) ELM alleged three claims for monetary damages – breach of contract, quantum meruit, and promissory estoppel. (CP 3-5) ELM did not seek to enforce any attorney’s lien as part of its complaint. (See CP 3-5)

In his answer, MacDonald raised ELM’s failure to satisfy a condition precedent because MacDonald’s interest in the real property was not appraised before ELM brought. (CP 8) He also alleged that the fee agreements violated public policy, (CP 8) and that ELM violated the standard of care by modifying the fee agreement during its representation. (CP 8) MacDonald claimed that ELM’s “claim for attorney fees and costs should be denied, or; the sum claimed by plaintiff should be reduced, or; that plaintiff should be entitled only to a quantum meruit recovery, or; plaintiff should be required to disgorge fees previously paid.” (CP 8)

Nearly a week after filing its action against MacDonald, on December 30, 2008, ELM notified Douglas MacDonald’s Washington lawyer by letter that it had a lien against the secured Promissory Note received by MacDonald as part of the estate litigation settlement. (CP 45) On April 15, 2009, ELM also claimed

an attorney's lien in a letter written to MacDonald's California lawyer, who MacDonald had retained after ELM abandoned the estate litigation in order to sue its client. (CP 83) ELM did not otherwise file a notice of lien in the superior court of Washington or perfect a lien under California law.

MacDonald's California attorney completed the estate litigation that ELM abandoned. (Sub no. 53, Supp. CP ___) The settlement was finally approved by a California probate court on April 23, 2009. (Sub no. 53, Supp. CP ___) MacDonald has not yet received his interest in the Lewis & Clark Ranch, as its partition is still in litigation in Benton County Superior Court Cause No. 08-2-02988-1. (See Sub no. 15, Supp. CP ___)

E. The Superior Court Summarily Ordered MacDonald To Pay Over \$130,000 To ELM. Two Weeks Later It Held MacDonald In Contempt Of This Order, And Imposed A \$500 Per Day Sanction Against MacDonald.

Three weeks after ELM filed suit against its client, ELM filed a motion for a writ of attachment on January 14, 2009, alleging that its claim was based on contract, that MacDonald was a foreign defendant, and MacDonald had indicated an intention "to mortgage the property and thereby convert it to cash." (Sub no. 10, Supp. CP ____, *citing* RCW 6.25.030(2), (10)) On January 30, 2009, King

County Superior Court Judge Julie Spector (the “superior court”) ordered issuance of writs of attachment against MacDonald’s interest in the Benton County Lewis & Clark Ranch and the Snohomish County Jones Property. (CP 315-33)

MacDonald moved to vacate the writ attaching the Jones property on the grounds that if MacDonald’s interest in the Lewis & Clark Ranch was worth \$5.6 million, as ELM maintained, the value of this attached property alone exceeded more than twice the value of ELM’s claim. (Sub no. 23, Supp. CP ___) The superior court denied the motion on February 10, 2009 and the writs continue to secure ELM’s claim. (CP 253-54)

Meanwhile, in February or March 2009, MacDonald’s California counsel secured a payment of \$131,250 for MacDonald from the proceeds of the sale of one of the California Dixon properties that secured the \$650,000 note MacDonald received as part of the settlement. (CP 83-85) MacDonald directed his California counsel to retain 10% of those funds, or \$13,125, in his trust account, to pay ELM’s contingency fee. (CP 85) MacDonald used the majority of the remaining proceeds to pay other creditors,

including his California counsel retained after ELM abandoned its representation of MacDonald. (Sub no. 53, Supp. CP __)

On May 7, 2009, ELM filed a motion asking the superior court to order MacDonald “to immediately deliver” to ELM all of the funds paid to his California lawyer’s trust account following sale of the Dixon property. (CP 10-11) The hearing on ELM’s motion was scheduled for May 15, 2009 – six court days later. (See CP 10) In support of its motion, ELM asserted that it had financed the costs for the MacDonald litigation with a line of credit, and that its lender was demanding payment. (CP 30, 90) ELM demanded delivery of the “money so that ELM can apply the money against the line of credit that ELM used to pay MacDonald’s litigation costs.” (CP 11)

Other than this declaration, there was no evidence of the existence of the line of credit, its terms, or how ELM used the line of credit. Relying on a confidential settlement offer made by MacDonald, ELM asserted that its entitlement to at least \$131,250 was “undisputed” and “admitted.” (See CP 11, 14-17)

On May 19, 2009, the superior court directed MacDonald to “immediately deliver the proceeds he received from the sale of the property in Dixon, California, which are presently being held in trust,

in the approximate amount of \$131,250, plus any interest accrued thereon.” (CP 251-52) On May 27, 2009, MacDonald moved for discretionary review of this order and sought a RAP 8.1(b)(3) stay in this court. (See CP 248, 340)

One week after the superior court entered its order, on May 26, 2009, ELM moved to hold MacDonald in contempt for failing to comply with the court’s May 19 order. (CP 240) ELM asked the court to “impose a forfeiture of \$500 a day until [MacDonald] obeys the Court’s May [19] Order.” (CP 241) ELM also asked the court to order MacDonald to immediately deposit the balance of the proceeds from promissory note – \$519,000 – into the registry of the court when and if MacDonald receives payment on this note. (CP 241)

MacDonald’s California counsel retained in trust \$13,125, representing ELM’s 10% contingent fee, pursuant to MacDonald’s instructions before ELM had filed its May 7 Motion for Delivery of Proceeds. (CP 85) MacDonald explained that he did not have the ability to comply with the court’s May 19 order because he had already disbursed a substantial portion of the proceeds of the Davis property to other creditors. (Sub no. 53, Supp. CP __)

The superior court refused to stay its order pending consideration of MacDonald's previously filed motion for discretionary review. (See CP 275, 398) On June 3, 2009, while MacDonald's motions for discretionary review and stay were pending in this court, the superior court held MacDonald in contempt for failing to pay \$131,250 to ELM, imposed contempt sanctions of \$500 per day for each business day in which the money is not paid, and ordered that all future payments due under the Note or from the proceeds of sale of the Dixon properties be paid into the court registry. (CP 399-400) The superior court also ordered that third party "agents and attorneys acting on MacDonald's behalf" were similarly bound by the terms of its order. (CP 400)

On June 10, 2009, MacDonald filed an emergency motion for stay of the contempt order in this court. MacDonald paid \$51,077.50 to ELM, which represented the balance of the Dixon proceeds that MacDonald had in his possession that had not

already been disbursed, including the \$13,125, or 10% of the recovery, which has remained in his California attorney's account.¹

On June 19, 2009, Commissioner Ellis granted a stay of the contempt order conditioned on MacDonald's deposit of the balance of \$80,172.50 owed under the May 19 Order into the registry of the superior court. (June 19 Commissioner's Ruling) MacDonald deposited the funds into the court registry on June 22, 2009, borrowing the funds by securing a line of credit against his wife's separate property.² (CP 401) Addressing MacDonald's argument challenging the merits of the superior court's order, the Commissioner noted, "it is not clear how the trial court could order one litigant to pay the other without adjudicating the underlying claim on which the payment is predicated." (June 19 Commissioner's Ruling)

On July 14, 2009, Commissioner Neel confirmed that this court would review both the June 3, 2009 contempt order and the

¹ Declaration of Edward R. MacDonald in support of Petitioner's Motion for Stay filed in this court on June 10, 2009.

² Declaration of Edward R. MacDonald in support of Petitioner's Motion for Stay filed in this court on June 10, 2009.

May 19, 2009 order requiring MacDonald to deliver \$131,250 to ELM. (July 14, 2009 Commissioner's Ruling)

V. ARGUMENT

A. The Superior Court Could Not Compel MacDonald To Pay Money To ELM Without Entering Judgment On The Contested Claim.

No legal authority supports the superior court's prejudgment order requiring the "immediate" delivery of over \$131,000 to ELM or its contempt order requiring MacDonald to deposit "any future payments on the September 15, 2008 Promissory Note" into the court registry without discovery, without an evidentiary hearing, and without a summary judgment establishing MacDonald's liability to ELM. A court "is without jurisdiction to compel [a party] to surrender [money]" by ordering either a deposit into the court registry or payment to the other party. See *Rainier National Bank v. McCracken*, 26 Wn. App. 498, 509, 615 P.2d 469 (1980) (quoting with approval *In re Elias*, 209 Cal.App.2d 262, 25 Cal. Rptr. 739, 747-48 (1962)). "[T]his constitutes an issue which should not be tried in this summary manner, but one which requires a judicial determination, on the hearing of all the facts, that [defendant] has no right to the funds." *Rainier National Bank*, 26 Wn. App. at 509.

1. The Superior Court Deprived MacDonald Of His Property Without Due Process.

A party cannot execute on a claim without first obtaining an enforceable judgment. See *Fluor Enterprises, Inc. v. Walter Const., Ltd.*, 141 Wn. App. 761, 768-69, ¶ 15, 172 P.3d 368 (2007). Civil Rule 54(a)(1) defines a judgment “as the final determination of the rights of the parties.” This court recognized that allowing a party to “execute on a claim absent a final judgment as to that claim” would improperly allow “a prevailing party [to], under court authority, seize the property, garnish the proceeds, or sell the assets of the losing party without the latter having any immediate avenue available for challenging the underlying interlocutory judgment.” *Fluor Enterprises, Inc.*, 141 Wn. App. at 768-69, ¶ 15 (quoting *Electrolert v. Lindeman*, 99 Ohio App.3d 154, 650 N.E.2d 137, 140 (1994)).

Here, there was no “final determination” of the parties’ rights. Instead, the superior court compelled MacDonald to pay his money to ELM in a summary manner without any judicial determination that he is liable to ELM, contrary to the holding of this court in *Rainier National Bank*, 26 Wn. App. at 508.

In ***Rainier National Bank***, this court reversed an order summarily requiring appellants to deposit funds into the court registry without any judicial determination of their liability. 26 Wn. App. at 510 (“Since [defendants] at all times claimed title and right to all of those funds, and since that issue had not been judicially determined at the time, the order was invalid”). In reversing the trial court’s order, this court noted that “if money is ordered to be brought in, which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct.” ***Rainier National Bank***, 26 Wn. App. at 509 (*citations omitted*). Here, the June 3 contempt order suffers from the same defect as the order in ***Rainier National Bank*** because the court ordered MacDonald to deposit money that he may receive in the future into the court registry without any judicial determination of his liability.

The superior court’s May 19 order is even more egregious because it does not require MacDonald to deposit his money into the court registry, as in ***Rainier National Bank***. Instead, the superior court ordered MacDonald to pay his money directly to ELM, with no safeguards for the money’s return if “afterwards [he

is] told that his view of the case was correct.” **Rainier National Bank**, 26 Wn. App. at 509.

This summary deprivation of MacDonald’s property violates fundamental principles of due process. “When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice to the deprivation and an opportunity to be heard to guard against erroneous deprivation.” **Amunrud v. Board of Appeals**, 158 Wn.2d 208, 216, 143 P.3d 571 (2006), *cert. denied*, 549 U.S. 1282 (2007) (*citations omitted*). “Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” **Post v. City of Tacoma**, ___ Wn.2d ___, ___ P.3d ___ (October 15, 2009) (*citing Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)); *see e.g. Williams v. Athletic Field, Inc.*, 142 Wn. App. 753, 767, ¶ 35, 139 P.3d 426 (2006) (reversing summary adjudication of lien claim prior to resolution of factual disputes); **State v. Kessler**, 75 Wn. App. 634, 637, 879 P.2d 333 (1994) (drug court participants have due process right to resolution of factual disputes upon termination of

participation); see also *Krein v. Nordstrom*, 80 Wn. App. 306, 308, 908 P.2d 889 (1995).

In *Krein*, this court held that the summary adjudication authorized by the attorney lien statute when the attorney is holding “money or papers” of the client comported with due process where the trial court set the matter “for a one-half day trial on the short matter calendar, allowing oral testimony . . . with remainder of the evidence presented by affidavit or declaration.” 80 Wn. App. at 308.

Similarly, in *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 308, 170 P.3d 53 (2007), *rev. denied*, 163 Wn.2d 1054 (2008), this court affirmed the trial court’s use of a two-day evidentiary hearing to adjudicate an attorney’s lien on a judgment as “a form of proceeding by which the matters might be properly adjudicated.” 141 Wn. App. at 315, ¶ 22. There, the trial court “took testimony from a number of witnesses, admitted exhibits, and reviewed a deposition transcript as part of the evidence.” *Seawest Inv. Associates, LLC*, 141 Wn. App. at 308, ¶ 5. This court held that the procedure fully complied with due process as “the hearing gave [the parties] ample time to present

evidence, bring counterclaims, and argue their theories of the dispute.” *Seawest Inv. Associates, LLC*, 141 Wn. App. at 315-16, ¶¶ 23, 24.

By contrast, the trial court dispensed with these procedural safeguards in the instant case. While other statutory procedures allow for placing the property of a party under the control of the court pending a resolution of the merits of a dispute, those remedies were also not followed here. For instance, Washington’s prejudgment garnishment statute allows the court to garnish property of a party prior to judgment, but only in narrow circumstances. RCW 6.26.010. The prejudgment garnishment statute contains procedural protections against a wrongful deprivation, including the requirement that the moving party post a bond to safeguard against the wrongful deprivation of property. See RCW 6.26.020 (requiring plaintiff, as condition of garnishment before judgment, to “file with the clerk a bond with sufficient sureties . . . in double the amount of the debt claimed therein . . .”).

No procedural safeguards accompanied the trial court’s summary order. This court should reverse and remand because

the trial court lacked authority to compel MacDonald to pay ELM money prior to entry of judgment and without due process of law.

2. The Superior Court Could Not Summarily Adjudicate MacDonald's Liability Without Proper Notice Under CR 56 And In The Face Of Genuine Issues Of Material Fact.

The civil rules incorporate principles of due process by allowing the superior court to adjudicate a defendant's liability to the plaintiff, short of a trial on the merits, after notice and opportunity to be heard, if there are no disputed issues of fact, and if the moving party is entitled to judgment as a matter of law. CR 56. None of these conditions were met here.

a. MacDonald Was Not Provided Adequate Notice Before The Superior Court Summarily Determined His Liability To ELM.

Civil Rule 56 allows a summary judgment upon four weeks notice. CR 56(c). Here, the superior court entered an order requiring MacDonald to transfer over \$131,000 to ELM as a result of a motion filed on a 6-day calendar. Civil Rule 56(c) requires that a party receive at least 28 days notice "to prevent a summary judgment from being too summary." *Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc.*, 54 Wn.2d 211, 215, 339 P.2d 89 (1959).

b. The Superior Court Could Not Summarily Determine MacDonald's Liability In The Face Of Disputed Issues Of Fact.

Even if MacDonald had been provided with adequate notice under CR 56(c), summary judgment would still not be appropriate because there were genuine issues of disputed fact as to whether ELM was entitled to its fees under the fee agreements. **Valley/50th Ave., L.L.C. v. Stewart**, 159 Wn.2d 736, 743, ¶ 11, 153 P.3d 186 (2007) (summary judgment is warranted *only* if “there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law”). ELM asserted a contingent fee based on the value of MacDonald's interest in the Lewis and Clark ranch – property which MacDonald has still not received. (CP 34-35) The parties disputed the value of MacDonald's interest, but no appraisal had been performed as required as an express condition precedent to ELM's entitlement to a fee. (CP 8)

MacDonald presented an unchallenged declaration from Mark Fucile, an expert on legal ethics, that at a minimum raised questions of fact whether the fee agreements on which ELM based its lawsuit against MacDonald violated public policy and whether ELM breached a standard of care by modifying the agreement

during its representation of MacDonald. (CP 8, 13) For example, the fee agreement was “clarified,” or modified, without proper consideration, rendering the agreement invalid. ***Perez v. Pappas***, 98 Wn.2d 835, 841, 659 P.2d 475 (1983) (if a renegotiated fee agreement results in greater compensation than counsel was entitled to under the original agreement, courts may refuse to enforce the renegotiation unless it is supported by new consideration). There was also a question of fact whether ELM fairly disclosed to MacDonald that ELM claimed \$450,000 in costs, including “attorney fees apparently incurred by California legal counsel hired by ELM.” (CP 117-18) Finally, ELM claimed a contingent fee on the recovery of Dougal MacDonald, an admitted adverse party. This conflict of interest warranted denial of additional fees or complete disgorgement of fees already received. ***Eriks v. Denver***, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992) (attorneys’ failure to disclose actual conflict of interest was a breach of their ethical duties which could result in the disgorgement of fees).

There were several factual disputes left to be resolved to determine whether the fee agreements were valid and whether

ELM should be required to disgorge any of the \$258,000 it already received from MacDonald as a result of its breach of ethical duties. Even if no questions of fact exist on ELM's entitlement to recover costs, adjudication of a portion of ELM's claim would result in only a partial summary judgment, which is not enforceable under CR 54.

Fluor Enterprises, Inc., 141 Wn. App. at 768, ¶ 15.

c. There Was No Legal Authority To Support The Superior Court's Prejudgment Order Compelling A California Resident To Turn Over Proceeds From The Sale Of California Real Property As A Result Of A Purported Attorney's Lien.

There was no legal authority to support the superior court's prejudgment order forcing MacDonald to deliver money to ELM and to the Clerk of the Superior Court prior to an adjudication. The only legal authority cited by ELM was Washington's attorney's lien statute, RCW ch. 60.40 (See CP 14-17) But the superior court did not rely on ELM's purported attorney's lien in entering its orders. (See CP 251-52, 398-400) Nor could it under these circumstances.

Setting aside the fact that the superior court's orders failed to protect MacDonald's due process rights, the superior court could not order a California resident to turn over proceeds from the sale of California real property held by his California counsel, which was

received as part of a settlement with other California litigants, based on an attorney's lien allegedly covering as costs legal services performed in California. No lien could be established under California law. In California, an attorney's lien can only be created by contract, and cannot be created by "the mere fact that an attorney has performed services in a case." See **Fletcher v. Davis**, 33 Cal.4th 61, 90 P.3d 1216, 1219 (2004).

Rule 3-300 of the Rules of Professional Conduct of the State Bar of California requires the written consent of the client before an attorney may take a lien on the proceeds of a recovery. **Fletcher**, 90 P.3d at 1219. The California courts have recognized that "a charging lien could significantly *impair* the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved." **Fletcher**, 90 P.3d at 1220 (emphasis in original). "[A] charging lien grants the attorney considerable authority to detain all or part of the client's recovery whenever a dispute arises over the lien's existence or its scope. That would unquestionably be detrimental to the client." **Fletcher**, 90 P.3d at 1221.

Here, none of the fee agreements at issue purported to create a lien in favor of ELM. California law precludes ELM from perfecting a lien by “the mere fact that [it] has performed services in a case.” See *Fletcher*, 90 P.3d at 1219. Thus, even were the trial court authorized to summarily adjudicate ELM’s entitlement to MacDonalds’ property, the Washington’s attorney lien statute – the only legal authority cited by ELM – does not support its order. *Plummer v. Great Northern Ry. Co.*, 60 Wash. 214, 217 110 P. 989 (1910) (Washington attorney lien could not be satisfied from payment from settlement proceeds when the underlying action on behalf of the client was brought in British Columbia, where attorney’s liens are not allowed).

Even if Washington’s attorney lien statute, RCW 60.40.010, could apply against a California resident, it cannot attach to real property or its proceeds. Therefore, RCW 60.40.010 cannot support a superior court’s order requiring MacDonald to transfer over \$131,000, which are proceeds from the sale of real property in California, to his former attorneys. An attorneys’ lien does not attach to real property prior to entry of a judgment in favor of the attorney. *Ross v. Scannell*, 97 Wn.2d 598, 605, 647 P.2d 1004

(1982) (“If the legislature had intended attorneys’ liens to attach to real property as proceeds of a judgment, it would have included a provision to that effect.”) The **Ross** Court held that an attorney seeking to attach the client’s real property must “reduce his fees to judgment” or “post a bond and proceed with a writ of attachment pursuant to RCW 7.12.” 97 Wn.2d at 605-06. Here, ELM did neither. Further, just as an attorney’s lien cannot attach to real property, it also cannot attach to the proceeds of real property sales. ***In Re Disciplinary Proceeding Against Vanderbeek***, 153 Wn.2d 64, 88, 101 P.3d 88 (2004) (“we see no difference between attorney liens filed on the title of real property and those filed on the proceeds of real property sales”).

There was no legal authority to support the superior court’s prejudgment order compelling a California resident to turn over proceeds from the sale of California real property as a result of a purported attorney’s lien. This court should reverse the order and direct restitution of any funds paid to ELM pending an adjudication of MacDonald’s liability and entry of an enforceable judgment.

B. The Superior Court's Contempt Order Must Be Vacated As It Is Based On Violation Of An Order That Exceeded The Court's Authority And MacDonald Lacked The Ability To Comply With The Order.

1. The Superior Court's Order Finding MacDonald In Contempt Cannot Stand Because The Underlying Prejudgment Order Requiring The Delivery Of Funds Violated MacDonald's Right To Due Process.

As the superior court lacked the authority to enter its May 19 prejudgment order requiring MacDonald to pay over \$131,000 to ELM without a proper adjudication of the merits, the superior court's contempt order, entered after MacDonald failed to "immediately" comply with the order, was also erroneous as a matter of law. *Rainier National Bank v. McCracken*, 26 Wn. App. 498, 510-11, 615 P.2d 469 (1980), *rev. denied*, 95 Wn.2d 1005 (1981).

In *Rainier National Bank*, the appellants challenged both a pre-trial order requiring them to deposit funds into the court registry and the order finding appellants in contempt of that order. This court held that the pre-trial order was invalid because the trial court could not order the appellants to deposit funds into the court registry in a summary manner when the appellants had "at all times claimed title and right to all those funds, and since that issue had not been judicially determined at the time." 26 Wn. App. at 510.

Because that order was determined to be invalid, this court also reversed the contempt order, which imposed a \$100 per day contempt fine against appellants. *Rainier National Bank*, 26 Wn. App. at 510-11; see also *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 733, 812 P.2d 488 (1991).

In *Seattle Northwest Securities Corp.*, appellants challenged discovery orders that required disclosure of privileged documents. This court denied discretionary review of the orders. The trial court subsequently found appellants in contempt of those orders, and appellants appealed the contempt order. This court held “that the validity of the contempt judgment against SDG can be reviewed and we may examine whether the invocation of the attorney-client privilege by SDG was proper.” 61 Wn. App. at 736. When this court reversed the discovery order as “too broad,” it also reversed the contempt judgment and sanctions against the appellants. *Seattle Northwest Securities, Corp.*, 61 Wn. App. at 744-45; see also *State v. Turner*, 98 Wn. 2d 731, 738-739, 658 P.2d 658, 662 (1983) (reversing finding of contempt when the order that truants purported to violate was entered without jurisdiction).

The superior court had no authority to enter its May 19 order and the summary adjudication of MacDonald's liability violated his right to due process of law. The contempt order entered in reliance on the May 19 Order, including its coercive sanctions of \$500 and attorney fees, must be reversed.

2. Even If The Prejudgment Order Was Valid, The Superior Court Erred In Finding MacDonald In Contempt When He Did Not Have The Ability To Comply With The Order.

The superior court also erred in holding MacDonald in contempt of the prejudgment order requiring him to turn over funds to ELM because MacDonald demonstrated that he could not presently comply with the order. "It is well settled that 'the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense.'" *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34, ¶ 17, 113 P.3d 1041 (2005), *rev. denied*, 156 Wn.2d 1032 (2006); *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); *Rainier National Bank*, 26 Wn. App. at 511 ("disobedience of any valid court order constitutes contempt unless the person disobeying the order is unable to comply with it").

MacDonald explained, without challenge, that between the time that his California attorney received the \$131,250 payment from the proceeds of the sale of the Dixon property in March 2009 and the time that ELM filed its motion asking that those funds be turned over to ELM, MacDonald had already disbursed the majority of the proceeds except the \$13,125 that was being held in trust for ELM's 10% contingent fee. (Sub no. 53, Supp. CP ___) This money was used to pay law firms working to either complete the estate litigation that ELM abandoned when it sued MacDonald, including the Benton County partition action, or defending against ELM's lawsuit for its fees. (Sub no. 53, Supp. CP ___)

Because ELM obtained writs of attachment against the Lewis & Clark Ranch and the Jones properties, MacDonald could not use those properties to secure a line of credit that could have otherwise been used to pay these legal fees. (Sub no. 53, Supp. CP ___) Therefore, out of necessity, MacDonald was required to use the Dixon proceeds, while retaining \$13,125 for ELM's 10% contingent fee. (Sub no. 53, Supp. CP ___) By the time of the court's May 19 order, MacDonald did not have the ability to turn

over \$131,250 in proceeds because they were no longer available.

(Sub no. 53, Supp. CP ___)

MacDonald did not have the present ability to comply with the court's May 19 prejudgment order requiring him to turn over the proceeds from the sale of the Dixon property to ELM. (See Sub no. 53, Supp. CP ___) In light of MacDonald's inability to comply with the May 19 order, the superior court erred in holding him in contempt, even if that order was valid.

3. The Court Could Not Adjudicate Third Parties' Entitlement To Disputed Funds As Part Of Its Contempt Order.

The superior court's Contempt Order purports to apply to "all obligations and prohibitions . . . regarding MacDonald . . . with equal force and effect upon agents and attorneys acting on MacDonald's behalf." (CP 400) But MacDonald's attorneys received the proceeds of the Dixon property before the superior court entered its May 19 Order. (See Sub no. 53, Supp. CP ___) Until receiving "actual notice of the [May 19] order by personal service or otherwise," CR 65(d), neither MacDonald, nor his attorneys, could be bound by it. ***Stella Sales, Inc. v. Johnson***, 97 Wn. App. 11, 20, 985 P.2d 391, *rev. denied*, 139 Wn.2d 1012

(1999)(nonparty may only be held in contempt for violating a court order, if the court finds that the person had actual knowledge of the order).

As contempt is the “intentional . . . disobedience of any lawful judgment, decree, order, or process of the court,” RCW 7.21.010(1)(b), MacDonald’s attorneys cannot be subjected to an order of forfeiture without any notice or opportunity to be heard. This is especially true with regard to MacDonald’s California counsel who had originally received the proceeds and over whom the superior court had no personal jurisdiction. The attorneys have not been subjected to an order to show cause, and they are not subject to the court’s contempt power under RCW 7.21.010. This court must vacate that portion of the superior court’s order that purports to bind MacDonald’s attorneys.

VI. CONCLUSION

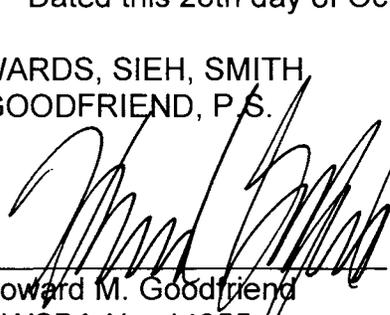
The superior court erred in entering its prejudgment order requiring MacDonald to pay \$131,250 to ELM prior to any adjudication on the merits of plaintiff’s claim for a money judgment. The superior court also erred in holding MacDonald in contempt for failing to comply with this prejudgment order when the order was

invalid, and MacDonald did not in any event have the ability to comply with the order. This court must reverse and vacate the superior court May 19 order and June 3 contempt order.

Dated this 28th day of October, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

JOHNSON & FLORA, PLLC

By: 

Howard M. Goodfriend
WSBA No. 14355
Valerie A. Villacin
WSBA No. 34515

By: 

Mark Johnson
WSBA No. 8463
Sims Weymuller
WSBA No. 33026

Attorneys for Petitioner/Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 28, 2009, I arranged for service of the Brief of Petitioner/Appellant, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mark Johnson Sims Weymuller Johnson & Flora, PLL C 2505 2nd Ave., Suite 500 Seattle WA 98121-1484	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E- Mail
Robert M. Sulkin McNaul Ebel Nawrot & Helgren PLLC 600 University St., Suite 2700 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 28th day of October, 2009.



Carrie O'Brien

FILED
KING COUNTY, WASHINGTON

Hon. Julie Spector

MAY 19 2009

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ELLIS, LI & McKINSTRY PLLC, a
Washington professional limited liability
company,

Plaintiff,

v.

EDWARD R. MacDONALD and the
marital community of Edward R.
MacDonald and Susan C. MacDonald,

Defendants.

No. 08-2-43607-1SEA

* ORDER ON PLAINTIFF'S MOTION
FOR DELIVERY OF DIXON
PROCEEDS

~~PROPOSED~~

Pending before the Court is plaintiff Ellis, Li & McKinstry PLLC's Motion for Delivery of Dixon Proceeds. In connection with plaintiff's motion, the Court reviewed the following:

- (1) Plaintiff's Motion for Delivery of Dixon Proceeds;
- (2) Declaration of Robert M. Sulkin in Support of Motion for Delivery of Dixon Proceeds and Exhibits A-G attached thereto;
- (3) Declaration of Michael R. McKinstry in Support of Plaintiff's Motion for Delivery of Dixon Proceeds;
- (4) Defendants' response and supporting material, if any;
- (5) Plaintiff's reply and supporting material, if any.

The Court has also reviewed the records and files herein. Being fully advised in this matter, the Court hereby ORDERS that Plaintiff's Motion to Delivery Dixon Proceeds

ORDER ON PLAINTIFF'S MOTION FOR DELIVERY OF
DIXON PROCEEDS - Page 1

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App. A

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is GRANTED. Defendant Edward R. MacDonald shall immediately deliver the proceeds he received from the sale of the property in Dixon, California, which are presently being held in trust, in the approximate amount of \$131,250, plus any interest accrued thereon.

Spector 5/15/09
Honorable Julie Spector, King County Superior Court Judge

Presented by:

McNAUL EBEL NAWROT & HELGREN PLLC

By: [Signature]
Robert M. Sulkin, WSBA No. 15425

Attorneys for Plaintiff

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FILED
KING COUNTY, WASHINGTON

Hon. Julie Spector

JUN 03 2009

SUPERIOR COURT CLERK
BY JUAN C. SUENKWE
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ELLIS, LI & McKINSTRY PLLC, a
Washington professional limited liability
company,

Plaintiff,

v.

EDWARD R. MacDONALD and the
marital community of Edward R.
MacDonald and Susan C. MacDonald,

Defendants.

No. 08-2-43607-1SEA

ORDER REGARDING FUTURE
PROMISSORY NOTE PAYMENTS
AND CONTEMPT

PROPOSED

Pending before the Court is Plaintiff Ellis, Li & McKinstry PLLC's Motion Regarding Future Promissory Note Payments and Contempt. In connection with Plaintiff's motion, the Court reviewed the following:

- (1) Plaintiff's Motion Regarding Future Promissory Note Payments and Contempt;
- (2) Declaration of Robert R. Sulkin in Support of Motion Regarding Future Promissory Note Payments and Contempt;
- (3) Defendant's Opposition to Plaintiff's Motion Regarding Future Promissory Note Payments and Contempt;
- (4) Declaration of Sims Weymuller in Support of Defendants' Opposition to Plaintiff's Motion Regarding Future Promissory Note Payments and Contempt and Exhibits 1-6 attached thereto;

ORDER REGARDING FUTURE PROMISSORY
NOTE PAYMENTS AND CONTEMPT - Page 1

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- 1 (5) Declaration of Edward R. MacDonald in Support of Defendants'
2 Opposition to Plaintiff's Motion Regarding Future Promissory Note
3 Payments and Contempt and Exhibits 1-4 attached thereto.
- 4 (6) Plaintiff's Reply in Support of Motion Regarding Future Promissory Note
5 Payments and Contempt; and
- 6 (7) Declaration of Chad Allred in Support of Plaintiff's Reply in Support of
7 Motion Regarding Future Promissory Note Payments and Contempt and
8 Exhibits A-B attached thereto.

9 The Court has also reviewed the records and files herein. The Court finds that in February
10 or March 2009, Defendant Edward MacDonald ("MacDonald"), or his agents or attorneys,
11 received \$131,250 as an initial payment on the September 15, 2008 Secured Promissory
12 Note, from Douglas B. MacDonald to Edward R. MacDonald ("Promissory Note"). On
13 May 15, 2009, the Court ordered MacDonald to immediately deliver the \$131,250 so that
14 Ellis, Li & McKinstry ("ELM") can pay the \$131,250 against the bank line of credit that
15 ELM incurred to finance MacDonald's litigation costs when it previously represented
16 MacDonald. The Court finds that MacDonald has disobeyed the Court's May 15 Order, he
17 is in contempt of court, and in disobeying, he has failed or refused to perform an act that is
18 yet within his power to perform. The Court considers itself fully advised.

19 Therefore, it is ORDERED, ADJUDGED, and DECREED that:

- 20 1. Plaintiff's Motion Regarding Future Promissory Note Payments and
21 Contempt is GRANTED.
- 22 2. MacDonald shall immediately pay to ELM the \$131,250 referred to above.
23 Upon receipt of this money, ELM shall promptly pay it against the bank line of credit that
24 ELM incurred to finance litigation costs when it previously represented MacDonald.
- 25 3. Under RCW 7.21.030, unless and until MacDonald fully obeys paragraphs
26 2 through 4 of this Order, MacDonald shall pay ELM a forfeiture of \$500 per day, which
shall be due by the close of business each day.

ORDER REGARDING FUTURE PROMISSORY
NOTE PAYMENTS AND CONTEMPT - Page 2

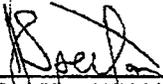
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1 4. Under RCW 7.21.030, ELM is awarded attorney fees of \$500, which
2 MacDonald shall immediately pay to ELM.

3 5. All future payments on the September 15, 2008 Promissory Note shall be
4 made to the Clerk of the King County Superior Court. This includes, without limitation,
5 any payments generated from the sale of Solano County, California parcel nos. 113-333-
6 060 or 113-333-070. MacDonald is prohibited from receiving, keeping, using, or
7 transferring any payment on the Promissory Note except that if he receives any payment
8 on the Promissory Note, he shall immediately pay it to the Clerk of the King County
9 Superior Court and shall immediately notify ELM.

10 6. All obligations and prohibitions in this Order regarding MacDonald apply
11 with equal force and effect upon agents and attorneys acting on MacDonald's behalf,
12 acting in concert with him, or receiving, holding, or transferring money on his behalf.

13 DATED THIS 3rd day of June, 2009.

14
15 
16 _____
HONORABLE JULIE SPECTOR
King County Superior Court Judge

17 Presented by:

18 McNAUL EBEL NAWROT & HELGREN PLLC

19
20 By: 
21 Robert M. Sulkin, WSBA No. 15425

22 Attorneys for Plaintiff
23
24
25
26

ORDER REGARDING FUTURE PROMISSORY
NOTE PAYMENTS AND CONTEMPT - Page 3

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