

65401-2

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No. 65401-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

UMPQUA BANK,

Respondent,

v.

BINGO INVESTMENTS, LLC, a Washington limited liability company;
FRANCES P. GRAHAM and JOHN DOE GRAHAM and the marital
community composed thereby; DAVID S. BINGHAM and SHARON G.
BINGHAM and the marital community composed thereby; SCOTT F.
BINGHAM and KELLY BINGHAM and the marital community
composed thereby; CHRISTOPHER G. BINGHAM and CHERISH
BINGHAM and the marital community composed thereby; and BINGO
DEVELOPMENT, LLC, a Washington limited liability company,

Judgment Debtors,

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Garnishee Defendant.

UNION BANK (f/k/a FRONTIER BANK)

Appellant.

RESPONDENT'S BRIEF

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7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §1916, at 44423

I. INTRODUCTION AND OVERVIEW

Appellant Union Bank (f/k/a Frontier Bank) (“Frontier”) essentially makes three arguments why this Court should reverse the trial court’s order denying its Motion to Intervene: (1) that the untimely motion was somehow timely; (2) that procedural issues between respondent Umpqua Bank (“Umpqua”) and non-party garnishee defendant Raymond James, arising *after* the denial of Frontier’s motion and after this appeal was taken, somehow justify reversal of the trial court’s order; and (3) that Frontier was entitled to an evidentiary issue on some unspecified and unsupported issue which likewise was not timely brought to the trial court’s attention and is not properly reviewable in this appeal.

II. RESPONDENT’S STATEMENT OF THE CASE

A. THE UNDERLYING JUDGMENT BEFORE COLLECTION

On June 19, 2009, Umpqua obtained a judgment against Bingo Investments, LLC, Frances P. Graham, David S. Bingham and Sharon G. Bingham and their marital community, Scott F. Bingham and Kelly Bingham and their marital community, Christopher G. Bingham and Cherish Bingham and their marital community, and Bingo Development, LLC (collectively, the “Judgment Debtors”), jointly and severally, for

\$23,290,953.14 (the “\$23 MM Judgment”). (CP 209; 220-22.)

Thereafter, Umpqua began collection procedures, which included serving many writs of garnishment on various financial institutions. (CP 210.)

B. THE GARNISHMENT ACTION AT ISSUE HERE

Relative to this appeal, on October 21, 2009, Umpqua obtained and served two writs of garnishment on Raymond James Financial Services, Inc. (“Raymond James” or “Garnishee”) – one writ regarding Judgment Debtors David and Sharon Bingham and another writ regarding Judgment Debtors Scott and Kelly Bingham (collectively, the “Garnishment Action”). (CP 225-232.) In response to Umpqua’s writs, the Garnishee prepared two Answers on November 5, 2009.¹

Despite the defect in the form of the Answers, the Garnishee did admit that on the date the writ was served (October 21, 2009), it held property in an account owned by Sharon Bingham with a balance of \$105,545.43, and held property in an account owned by Scott Bingham with a balance of \$304,826.13. The Garnishee’s Answers also asserted

¹ The Answers the Garnishee filed did not comply with the statutory-required form, which Umpqua had provided to Garnishee when it had the writs served. (*Compare* CP 233-236 and 654 *with* RCW 6.27.190 and CP 147-152.) Likewise, as recognized by the trial court, the Answers were neither verified under oath or completed by someone having corporate authority to make the statements on behalf of the corporation (CP 847.)

that the debtors' property in these accounts were security for an unnamed lender,² but the Answers also claimed that the Garnishee had specifically given the unnamed allegedly secured lender notice of Umpqua's writs and the collection efforts Umpqua was utilizing to try and collect on its \$23 MM Judgment against the Judgment Debtors. (CP 85 and 88.)

After receiving the Garnishee's Answers admitting possession of the Judgment Debtors' property, Umpqua stayed any further acts in the Garnishment Action until after the Judgment Debtors received their statutorily-allotted time to file an exemption or controversion if they so desired. In addition, this additional time gave the unnamed lender an opportunity to respond to the notice provided it by Raymond James as set forth in the Answers. Ultimately, the Judgment Debtors did not file any exemptions or controversions in this Garnishment Action.³ (CP 133-24.) Likewise, it is undisputed no alleged lender holding a security interest

² Only after judgment was entered against Raymond James, did Umpqua (or the trial court) learn that this unnamed lender was Frontier. (CP 671.) Since these events, Union Bank, through the FDIC, has become the successor in interest to Frontier Bank.

³ However, while the Garnishment Action was pending, many other controversions and exemptions were pending relating to other various writs and collection proceedings that Umpqua was utilizing to collect on the \$23 MM Judgment. (CP 669; 671; 910 at p. 36, ll. 9-13.) None of these involved Raymond James or Frontier.

appeared within the statutory time lines or otherwise contacted Umpqua or its counsel.

Umpqua also did not file any controversions in this Garnishment Action for three reasons. First, it had no reason to believe the account balances listed in the Garnishee's Answers were incorrect. Second, aside from Umpqua not being provided any actual documentation proving the referenced lender's alleged perfected security interest in the garnished accounts at that time, it believed that, if the alleged secured lender truly had a perfected security interest, then it would timely move to intervene to formally prove and protect its alleged perfected security interest. At the very least, it would have contacted Umpqua's counsel to informally do the same. (CP 668 at ¶ 5.) Lastly, the Judgment Debtors did not claim an exemption or otherwise controvert the Answers and confirm that the accounts were actually pledged as collateral. In a prior garnishment action involving the same \$23 MM Judgment, Umpqua garnished UBS Financial Services, Inc. ("UBS"), but unlike the instant garnishment against Raymond James, when the money being garnished from UBS involved a security interest, the Judgment Debtors filed an exemption to that effect in order to protect that secured party's interest over those funds. (CP 669 at ¶ 6.) It is undisputed that all three of

these reasons were valid: (1) the balances listed in the Answers were correct; (2) Umpqua received no information from any alleged lender; and (3) the Judgment Debtors did not assert, as they had before, that a valid security interest existed.⁴

Because Umpqua never heard from the alleged secured lender, judgment was ultimately sought against the Garnishee based on the amounts admittedly held by it that were in the Judgment Debtors' accounts. Pursuing a judgment was the result of Umpqua doubting that a third-party lender truly had a perfected security interest in the garnished accounts. As stated above, Umpqua initially became suspicious of the alleged perfected security interest when the Judgment Debtors failed to claim an exemption in this Garnishment Action, as discussed above, or otherwise act in response to the Answers.⁵

Then, when Umpqua never heard from the alleged secured lender even after it had been on notice of Umpqua's writs for *over two months*, when

⁴ The reason for this may be that the Judgment Debtors obviously contest Frontier's rights as a creditor or that any money is owed Frontier from the Judgment Debtors. (CP 760-770 [Judgment Debtors' counterclaims against Frontier in the Snohomish County action filed by Frontier]; App. Brief at p. 7.) According to the docket in that case, no action has been taken since the Judgment Debtor's counterclaims were filed in early 2010 and the case is still pending.

⁵ Umpqua thought it was suspicious that the Judgment Debtors would protect one of their secured lenders but not another, it assumed that either the secured interest no longer existed or never did in the first instance. On the other hand, as this may have been an oversight by the Judgment Debtors, Umpqua continued to withhold acting for quite some time, against providing far more than the statutory time frame for any interested party to act.

it had never been provided any documentation on the alleged security, and when it never having heard further from either Raymond James or the Judgment Debtors, Umpqua reached the conclusion that the alleged security interest was invalid for some reason. Whether it was never created in the first place, never properly perfected, or whether it was subsequently released or offset, Umpqua did not know, but the combination of the Judgment Debtors', the Garnishee's, and the alleged secured lender's inactions for several months led Umpqua to seek a judgment against the Garnishee. (CP 668-669.)

On January 26, 2010, Umpqua presented an *ex parte* Judgment and Order to Pay directed at the garnished accounts held by the Garnishee ("Judgment/Pay Order").⁶ Umpqua presented the Judgment/Pay Order to the Ex Parte Department because, as is customary in collection proceedings, neither notice nor a hearing were required under the garnishment statute when a garnishee defendant admits to having a specific amount of funds or property belonging to a judgment debtor and

⁶ Umpqua never attempted to obtain a "default judgment," as erroneously asserted by Frontier. (App. Brief, at p. 9). A default judgment would have been in the full amount of the \$23 MM Judgment, would have required advance notice, and is only provided when a garnishee fails to answer a writ. RCW 6.27.200. Instead, Umpqua submitted its *ex parte* application, which is the standard process for obtaining a judgment against a garnishee that *has answered* a writ *admitting* it controls *property owned by the judgment debtor* – just as the Garnishee's Answers did in this case. (CP 84-89.) *See* RCW 6.27.250(1)(a).

no controversions or exemptions to such funds are filed. *See* RCW 6.27 *et seq.*) (CP 669 and 690 [confirmation receipt from the court re: *ex parte* presentation of judgments and pay orders and the court’s subsequent entry of the same].)⁷ Along with the requisite Judgment/Pay Order, Umpqua also presented Dana Rognier’s declaration per RCW 6.27.250(1)(a), confirming that the required return or affidavits showing service on or mailing to the appropriate Judgment Debtors had been filed with the Court and that there were no pending exemptions or controversions regarding the Answers underlying the Judgment/Pay Order.⁸ (CP 132-34.)

Later that same day on January 26th, Umpqua’s counsel received a Minute Order from a Commissioner stating that the *ex parte* Judgment/Pay Order was denied for the sole reason that Umpqua did not provide a copy

⁷ Frontier is under the mistaken impression that notice to others was required in obtaining a judgment/pay order on an actual answer. The only notice to be provided to a garnishee defendant is when the judgment creditor is attempting to take a “default judgment” – in this case, a judgment for the entire \$23 MM under Umpqua’s original judgment, rather than an amount admittedly belonging to the judgment debtors in the garnishee defendant’s possession. *See* RCW 6.27.200. At this same time, Umpqua presented several other judgments and orders to pay regarding answers in other garnishment actions relating to the Judgment Debtors that also had no exemptions or controversions pending. In other words, on January 26, 2010, as well as other various times, Umpqua presented to the court, *ex parte*, judgments and orders to pay for all the garnishee answers that had no exemptions or controversions but that admitted having specific amounts of funds in their possession that belonged to the Judgment Debtors. (CP 133.) However, these additional judgments and orders to pay have been paid out and are not at issue in this appeal.

⁸ The Rognier declaration also attached copies of service slips in order to provide the Court with documents supporting Umpqua’s claimed costs listed on the face of the Judgment/Pay Order. (CP 134.)

of the garnishee's Answers. (CP 127.) RCW 6.27 *et seq.* does not require providing a copy of this answer and, it should be noted that these Answers were on file and electronically available for the Commissioner to review if necessary. (CP 90-100.) Nevertheless, Umpqua's counsel, Ms. Rognier, filed a second declaration attaching copies of the Answers. (CP 101-126.)

Not until the next day, on January 27th, did Umpqua's counsel receive a second Minute Order from a Commissioner stating that the Judgment/Pay Order was again being denied, but this time for alleged exemptions and controversions (which made no sense since no such events existed in the instant Garnishment Action – although under the general cause number itself, there were many exemptions and controversions pending related to other garnishments but unrelated to the Raymond James Answers/garnishment):

Given the controversions and exemption claims I think this needs to be presented in person and with notice to the opposing party. I have no time to figure out what the status of the litigation is but it is clear a hearing is to be set before Judge Dubuque. As well the Garnishment statute is not clear regarding the filing of a controversion upon pending answers to writs of garnishment but they do contemplate a hearing to determine the issue so the signing of a judgment against the garnishee defendant does not seem called for under the statutes.

This Minute Order went on to state that the Judgment/Pay Order be “[r]esubmit[ted] only with notice to opposing parties...” (CP 128.) (emphasis added). It was obvious that the Commissioner had not bothered to read the file to ascertain the true status of the Garnishment Action before him, nor did he contact Umpqua’s counsel to make any inquiries. Instead he incorrectly assumed that the various pending controversies and exemptions (already scheduled before the trial court) involved the instant Garnishment Action and Umpqua’s request for judgments and pay orders unrelated to any controversies or exemptions.

In response to this second Minute Order and the Commissioner’s obvious confusion and failure to understand what the status of *this* Garnishment Action was in relation to the various other garnishments and proceedings that all contained within the same cause number, Umpqua’s counsel first contacted the trial court through the bailiff explaining the situation and was then advised to write the judge. Thereafter, counsel wrote an explanatory letter to the assigned trial judge (Judge Dubuque), detailing its failed attempts to have a standard Judgment/Pay Order entered with the Ex Parte Department on the various pending garnishments, including the Raymond James Garnishment Action, as well

as notifying the trial judge about the Commissioner's confusing order in this matter. Umpqua's counsel further explained that the proposed Judgment/Pay Order was unrelated to the pending exemption and controversion proceedings that were then already set before the trial court (these regarding separate garnishment actions). (CP 670.) Counsel believed that attached to this letter were all the relevant documents referenced therein, including the minute orders. (*Id.*)⁹ Ultimately, after considering the entire record and the statute governing entry of garnishee judgments, the trial court correctly entered the Judgment/Pay Order on January 28, 2010, as well as several other unrelated judgments/pay orders also submitted therewith. (CP 129-31.)¹⁰

The day after the Judgment/Pay Order was entered, Umpqua's counsel sent a letter to the Garnishee notifying it of the Judgment/Pay Order. A copy of the Judgment/Pay Order was also enclosed in the letter. (CP 670 and 737.) Garnishee Raymond James neither sought reconsideration of that Judgment/Pay Order, nor did it appeal that

⁹ However, even if counsel was mistaken, all such documents were readily available to the trial judge through the court's file. (CP 670.)

¹⁰ Umpqua did not refile the two Rognier declaration, as erroneously asserted by Union Bank. *See* App. Brief at p. 10. Umpqua speculates that the trial court judge had the declarations refiled upon entry of the Judgment/Pay Order because Umpqua's counsel did not refile them. (CP 670.)

Judgment/Pay Order within the requisite 30 days. Likewise, no alleged secured lender appeared within that time frame to raise any issues or otherwise contact Umpqua or its counsel. In fact, it was only after the Judgment/Pay Order became subject to execution, did the alleged secured lender referenced in the Garnishee's Answers (i.e., finally disclosing itself as Frontier) eventually take action.

C. FRONTIER'S POST-JUDGMENT ACTIONS

What did happen before Frontier filed its Motion to Intervene was, on or around February 11, 2010, it sent a letter to Raymond James stating that Raymond James "should not have allowed a judgment to be entered" and requested that it "file pleadings to quash the judgment." This letter also requested that Raymond James not pay on the judgment. Frontier further represented that it was in the process of preparing pleadings to intervene in the Garnishment Action and to quash the Judgment/Pay Order. This letter was not delivered to Umpqua's counsel. (CP 741.) Obviously, Raymond James did not think much of these demands or instructions/requests at the time, as it took no immediate action nor did it contact Umpqua's counsel on this issue.

Almost two weeks after its letter, on February 24, 2010, Frontier finally filed the Motion to Intervene at issue in this appeal (“Intervention Motion”). (CP 159-60.) This Intervention Motion came over three months after Frontier was notified of Umpqua’s writs, and nearly a month after the Judgment/Pay Order was entered. In its approximately one-page Intervention Motion, Frontier did not even attempt to address why it did not act earlier (i.e., in the three months before the Judgment/Pay Order was entered) despite being aware that the judgment had already been entered. (CP 159-60.) Likewise Raymond James took no action to comment on the motion or otherwise seek a stay or appeal of the Judgment/Order to Pay entered against it.

Thereafter, upon proper motion briefing, the trial court denied the Intervention Motion due to its obvious untimeliness; Frontier’s subsequent Reconsideration Motion was also denied. (CP 258-59; 624-625.) It is important to note that whether Frontier actually had an enforceable security interest in the Judgment Debtors’ funds held for them by Raymond James was neither decided by the trial court nor was this at issue below as the trial court’s denial of the Intervention Motion was based on the timeliness, or lack thereof, by Frontier under CR 24. (CP 258-59

[“Frontier Bank’s motion failed to make any showing sufficient to justify finding the motion to intervene “timely” as required under CR 24”].)¹¹

D. GARNISHEE’S POST-JUDGMENT ACTIONS

Only after the Intervention Motion was denied, did the Garnishee react to the now final and unappealable general monetary judgment (the Judgment/Pay Order) against it, by filing a Motion to Vacate Judgment (“Motion to Vacate”) on March 22, 2010. This was almost two months after the Judgment/Pay Order was entered. (*Compare* CP 129-331 to 266-78.) Although vigorously disputed by Umpqua, ultimately, the trial court granted the Motion to Vacate and vacated the Judgment/Pay Order. (CP 872-74.) This decision is likewise on appeal before this Court under No. 65706-2.

During the returnable show cause hearing on the Motion to Vacate, the trial court largely agreed with Umpqua’s arguments against the Garnishee.¹² (CP 847-48.) Yet, the trial court vacated Umpqua’s

¹¹ Umpqua does not deny that Frontier *claims* a security interest, which would be necessary to do to even submit a motion under CR 24 in good faith, but whether it actually has a secured perfected pending security interest is not admitted nor is it relevant to this appeal or the trial court’s decision below.

¹² The following are excerpts from the trial court directed to the Garnishee’s counsel during the April 9, 2010 show-cause hearing: “[W]hy would [Umpqua] be required to controvert when they have no basis to say in good faith that that answer is inaccurate given the general nature of the answer itself?” (CP 811.) In response to Garnishee

Judgment/Pay Order solely because of Umpqua's alleged failure to comply with the Commissioner's second Minute Order by providing notice to "opposing parties" before resubmitting its Judgment/Pay Order. Although it should be noted that the trial court, recognizing the *ex parte* nature of entering judgment/pay orders on garnishee answers admitting possession of debtor property/funds, agreed that the Minute Order was an "erroneous determination" by the Commissioner. (CP 848; 912.) In any event, an appeal is currently pending on the trial court's vacation of Umpqua's Judgment/Pay Order, seeking reinstatement of the Judgment/Pay Order. *See* Appellate Cause No. 65706-2.

Obviously that appeal (No. 65706-2) should be decided first. If it is affirmed, then this appeal is moot, as Raymond James has filed an interpleader naming the Judgment Debtors, Frontier, and Umpqua. Only

counsel's argument, the Court stated: "Can you show me where in the garnishment statute that you were entitled to receive notice of [Umpqua's] intent to get judgment." (CP 816.) "I don't see in the statute any mechanism once [Raymond James] filed an answer saying yes, we're holding monies, but there is a security interest that requires [Umpqua] to go further." (CP 818.) "And you have not yet raised the fact that Raymond James' answer doesn't even comply with the statute." (CP 842.) "Raymond James did not file an answer in accordance with the simple mechanisms or the procedure of the statute..." "I do not believe that the case law requires the creditor, when there is a simple statement that there is a secured creditor out here, that lender or secured creditor has been given notice of the existence of the garnishment, that they have to go searching through the records to find out whom that may be, especially when we have sophisticated financial institutions..." (CP 847-48.)

if this Court reverses in the 65706-2 appeal, reinstating the Judgment/Order to Pay as Umpqua believes that it will, does this appeal have any bearing on the issues. Assuming this Court reinstates the Judgment/Order to Pay, the following argument would apply.

III. ARGUMENT

A. STANDARD OF REVIEW

Without authority, Frontier argues that this Court should review the trial court's order denying intervention under a *de novo* standard instead of for an abuse of discretion. (App. Brief at p. 14.) No authority exists for this proposition and, in fact, both Washington law and 9th Circuit authority (interpreting the identical federal counterpart to CR 24) are clear that a denial to intervene based on timeliness is reviewed under an abuse of discretion standard. *See, e.g., DeLong v. Parmelee*, 157 Wn. App. 119, 164 (2010) ("We review a trial court's evaluation of timeliness for abuse of discretion"); *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832 (1989) ("Abuse of discretion is the proper standard of review for a trial court's determination of timeliness."); *Olver v. Fowler*, 131 Wn. App. 135, 139 (2006) ("A trial court's determination of timeliness is reviewed for abuse of discretion."); *United States v. Aerojet Gen. Corp.*, 606 F.3d

1142, 1148 (9th Cir. 2010) (“We review de novo a district court's denial of a motion to intervene as of right, except for the court's determination of timeliness, which we review for abuse of discretion.”); *Sanford v. Member Works, Inc.*, 483 F.3d 956, 960 (9th Cir. 2007) (“The denial of a motion to intervene as untimely is reviewed for abuse of discretion.”); *United States v. Alisal Water Corp.*, 370 F.3d 915, 918-19 (9th Cir. 2004) (same).

“A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *DeLong*, 157 Wn. App. at 164. A trial court’s decision is “manifestly unreasonable” “only when no reasonable person would take the position adopted by the trial court.” *Id.*; *see also Kreidler*, 111 Wn.2d at 832 (quoting *Board of Regents v. Seattle*, 108 Wn.2d 545, 557 (1987)); *Spokane County v. State*, 136 Wn.2d 644, 650 (1998) (same). In this case, as timeliness is the critical requirement of CR 24(a) at issue, when a person seeks to intervene after judgment, “the court should allow intervention only upon a *strong showing* after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay.” *Id.* (emphasis added); *see also*

Kreidler, 111 Wn.2d at 832; *Martin v. Pickering*, 85 Wn.2d 241, 243-44 (1975); *Rains v. Lewis*, 20 Wn. App. 117, 125 (1978).

Thus, this Court needs to consider the evidence, or lack thereof, presented by Frontier relating to “prior notice,” the “prejudice to the other parties” (namely Umpqua), and the “reasons for and length of delay” and determine whether the trial court’s conclusion that “Frontier Bank’s motion failed to make any showing [let alone the required “strong showing”] sufficient to justify finding the motion to intervene ‘timely’ as required under CR 24 ...” was a position (or conclusion) that no reasonable person would take (or make). In this case, the trial court’s decision is not only supportable, but correct and any reasonable person would agree with it. The Court must affirm that ruling.

B. THE INTERVENTION MOTION WAS UNTIMELY

In any event, under any standard, the trial court properly denied Union Bank’s Intervention Motion as a result of its obvious untimeliness. Prior to the enactment of CR 24, Washington law was clear: A complaint in intervention was too late if filed after judgment. *See, e.g., Portland Ass’n of Credit Men v. Earley*, 42 Wn.2d 273, 279 (1953). However, the basis for that rule was under prior RCW 4.08.190, which expressly

provided that intervention must have been before trial. However, since that statute has been superseded by CR 24, which eliminated the "before trial" requirement of under the previous statute, the trial court now has discretion under a standard of "timely application." *Ford v. Logan*, 79 Wn.2d 147, 150 (1971).

Thus, the only question is whether the trial court had a tenable basis for finding Frontier's motion to be "untimely" – in other words, would no reasonable person reach the same conclusion basis on the record before the trial court. Initially, Frontier argues that a special timing standard should be applied to garnishment actions. Frontier argues that so long as intervention is sought before a garnishee pays on a judgment/pay order, then the motion should be considered timely. The sole authority cited for this proposition is a 1982 Kansas court of appeals case, *Dailey v. Walden*, 648 P.2d 258 (Kansas Ct. App. 1982).

In *Dailey*, seemingly in a case of first impression there, the Kansas court held that an intervenor's application to intervene would be timely, but that "the application must be made before the garnishment is satisfied." 648 P.2d at 261. In reaching that conclusion, the court's sole authority was an older version of the CJS treatise (i.e. 38 C.J.S.,

Garnishment § 277(c) (1979)). No other authority for this proposition has been cited by Frontier and none could be found. However, as to the *Dailey* Court's reliance on this outdated treatise, an updated/modified version, while acknowledging the *Dailey* case and its lone decision on the timeliness of intervention, now states that “[i]f the time is not prescribed by statute, the intervention may be at any time during pendency of the proceedings *but not after final judgment in favor of the plaintiff against the garnishee*” 38 C.J.S. Garnishment § 38 (2010 Supp.) (emphasis added).

A timing interpretation of before judgment entry, is in accord with other jurisdictions that have considered this issue. *See, e.g., Jefferson Sav. & Loan Ass'n v. Adams*, 802 S.W.2d 811, 813 (Tex. App. 1990) (In affirming the trial court's allowance of intervention in a garnishment, the court confirmed that “an intervention is timely and proper if brought anytime before the judge renders his judgment”); *El Paso County Bank v. Charles R. Milisen & Co.*, 622 P.2d 594, 596 (Colo. Ct. App. 1980) (confirming that Colorado law permits a person claiming an interest in a garnishment action to intervene prior to the time the garnishment proceedings are terminated – in other words, prior to judgment against the

garnishee); *Hahnwald v. Schlapfer*, 260 Pac. 105 (Colo. 1927) (“Where the intervention is before the judgment against the garnishee, it cannot be said that the garnishment proceedings have then been determined, the intervention, therefore, is in due time.); *Shawmut Commercial Paper Co. v. Cram*, 98 N.E. 696, 697 (Mass. 1912) (“While no time is prescribed within which a claimant may be admitted as a party, it is plain that it must be at some time before final judgment. The case cannot always be kept open for this purpose, and in reason the limit must be not later than the time when it has been disposed of finally.”).

Dailey, besides not being supported by other jurisdictions or more recent authority, is unpersuasive for other reasons as well. First, unlike the third-party in *Dailey*, Frontier had three months plus notice of the pending garnishment against Raymond James relating to the Judgment Debtor’s property that it claims some security interest to before the judgment entered. In *Dailey*, the court discussed the fact that the putative intervenor had no prior notice of the garnishment action. (*Compare* CP 248 [“Frontier Bank was advised by Raymond James in November 2009 that it had received a writ of garnishment”] to *Dailey*, at 262 [“Furthermore, considerations of fundamental fairness would preclude

applying this time limitation to an intervenor when it does not appear the intervenor was given notice of the action under the statute”].) In fact, the one Washington court to address interventions in garnishments, would seem to confirm that Frontier needed to make a “timely” application and that the usual standards for allowing intervention applied even in a garnishment action. *Zesbaugh, Inc. v. General Steel Fabricating*, 26 Wn. App. 929, 931 (1980) (“We hold that upon a *proper showing* and after following the correct procedure, a secured creditor is entitled to intervene in a garnishment proceeding as a matter of right.”), *rev’d on other grounds*, 95 Wn.2d 600 (1981).

Next, Frontier’s argument (as well as *Dailey’s* holding) that “timely” is anytime before the payment of funds on a judgment lacks both common and business sense and should not be adopted by this Court. In this case, Frontier was aware of the writ shortly after service in November 2009. The Judgment/Pay Order against Raymond James was not entered until January 28, 2010 well before Frontier filed its Intervention Motion on February 24, 2010. Pursuant to CR 62(a)¹³ and RCW 6.27.260,¹⁴ that

¹³ The Court Rule provides for a 10-day stay before enforcement proceedings on a judgment can begin.

Judgment/Pay Order became a collectible general money judgment subject to execution nearly three weeks before Frontier decided to act.

Accordingly, Umpqua (or any judgment creditor against a garnishee in a similar situation) could have done a number of things with the Judgment/Pay Order that did not involve having Raymond James actually pay off that money judgment.

The judgment creditor against the now garnishee-judgment debtor could have assigned its judgment/pay order to another for value pursuant to RCW 4.56.090.¹⁵ It could have already begun foreclosing on the now garnishee-judgment debtor's property, both real or personal. *See* RCW 4.56.190 and RCW 6.27.260. Likewise, the judgment creditor could have subsequently borrowed against the judgment/pay order and pledged it as collateral for the benefit of another lender under the UCC. In other words, a judgment creditor could institute a myriad of collection efforts

¹⁴ The garnishment statute that provide for execution on garnishee judgments just like any other state court general money judgment.

¹⁵ A judgment/pay order under RCW 6.27 *et seq.* no longer relates to the specific funds being held by the garnishee belonging to the debtor, instead it becomes a general monetary judgment against the garnishee subject to collection by the judgment creditor against *any of the property* belonging to the *garnishee*. RCW 6.27.260. In this instance, the Judgment/Pay Order entitled to Umpqua to collect against any assets of Raymond James. Whether Raymond James should have acted to protect Frontier's interest is not before this Court, but would seem relevant in any future action between those parties once the Judgment/Pay Order was satisfied.

against the now garnishee-judgment debtor (e.g., garnishments, attachments, foreclosures, debtor exams, etc.), which would obviously prejudice the judgment creditor if intervention were allowed at such an untimely juncture.

By holding that any intervention is timely in a garnishment action any time before a garnishee has paid on the judgment entered against it as urged by Frontier, would lead to uncertainty, not the certainty the law favors and strives for. Obviously, the only certain fixed event in a garnishment, upon which to base timeliness, is the judgment – either before it when the judgment creditor has not taken any action or is not entitled to take any action as a result of the garnishee’s answer, or after it, when a judgment has been entered and a whole panoply of events may have since ensued relating to that garnishee judgment. To rule otherwise, would be to ensure that no certainty on this issue would exist. This result is confirmed by the “considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment. . . .”

7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §1916, at 444.

In fact, there is no need to extend, stretch, or twist the timing standards under Washington law as, the standards for when intervention is sought after judgment is already well-developed in this state. After judgment a stronger and different showing must be made by the putative intervenor – a showing that Frontier never even tried to make below and does not now even argue before this Court. *See, e.g., Kreidler v. Eikenberry*, 111 Wn.2d 828, 832-33 (1989) (“Where a person seeks to intervene after judgment, the court should allow intervention only upon a *strong showing* after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay.”) (emphasis added).¹⁶

The Court should ask, what showing, let alone a strong showing, did Frontier make in its Intervention Motion relating to the various circumstances, “including prior notice, prejudice to the other parties, and reasons for and length of the delay including”? The answer is “none.” No where in Frontier’s moving papers below did it even address these standards or submit any evidence regarding any of them.

¹⁶ *Martin v. Pickering*, 85 Wn.2d 241, 243 (1975) (“Timeliness is a critical requirement of CR 24(a)”).

Instead Frontier submitted basically a two-page declaration of Gale Inman in support of its Intervention Motion (CP 164-66), followed by a reply declaration of Steven Arrivey (approximately one-page) (CP 247-48). Ms. Inman's declaration does not in any way address any of three necessary points. It does not speak to Frontier's prior notice of the Garnishment Action, it does not dispute Raymond James' Answers indicating that Frontier was put on affirmative notice of the collection activities of Umpqua well before the Judgment/Pay Order was issued. It does not speak to any "reasons for [or] length of the delay" in Frontier's action to that point.

Next, the Court should review Frontier's Mr. Arrivey's declaration. His declaration simply states that Frontier and Raymond James are "separate and distinct entities" (CP 248), but did not address Umpqua's contentions that the two entities were somehow related as set forth in Umpqua's response to the Intervention Motion. (CP 211, 218, 240-43.) Mr. Arrivey's declaration actually affirmatively admits that Frontier had notice of the collection proceeding just as Raymond James contended it did in its Answers. (CP 248, ll. 10-15). The only statement put forth by Frontier, through Mr. Arrivey, as to the reason for Frontier's

delay in the first instance is that “Frontier Bank assumed” “that [Raymond James] would be advising Umpqua Bank that the accounts had previously been pledged to Frontier Bank and could not be garnished.” (*Id.* at ll. 12-15.)

In other words, the only answer that can be found in Frontier’s moving papers regarding why it did not act, or why it did not act at least sooner, is the faulty conclusion by Frontier that it “assumed that this was the end of the matter” based on a single unspecified communication from Raymond James shortly after it received the writ in question. (*Id.*) Frontier never indicates why it did not seek to protect its alleged rights sooner. It never indicates why it did not contact Umpqua or Umpqua’s counsel ever to assert its alleged rights. Instead it simply (incorrectly) believed it did not need to do anything.

Is it any wonder the trial court concluded that the Intervention Motion was untimely? The facts were simple: (1) Umpqua garnished Raymond James, (2) Raymond James answered indicating it had accounts belonging to the Judgment Debtors, (3) Raymond James indicated it had promptly advised Frontier (although at the time, Umpqua was unaware of the identity of the alleged secured creditor) of the garnishment, (4) no

parties stepped-up within the next several months to intervene, to controvert, to claim exemption, to even call or write to Umpqua and assert any alleged superior rights, (5) Frontier admits that it was promptly notified of Umpqua's collection activities, (6) the Judgment/Pay Order is issued after waiting the statutorily mandated amount of time, (7) Raymond James is notified of judgment and neither seeks reconsideration nor appeals, (8) Frontier waits even longer to finally appeal and seek intervention, (9) Frontier's papers fail to argue, let alone address, the requisite standards for intervening post-judgment, (10) the trial court denies intervention due to lack of timeliness.

The question is whether any reasonable person could reach the same conclusions the trial court did on these facts. The answer is whether any reasonable person would not reach the same conclusion. Even Frontier realizes the failings it had below. On appeal it still fails to address the recognized standards for intervening post judgment, arguing, instead, for a new standard from an outside jurisdiction that is contrary to Washington law. In *Rains v. Lewis*, 20 Wn. App. 117 (1978), the Court of Appeals, in upholding a denial of intervention, held that "it [the intervenor] could have moved to enter the case at any time to protect its

position. It chose not to do so Its application was not timely.” *Id.* at 126. Whatever plan Frontier had to handle this garnishment and whatever it expected Raymond James to do or not do, was a plan of its own making and an expectation that it kept to itself. “[F]or reasons known only to itself” Frontier made decisions that led to the “timing and tardiness of the motion to intervene.” *Martin v. Pickering*, 85 Wn.2d 241, 244 (1975) (finding a lack of the required “strong showing” for intervention post-judgment and affirming the trial court’s denial of the motion to intervene).

C. NO DEFECTS IN THE JUDGMENT/PAY ORDER BUT THAT ISSUE IS ALREADY UNDER REVIEW

Frontier next argues that an alleged “defect” in the Judgment/Pay Order allowed it to seek intervention, post-judgment. (App. Brief at p. 19-21.) Not only was this argument not raised below, it makes no sense in timing of event nor in light of the pending appeal (No. 65706-2) before this Court on this very issue. Either this Court will affirm the vacation of the Judgment/Pay Order and the parties will proceed with Raymond James’ interpleader action, specifically including Frontier as a party thereto, or it will reverse and reinstate the Judgment/Pay Order, thus eliminating any claimed “defect” in the judgment as raised for the first time in this appeal. The issues relating to reversal or affirmance of the

trial court's order vacating the Judgment/Pay Order are irrelevant to the issue before the Court on this appeal – that being the timeliness or not of Frontier's Intervention Motion.

In going on, Frontier claims, without authority, that Umpqua “fail[ed] to comply with the rules governing garnishments.” (App. Brief at p. 19.) It does so without a single citation or authority in support. It simply claims that Umpqua should have controverted the Answers, but cites no authority why controversion would be required, nor is there any. It then wrongfully claims that “Umpqua attempted to take a default judgment against Raymond James” (*Id.*) Again, this is based on Frontier's lack of understanding how the garnishment statutes work. If Umpqua had attempted to take a \$23,000.000 plus judgment against Raymond James based on Raymond James' failure to answer, then RCW 6.27.200 would have required notice be given in advance. However, as Umpqua only sought an approximately \$400,000 judgment based entirely on the Answers admitting to having those specific funds

belonging to the Judgment Debtors in its accounts, then notice was not required and a default judgment was not sought. RCW 6.27.250(1)(a).¹⁷

Regardless, responding to these arguments makes no sense at the current time. If this Court does not reverse the trial court and reinstate the Judgment/Pay Order in Appeal No. 65706-2, then Frontier could move for intervention again, although such an action would be unnecessary in light of Raymond James' interpleader action. In other words, this entire appeal would be moot. However, if this Court reinstates the Judgment/Pay Order, as Umpqua believes it will when it considers the issues fully, then Frontier's entire argument on alleged "defectiveness" would once again be moot. In either case, further discussion here is unwarranted.¹⁸

**D. EVIDENTIARY HEARING WAS NOT PROPERLY RAISED
NOR WAS IT NECESSARY**

Lastly, Frontier claims that the trial court should have held an evidentiary hearing on the issues of "prior notice, prejudice to other parties

¹⁷ As the Court is aware, the legislature specifically amended the garnishment statutes requiring that, in instances where a *default* judgment was being sought for the entire underlying judgment against a non-answering garnishee, notice of such a judgment would have to be provided. *See* RCW 6.27.200. This notice provision is not found in that portion of the statute governing judgments on garnishee answers. *See* RCW 6.27.250(1)(a) (the statute upon which the Judgment/Order to Pay is based).

¹⁸ Frontier's arguments might have been better served as a CR 60 motion to the trial court rather than this pointless appeal which deprived the trial judge of further jurisdiction in this matter.

and reasons for the length of delay.” (App. Brief at p. 22.) As these are the same issues that Frontier failed to brief or submit any evidence regarding, it is strange how it believed that an evidentiary hearing was necessary. Nevertheless, it is undisputed that this argument was never raised below in Frontier’s Intervention Motion and was only raised for the first time in its Motion for Reconsideration. (*Compare* CP 159-160 [motion] and 250-253 [reply in support of motion] to CP 260-263 [motion for reconsideration].)

This Court need not consider any argument or theories raised for the first time on reconsideration. *See, e.g., Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 738 (2009); *Wesche v. Martin*, 64 Wn. App. 1, 6-7 (1992) (issues first raised in motion for reconsideration need not be considered on appeal); *Muma v. Muma*, 115 Wn. App. 1, 10 n. 7 (2002) (In declining to consider a legal issue before it, the Court of Appeals concluded that “Mr. Muma first raised this issue in a brief in support of his motion for reconsideration below. This is not timely.”).

Even if this Court were to consider Frontier’s new argument now, the Court’s decision to deny its Motion for Reconsideration is likewise reviewed under an abuse of discretion standard. *See, e.g., Meridian*

Minerals Co. v. King County, 61 Wn. App. 195- 203-04 (1991); *Holaday v. Merceri*, 49 Wn. App. 321, 334 (1987).

In other words, even if this Court were to consider whether the trial court erred in not holding an evidentiary hearing after receiving Frontier's motion for reconsideration, that decision is reviewed on whether the trial court abused her discretion to so rule. Since Frontier's new argument of an evidentiary hearing is allegedly based on the issues required to intervene post-judgment, namely the strong showing explaining the issues of "prior notice, prejudice to other parties and reasons for the length of delay" (App. Br. at p. 22), then it would have the burden of showing the trial court reached a manifestly unreasonable conclusion that "Frontier Bank's motion failed to make any showing sufficient to justify finding the motion to intervene 'timely' as required under CR 24" (CP 259.)

Frontier claims that the parties "submitted conflicting affidavits on these issues." (App. Brief at p. 22.) As addressed above, not only did Frontier fail to submit any affidavits/declarations relating to post-judgment intervention standards, but even on appeal it still fails to argue to this Court what those alleged "conflicts" are and where in the record they can be found, what showing it ever made below, or how the trial court erred in

finding that Frontier failed to meet the “strong showing” required to intervene post-judgment under Washington law. Even in arguing for an evidentiary hearing, Frontier does not actually state what factual issues existed. The trial court was obligated to “decide the issue on the evidence submitted to it.” *Jet Boats v. Puget Sound Bank*, 44 Wn. App. 32, 42 (1986). *See also Biehn v. Lyon*, 29 Wn.2d 750, 758 (1948) (same). It did too. Frontier failed to submit evidence or argument on the standards for intervening post-judgment below and it fails to do so now before this Court.

E. THE ALLEGED SECURITY INTEREST HAS NOT BEEN PROVEN AND IS IRRELEVANT AT THIS POINT

Frontier argues that the record “unequivocally establishes that [Frontier] held a prior perfected security interest in the garnished accounts” (App. Brief at p. 25.) However, since the issue of existence of a security interest, whether such an interest is perfected, and any alleged priority of such an interest, let alone any defenses that the judgment debtors have to such an alleged interest, was not at issue before the trial court, it is only “unequivocal” that these many issues have yet to be decided. Umpqua does not now concede Frontier’s claims, nor did it below. (CP 255, ll. 2-3.) However, even if this issue were relevant to the

appeal at hand, should this Court reinstate the Judgment/Pay Order against Raymond James, Frontier's point is irrelevant.

Umpqua will have a general monetary judgment against Raymond James, subject to collection against any asserts of Raymond James. The dispute will be between Raymond James and Frontier, as to whether Raymond James failed in some duty to Frontier or whether Frontier failed to timely act thereby relieving Raymond James of its alleged obligations to Frontier. Once Umpqua collects on its general monetary judgment, Raymond James and Frontier can argue about whether Raymond James has any liability to it. *Cf. Wise v. Reed*, 79 Wash. 134, 136 (1914) (after judgment was entered against a garnishee, court confirmed that the third-party claiming an interest in the garnished property who "might have intervened if she had desired to do so, and she is now estopped to assert title [to the garnished property] in an independent proceeding").

IV. CONCLUSION

Frontier failed to present any evidence below, let alone a strong showing, justifying post-judgment intervention, especially when it admittedly had knowledge of the pending garnishment action for nearly four months before. Frontier does not and cannot deny it knew of

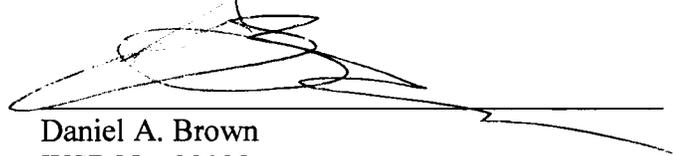
Umpqua's actions in starting a garnishment action against Raymond James, nor does it or could it deny that Umpqua lacked the knowledge that it was Frontier, specifically, that allegedly claimed a security interest. Instead, the undertone of Frontier's entire position in this matter is that Umpqua somehow had the duty to search out the unnamed "lender" that was referenced by Raymond James rather than Frontier (having full knowledge of both the garnishment action and its alleged security rights) having an obligation to intervene timely or do anything for that matter.

As the Court is aware, the garnishment statute (RCW 6.27 *et seq.*) is a statutorily time-sensitive creature with relatively short response and reply dates created in favor of a creditor's rights to collect on a judgment in an expeditious manner. As stated by the *Kreidler* Court, "a factor supporting the trial court's ruling [denying intervention] is the statute governing [the issue in this matter] emphasizes the importance of timeliness." 111 Wn.2d at 833. Likewise, the time-sensitive garnishment statute does not tolerate late-comers such as Frontier. Frontier "had ample opportunity to intervene before the Superior Court made its decision, but they failed to do so. They had notice, were aware of the suit, and no extraordinary circumstances justify delay." *Id.* at 833. Frontier never

even sent a letter or made a single phone call to Umpqua's counsel to call attention to itself. The trial court's decision to deny intervention should be affirmed.

DATED this 29th day of November, 2010.

WILLIAMS KASTNER & GIBBS PLLC

A handwritten signature in black ink, appearing to be "Daniel A. Brown", written over a horizontal line.

Daniel A. Brown
WSB No. 22028

Attorneys for Respondent
Umpqua Bank

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 29th day of November, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following counsel of record:

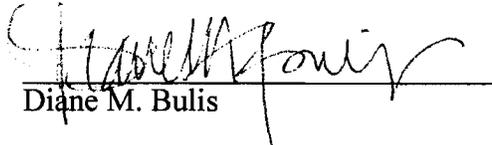
David R. Riley
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Attorney for Frontier Bank

SENT VIA:

- Fax
- ABC Legal Services
- Federal Express
- Regular U.S. Mail
- E-file / E-mail

Dated this 29th day of November, 2010, at Seattle, Washington.


Diane M. Bulis

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