

NO. 66612-6-1

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

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DAVID W. MAYERS, JR.,

Plaintiff/Appellant,

v.

JOHN GRAHAME BELL and YOUNG deNORMANDIE, P.C.,

Defendants/Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENTS ON APPEAL.....	1
II. STATEMENT OF FACTS.....	2
III. LEGAL AUTHORITY.....	4
A. Bell's payment of the distributed funds to YdN as compensation for legal services was not a fraudulent transfer within the meaning of the UFTA.....	4
1. Bell received "reasonably equivalent value" in exchange for the distributed funds.....	5
2. Bell's use of the distributed funds to challenge Mayers's judgment did not constitute "hindering" or "delaying" under the UFTA.....	7
B. Notwithstanding the terms of the Fee Agreement, Bell actually gave YdN an "advance fee deposit." Because the funds stayed in YdN's trust account, they were subject to garnishment and were not beyond the reach of Bell's creditors.	8
C. The Fee Agreement likely did not transfer ownership of the distributed funds from Bell to YdN. The distributed funds were not beyond the reach of Bell's creditors and no violation of the UFTA occurred.	9
D. The doctrine of equitable estoppel does not prevent YdN from arguing that Bell retained ownership of the distributed funds.....	14
E. Mayers made the poor tactical decision to release his writ of garnishment and pursue a UFTA action against Bell.....	16
IV. CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

Cases

<i>Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.</i> 982 So. 2d 628 (Fla. 2008).....	12
<i>Ashmore v. Estate of Duff</i> 165 Wn.2d 948, 205 P.3d 111 (2009).....	16
<i>Associates Housing Finance, LLC v. Stredwick</i> 120 Wa. App. 52, 83 P. 3d 1032 (2004)	6
<i>Cornerstone Equip. Leasing, Inc. v. MacLeod</i> 159 Wn. App. 899, 247 P.3d 790 (2011).....	15
<i>Cotton v. City of Elma</i> 100 Wn. App. 685, 998 P.2d 339 (2000).....	16
<i>Department of Ecology v. Theodoratus</i> 135 Wn.2d 582, 957 P.2d 1241 (1998).....	16
<i>Deyong Mgt., Ltd. v. Previs</i> 47 Wn. App. 341, 735 P.2d 79 (1987).....	13
<i>Freitag v. McGhie</i> 133 Wn.2d 816, 947 P.2d 1186 (1997).....	13, 14
<i>In re TRM, Inc.</i> 291 B.R. 400, 431 (Bnk. W.D. Mich. 2003).....	6
<i>Lampson Universal Rigging v. Wash. Public Power Supply Sys.</i> 105 Wn.2d 376 (1986).....	8
<i>Mahomet v. Hartford Ins. Co.</i> 3 Wn. App. 560, 477 P.2d 191 (1970).....	18
<i>Marcus, Santoro & Kozak, P.C. v. Wu</i> 652 S.E.2d 777 (Va. 2007)	11, 12
<i>Paxton v. City of Bellingham</i> 129 Wn. App. 439, 119 P.3d 373 (2005).....	16
<i>Thompson v. Hanson</i> 168 Wn. 2d 738, 239 P.3d 537 (2009).....	5, 13

TABLE OF AUTHORITIES

Page

Statutes

RCW 19.40.031 6
RCW 19.40.041 5
RCW 19.40.051 5
RCW 6.27.210 17
RCW 6.27.220 18
RCW 6.27.230 19

Rules

RAP 8.1 8
RPC 1.15A(c) 10
RPC 1.15A(c)(2) 11
RPC 1.5(f) 9, 10
RPC 1.5(f)(1) 4

I. ARGUMENTS ON APPEAL

Mayers claims in his brief that “the only argument advanced by the law firm in its motion for summary judgment” was that

the payment of an ‘earned retainer’ of \$36,000.00 for future legal services did not constitute a transfer under the statute [RCW 19.40 *et seq.*] because the deposit of the funds to a lawyer’s trust account did not have, “. . . the effect of placing the asset out of the reach of a creditor.”¹

Actually, Young deNormandie’s (“YdN”) argument contains two separate elements, summarized as follows:

1. Bell and YdN entered into a non-refundable fee agreement (“Fee Agreement”), by which Bell paid \$36,000.00 to the firm as a retainer for legal services. The Fee Agreement was enforceable and transferred ownership of the funds to YdN. This transfer of funds did not constitute a fraudulent transfer under the Uniform Fraudulent Transfer Act (“UFTA”) because: (1) YdN provided “equivalent value” for the funds; and (2) pursuing legal action to prevent enforcement of a judgment does not constitute “hindering” or “delaying” within the meaning of the UFTA.

2. Alternatively, Bell’s payment to YdN was an “advance fee deposit” rather than a “retainer.” Because of that, and because the distributed funds remained in YdN’s trust account, the funds still belonged to Bell and were subject to garnishment. Since the distributed funds were not beyond the reach of Bell’s creditors, no fraudulent transfer occurred.

¹ Mayers’s Opening Brief (“Mayers Brief”), page 1.

II. STATEMENT OF FACTS

John Young (“Young”) is a shareholder in YdN and was one of the lead attorneys in the *Exxon Valdez* litigation. Young and Bell are friends and Bell worked for Young on the *Exxon* case in 1989-90. As compensation for Bell’s work on *Exxon*, Young agreed to give him a share of the fees he received in the case.²

In January 2009, Young received fees from the *Exxon* litigation. Young deposited these fees into YdN’s IOLTA trust account. Young determined that Bell was entitled to receive \$36,795.39 from the *Exxon* payment and told Bell that he intended to pay him this amount (the “distributed funds”).³

Mayers brought a lawsuit against Bell in the King County Superior Court (*Mayers v. Bell* (KCSC 07-2-20616-7 KNT). In December 2008, Mayers obtained a default judgment against Bell.⁴ In January 2009, Bell asked YdN to assist him in challenging the judgment.⁵

YdN agreed to represent Bell in the *Mayers* lawsuit and “in connection with a suit that you [Bell] may wish to file naming Mr. Mayers, Terry Rielly, Michael Gusa, and/or Thomas Buchmeier as defendants, as appropriate.” YdN agreed to this representation “on the express condition that you [Bell] provide us with a \$36,000 retainer against which we will bill our fees as they are incurred.” The agreement

² CP 21.

³ *Id.*

⁴ CP 4.

⁵ CP 21-22.

provided that the retainer would be “earned upon receipt.”⁶

YdN advised Bell that if he agreed to these conditions, the firm would “transfer \$36,000 of the funds that we are holding in our trust account for you [the distributed funds] to our general account and will immediately start to work on your case.”⁷ Bell agreed with this proposal, signed the Fee Agreement and returned it to YdN.

YdN worked on the *Mayers* lawsuit, with its primary effort being to determine whether the judgment Mayer had obtained against Bell could be overturned. YdN billed Bell \$3,672.07 for this work and transferred that amount to its operating account from the distributed funds held in the firm’s trust account. YdN ultimately determined that no legitimate basis existed to challenge Mayers’s judgment against Bell and never appeared in the *Mayers* lawsuit.⁸

The Fee Agreement stated that YdN would immediately transfer the distributed funds to its operating account. By mistake, YdN failed to make this transfer.⁹ In July 2009, Mayers served YdN with its writ of garnishment.¹⁰

YdN answered the writ of garnishment by stating that it was holding \$33,123.32 in its trust account as a “non-refundable litigation retainer” for Bell’s benefit:

On July 23, 2009, the date Young deNormandie, P.C. received the writ, Young deNormandie held \$33,123.32 in its trust

⁶ CP 24.

⁷ *Id.*

⁸ CP 22.

⁹ *Id.*

¹⁰ CP 34-35.

account as a non-refundable litigation retainer for the benefit of J. Grahame Bell. Mr. Bell paid these funds pursuant to a written fee agreement with Young deNormandie which states that the funds were immediately earned and non-refundable. Relying upon the WSBA's Informal Opinions 1610 & 1838 Young deNormandie believes these funds are not subject to garnishment.¹¹

Mayers did not controvert YdN's answer or take any action to enforce his writ of garnishment. On August 27, 2009, Mayers voluntarily released his writ of garnishment.¹² Concurrent with this dismissal, Mayers filed his Complaint alleging that Bell fraudulently transferred \$33,123.32 to YdN.

III. LEGAL AUTHORITY

A. **Bell's payment of the distributed funds to YdN as compensation for legal services was not a fraudulent transfer within the meaning of the UFTA.**

Washington's Rules of Professional Conduct ("RPC") authorize non-refundable fee agreements. RPC 1.5(f)(1) provides that "[a] lawyer may charge a retainer, which is a fee that client pays to a lawyer to be available to a client during a specified period or a specified matter ...". If the attorney and client agree upon the retainer described in RPC 1.5(f)(1), "the fee is considered to be the lawyer's property upon receipt".¹³

YdN and Bell both believed the Fee Agreement was enforceable and that it transferred ownership of the distributed funds to the law

¹¹ CP 38

¹² CP 40.

firm.¹⁴ Mayers also had “no doubt” that the Fee Agreement “would be allowed” under the RPCs:

Washington’s Rules of Professional Conduct specifically authorize retainer agreements such as are involved here. There is no doubt that the retainer agreement between Bell and YDeN is one which would be allowed under the rule. The rule also provides that such retainers can be earned on receipt as Bell and YdeN agreed here.¹⁵

Operating under the assumption that YdN earned the distributed funds upon execution of the Fee Agreement, Mayers argues that Bell’s payment to the law firm constituted a fraudulent transfer under the UFTA. Mayers advances two bases for his argument: (1) Bell did not receive “equivalent value” in exchange for his transfer of the distributed funds; and (2) use of the distributed funds to challenge the validity of Mayers’s judgment constituted “hindering or “delaying” within the meaning of the UFTA.

1. Bell received “reasonably equivalent value” in exchange for the distributed funds.

To prevail on his fraudulent transfer claim, Mayers must prove that Bell “made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer.”¹⁶ Mayers claims that Bell did not receive equivalent value because the transfer

¹³ Comment 15 to RPC 1.5.

¹⁴ This belief is why YdN represented, in its answer to Mayers’s writ of garnishment, that the distributed funds were “immediately earned [by YdN] and non-refundable” and were “not subject to garnishment.” CP 38. Similarly, Bell testified it was his “belief that these [distributed] funds are no longer mine, but the earned income of Young deNormandie.” CP 73.

¹⁵ Mayers Brief, pages 14-15.

¹⁶ RCW 19.40.051. See RCW 19.40.041(2)(a transfer is fraudulent if the debtor made the transfer “[w]ithout receiving a reasonably equivalent value in return”); *Thompson v. Hanson*, 168 Wn. 2d 738, 745, 239 P.3d 537 (2009).

of the distributed funds to YdN had “no utility from a creditor’s viewpoint.”¹⁷ The “creditor’s viewpoint” Mayers refers to is his own; Mayers calls the transfer fraudulent because it did not provide him with a personal benefit.

Mayers’s error is in believing that he is the only creditor who matters. Under Mayers’s theory, Bell’s payments to other creditors (e.g., landlord, grocery store, utility company) would be fraudulent transfers. This is not the law.

“Reasonably equivalent value” has the same meaning as “fair consideration.”¹⁸ A transfer by a debtor to a creditor is not fraudulent as to other creditors, so long as the debtor received “fair consideration” in return.¹⁹ Equivalent value includes an unperformed promise “made in the ordinary course of the promisor’s business to furnish support to the debtor or another person.”²⁰

Mayers agrees that the RPCs “specifically authorize retainer agreements” like the one between YdN and Bell. Thus, YdN’s promise to provide future legal services to Bell, which was made in the “ordinary course” of YdN’s business as a law firm, provided equivalent value for Bell’s transfer of the distributed funds. No fraudulent transfer occurred.

¹⁷ Mayers Brief, page 29 (quoting *Clearwater v. Skyline Construction Co.*, 67 Wn. App. 305, 322-23, 835 P.2d 257 (1992).

¹⁸ *In re TRM, Inc.*, 291 B.R. 400, 431 (Bnk. W.D. Mich. 2003).

¹⁹ See *Associates Housing Finance, LLC v. Stredwick*, 120 Wa. App. 52, 58, 83 P. 3d 1032 (2004)(“A transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value.”).

²⁰ RCW 19.40.031.

2. Bell's use of the distributed funds to challenge Mayers's judgment did not constitute "hindering" or "delaying" under the UFTA.

Bell testified in his deposition that he hired YdN to have Mayers's judgment "reverse[d]" or "canceled."²¹ Mayers's argues that such action violated the UFTA because it "hindered" or "delayed" enforcement of the judgment:

There can be no doubt that Bell's stated intention to "reverse" and/or "have the judgment canceled" would directly and specifically hinder the plaintiff in realizing upon his judgment. The application of the plain meaning of the word "delay" obtains the same result when it is applied to Bell's stated intention to "reverse" and/or "have the judgment canceled."²²

Mayers acknowledges that Bell had a legal right to challenge the judgment, but claims the UFTA doesn't give a "free pass" for such action. According to Mayers, the "fact that Bell's intent was directed toward the legal process has no bearing on this issue. There is no free pass in the UFTA for dealings with and between lawyers."²³

Under Mayers's interpretation of UFTA, a debtor must either satisfy or supersede a judgment before hiring an attorney to pursue the appeal. To do otherwise would be to "hinder" or "delay" enforcement of the judgment. Further, if the debtor lacks sufficient funds to satisfy or supersede the judgment, then he violates UFTA by using his limited funds to pay an attorney to handle the appeal.

²¹ CP 101.

²² Mayers Brief, pages 26-27. Mayers also claims "[i]t is beyond argument that Bell's stated intention to "reverse" or "cancel" plaintiff's judgment would, and did in fact, both hinder and delay the enforcement of that judgment." *Id.*, page 25.

²³ *Id.*, page 27.

Mayers's argument is nonsensical. A judgment debtor is entitled, but not required, to satisfy or supersede the judgment before pursuing an appeal.²⁴ Also, as discussed *supra*, a debtor receives equivalent value when he pays for legal services. Bell did not violate UFTA by hiring YdN to challenge Mayers's judgment.

B. Notwithstanding the terms of the Fee Agreement, Bell actually gave YdN an "advance fee deposit." Because the funds stayed in YdN's trust account, they were subject to garnishment and were not beyond the reach of Bell's creditors.

Bell's payment to YdN is more accurately characterized as an "advance fee deposit" rather than as a "retainer." Because of that, and because the distributed funds remained in YdN's trust account, the funds actually belonged to Bell and were subject to garnishment. Since the distributed funds were not beyond the reach of Bell's creditors, no fraudulent transfer occurred.

YdN stated in its answer to Mayers's writ of garnishment that, pursuant to the terms of the Fee Agreement, ownership of the distributed funds transferred from Bell to the firm. Mayers claims the doctrine of equitable estoppel prevents YdN from now arguing that, notwithstanding the Fee Agreement, Bell retained ownership of the distributed funds. However, the doctrine of equitable estoppel does not apply where the representations allegedly relied upon are matters of law and not fact.

If the distributed funds held in YdN's trust account belonged to Bell, then Mayers's writ of garnishment attached to them. Mayers's

²⁴ See RAP 8.1; *Lampson Universal Rigging v. Wash. Public Power Supply Sys.*, 105 Wn.2d 376, 378 (1986) ("An appellant is not obligated to supersede a judgment from which it is appealing").

voluntarily released the writ of garnishment as part of his “litigation strategy.” This was a poor decision for which Mayers bears full responsibility.

C. The Fee Agreement likely did not transfer ownership of the distributed funds from Bell to YdN. The distributed funds were not beyond the reach of Bell’s creditors and no violation of the UFTA occurred.

RPC 1.5(f) describes a “retainer” as a fee the client pays “to a lawyer to be available to the client during a specified period or on a specified matter”. Importantly, the retainer is “in addition to and apart from any compensation for legal services performed.”²⁵

Paragraph (f)(1) describes a fee structure sometimes known as an “availability retainer,” “engagement retainer,” “true retainer,” “general retainer,” or “classic retainer.” Under these rules, this arrangement is called a “retainer.” **A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer’s availability, but that will be applied to the client’s account as the lawyer renders services, is not a retainer under paragraph (f)(1).**²⁶

In its Informal Ethics Opinion 1838, the Washington Bar Association distinguishes between an “advance fee deposit” and a “retainer:”

It is the opinion of the committee that if a flat fee is an advance fee deposit, the fee must be placed in a trust account. If the flat fee is a retainer paid to secure the availability of the lawyer, the fee is considered earned at the time of receipt and is not deposited into the trust account. A nonrefundable fee paid pursuant to a fee agreement is a retainer and that nature is negated by the circumstances described in your inquiry [in

²⁵ RPC 1.5(f).

²⁶ Comment 13 to RPC 1.5.

which the firm would refund the fee if the client requested a refund to change lawyers after only a small amount of work was done on the client's behalf.] No portion of the nonrefundable fee should be placed in the trust account.

The RPCs make it clear that a retainer belongs to the attorney while an advance fee deposit remains the client's property. The RPCs are equally clear that "[n]o funds belonging to the lawyer may be deposited or retained in a trust account".²⁷ Client funds include "legal fees and costs that have been paid in advance other than retainers and flat fees complying with the requirements of Rule 1.5(f)."²⁸

In our present case, the Fee Agreement required Bell to pay a \$36,000.00 retainer to YdN and stated that "the retainer [would] be deemed earned upon receipt."²⁹ However, the Fee Agreement also stated that YdN "will bill our fees [against the retainer] as they are incurred" and provided a mechanism for Bell to obtain a refund of the unallocated retainer:

Because we cannot terminate our representation of you in pending litigation without court approval, we must insist that the retainer be deemed earned upon receipt. If (sic) will only be refundable if (i) either of us first terminates the representation and (2) we receive court approval to withdraw as your counsel. If these conditions are first met, any balance remaining after all of our fees and costs billed through the date termination of our

²⁷ See RPC 1.15A(c) ("A lawyer must hold property of clients and third persons separate from the lawyer's own property."); RPC 1.5(f) (because a retainer is considered to be "the lawyer's property on receipt," the retainer "shall not be placed in the lawyer's trust account."); Comment 15 to RPC 15A (a retainer "is considered the lawyer's property on receipt and must not be deposited into a trust account containing client or third-party funds.").

²⁸ Comment 2 to RPC 1.15A.

²⁹ CP 24.

representation is approved have been paid in full will then be refunded to you.³⁰

When viewed through the prism of the RPCs, it appears that the Fee Agreement describes an advanced fee deposit rather than a traditional retainer. The fact that the distributed funds remained in YdN's trust account supports this conclusion. RPC 1.15A(c)(2) requires an attorney to "deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." This is consistent with YdN's agreement to bill its fees against the retainer "as they are incurred."

Why does it matter that Bell's payment was actually an advance fee deposit and the funds were in YdN's escrow account? Because funds in the attorney's trust account are owned by the client and are subject to claims by the client's creditors. As explained by the Virginia Supreme Court:

Should a lawyer's client, having tendered funds into the lawyer's trust account, file a petition in bankruptcy, the funds in the trust account at the time of filing are assets of the client's bankruptcy estate because of the client's ownership interest. Conversely, if the attorney holding a client's funds files a petition in bankruptcy, the client's funds in the trust account are not part of the attorney's estate in bankruptcy. Those funds remain the separate property of the client because it is the client who has equitable ownership, not the attorney.³¹

³⁰ *Id.* Since YdN never appeared in the *Mayers* litigation, Bell could have recovered the unearned distributed funds by terminating his employment of the law firm.

³¹ *Marcus, Santoro & Kozak, P.C. v. Wu*, 652 S.E.2d 777, 782, (Va. 2007) (citations omitted).

In that same case, the court held that a client's funds deposited in a law firm's trust account are subject to garnishment by the client's creditors:

Thus, it is the debtor's intangible property interest that the garnishee may hold, not just an indebtedness from the garnishee, that is properly subject to garnishment. The [Law] Firms, as garnishees, held the intangible equitable property interest of Tseng in their trust accounts and were under a fiduciary duty not only to hold that interest but return the property to Tseng when the trust obligation ends. **As such, Tseng's property interest in the trust accounts could be attached in garnishment by Wu as "the judgment creditor [who] enforces the 'lien of his execution' against property . . . of the judgment debtor [Tseng] in the hands of a third person, the garnishee," the [Law] Firms.**³²

The Florida Supreme Court recently reached the same conclusion:

Furthermore, because attorneys and their trust accounts are subject to the same provisions of the garnishment statute as any other bank or non-bank garnishee, we cannot discern a principled basis for holding that funds located in an attorney's trust account warrant any greater protection from creditors than funds located in the client's personal account. As the Second District stated in this case, "[t]o exempt trust accounts from the garnishment provisions that apply to bank and non-bank garnishees would result in allowing the client a protection in the trust account that he would not have if the funds were in his own account." We agree with the Second District that such a result is not justified and therefore reject AME's assertion that attorneys and their trust accounts should be exempt from the obligations imposed on garnishees under the Florida garnishment statute.³³

³² 652 S.E. 2d at 783 (citations omitted and emphasis added).

³³ *Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc.*, 982 So. 2d 628, 640 (Fla. 2008) (emphasis added).

Nothing in the Washington garnishment statutes, RCW 6.27 et. seq., exempts funds held in an attorney's trust account from garnishment. Therefore, the distributed funds remaining in YdN's trust account were subject to garnishment and not outside the reach of Bell's creditors.

In *Deyong Mgt., Ltd. v. Previs*,³⁴ the court of appeals held that a fraudulent transfer does not occur unless the asset is placed beyond the creditor's reach:

We hold that a creditor may recover a money judgment from a transferee of a fraudulent conveyance who has knowingly accepted the property with an intent to assist the debtor in evading the creditor **and has placed the property beyond the creditor's reach**. Such a transferee is liable for the value of the property conveyed, up to the amount that the debtor owes to the creditor.³⁵

In *Thompson v. Hanson*,³⁶ the Washington Supreme Court applied *Deyong* and held that "a fraudulent transfer occurs where one entity transfers an asset to another entity, **with the effect of placing the asset out of the reach of a creditor**".³⁷ The Court said that this result was consistent with the overriding purpose of the UFTA:

The overriding purpose of the UFTA is to provide relief for creditors whose collection on a debt is frustrated by the actions

³⁴ 47 Wn. App. 341, 735 P.2d 79 (1987).

³⁵ 47 Wn. App. at 347 (emphasis added).

³⁶ 168 Wn.2d 738, 239 P.3d 537 (2009).

³⁷ 168 Wn.2d at 744 (emphasis added). Mayers argues that under the decision in *Freitag v. McGhie*, 133 Wn.2d 816, 947 P.2d 1186 (1997), he does not have to show that the distributed funds were outside of his reach. However, the sole issue in *Freitag*, decided 13 years before *Thompson*, was whether the discovery rule applied to fraudulent conveyance claims. *Freitag*, 133 Wn.2d at 827.

of a debtor to place the putatively satisfying assets beyond the reach of the creditor.³⁸

Regardless of what YdN and Bell intended or the Fee Agreement said, the distributed funds in YdN's trust account were within the reach of Bell's creditors (as evidenced by Mayers's garnishment of those funds).³⁹ No fraudulent transfer of the funds occurred.

D. The doctrine of equitable estoppel does not prevent YdN from arguing that Bell retained ownership of the distributed funds.

In its answer to Mayers's writ of garnishment, YdN stated that Bell paid the distributed funds to the law firm as a "non-refundable litigation retainer." Relying upon the WSBA's Informal Opinions Nos. 1610 and 1838, YdN expressed its belief that the distributed funds were "not subject to garnishment."⁴⁰

Mayers alleges that in its motion for summary judgment, YdN took "the new position that no 'transfer' occurred and that its characterization of the funds as 'earned income' was false."⁴¹ Mayers claims that "acting in reasonable reliance upon the Answer made by the lawyers [he] initiated the UFTA action and released the garnishment to facilitate prosecution of the fraudulent transfer action."⁴² Mayers argues that under the doctrine of equitable estoppel,

³⁸ 168 Wn.2d at 750(emphasis added).

³⁹ Mayers asserts in his brief that retention of the distributed funds in YdN's trust account "is a circumstance which indicates that the debtor has retained control over the funds." Mayers Brief, page 32.

⁴⁰ CP 38.

⁴¹ Mayers Brief, page 16. Mayers interpreted this argument as YdN telling the trial court that its "sworn statement [answer to writ of garnishment] and that of defendant Bell were not true statements and should be disregarded by the court." *Id.*, page 19.

⁴² *Id.*, page 19.

“such behavior [YdN’s legal argument regarding Bell’s ownership of the distributed funds] should not be permitted by the court.”⁴³

The principle of equitable estoppel “is based upon the reasoning that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.”⁴⁴ Equitable estoppel is not favored, and a party asserting it “must prove each of its elements by clear, cogent, and convincing evidence.”⁴⁵ Those elements are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.⁴⁶

Mayers does not claim he relied upon a factual representation that YdN subsequently repudiated. Rather, Mayers alleges he relied upon YdN’s legal conclusion that Bell transferred ownership of the distributed funds to the law firm. However, the doctrine of equitable

⁴³ *Id.* More colorfully, Mayers argues that “[t]he effect of the superior court granting the defendant’s motion and denying the plaintiff’s motion was to allow the defendant Young deNormandie to change its position from the one upon which the plaintiff relied in bringing this action and to profit from professional practices which are questionable at best and illegal when viewed more critically.” *Id.*, page 17.

⁴⁴ *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 907, 247 P.3d 790 (2011).

⁴⁵ *Id.*

⁴⁶ *Id.*, (citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, cert. denied, 506 U.S. 1028 (1992)).

estoppel does not apply “where the representations allegedly relied upon are matters of law, rather than fact”.⁴⁷

In its answer to Mayers’s writ of garnishment, YdN stated facts (that it held \$33,123,32 in its trust account, that Bell signed a fee agreement, etc.) and its legal conclusion based upon those facts; namely, that the funds were not subject to garnishment. Mayers did not have any right to rely upon YdN’s legal conclusion, just as nothing prevented Mayers from formulating his own legal conclusion based upon the same facts. The doctrine of equitable estoppel does not prevent YdN from arguing that Bell retained ownership of the distributed funds.

E. Mayers made the poor tactical decision to release his writ of garnishment and pursue a UFTA action against Bell.

Mayers claims that he “initiated the UFTA action and released the [writ of] garnishment” while “acting in reasonable reliance” upon YdN’s answer to the writ of garnishment.”⁴⁸ However, Mayers explained in response to YdN’s summary judgment motion that he abandoned the writ of garnishment and filed the UFTA action so he could “utilize the full range of discovery” and “have a jury trial:”

⁴⁷ *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). *Accord, Paxton v. City of Bellingham*, 129 Wn. App. 439, 448, 119 P.3d 373 (2005)(“It is a well established principle that ‘where the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied.’”); *Cotton v. City of Elma*, 100 Wn. App. 685, 697, 998 P.2d 339 (2000)(“the doctrine of equitable estoppel does not apply to questions of law). Similarly, the doctrine of judicial estoppel “prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation. The doctrine concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law.” *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009).

⁴⁸ Mayers Brief, page 16.

In light of suspected collusion between the defendants the plaintiff elected to pursue an action under the Uniform Fraudulent Transfer Act (UFTA). Such an action authorizes a creditor to utilize the full range of discovery and, when appropriate, have a jury trial. This is in marked contrast to the limited discovery and brief hearing before a Court Commissioner which typically occurs when a Writ of Garnishment is controverted. The plaintiff released the garnishment to facilitate the prosecution of the UFTA action.⁴⁹

Mayers alleges in his brief that he made the tactical decision to pursue the UFTA action because of Bell and YdN's "well-orchestrated machinations:"

When faced with what appeared to be a well orchestrated machination to hinder, delay or avoid payment of the Mayers judgment by these skilled and experienced practioners (sic), plaintiff elected to proceed under the UFTA, RCW 19.40 *et seq.* After the UFTA action was filed and served, the garnishment was released.⁵⁰

Regardless of Mayers's true motivation, he made a poor tactical decision in releasing the writ of garnishment. If Mayers didn't believe the Fee Agreement actually transferred ownership of the distributed funds to YdN, he simply had to controvert YdDN's answer to the writ of garnishment.⁵¹ If YdN still maintained the funds were exempt from garnishment after receiving the controversion, Mayers could have

⁴⁹ CP 88.

⁵⁰ Mayers Brief, page 10.

⁵¹ RCW 6.27.210 provides that if a plaintiff is not satisfied with the garnishee defendant's answer, he may file an affidavit "stating in what particulars" he believes the answer to be incorrect.

noted the matter for a hearing on “whether an issue is presented that requires a trial.”⁵²

If the court set the matter for trial, Mayer would have been able to “utilize the full range of discovery” available to civil litigants.⁵³ Had Mayers prevailed at trial, which as discussed *supra* was the likely result, he would have received an award of the garnished funds plus his reasonable costs and attorneys’ fees.⁵⁴

Mayers “elected to proceed under the UFTA” rather than seek enforcement of his writ of garnishment. Mayers has to live with the consequences of that decision. Bell did not fraudulently transfer the distributed funds to YdN and the trial court properly granted YdN’s summary judgment motion.

IV. CONCLUSION

Bell’s payment of the distributed funds to YdN as compensation for legal services was not a fraudulent transfer within the meaning of the UFTA. Bell received “reasonably equivalent value” in exchange for the distributed funds. Additionally, Bell’s use of the distributed funds to challenge Mayers’s judgment did not constitute “hindering” or “delaying” under the UFTA.

Notwithstanding the terms of the Fee Agreement, it is likely that Bell actually gave YdN an advance fee deposit rather than a retainer. The doctrine of equitable estoppel does not prevent YdN from arguing

⁵² RCW 6.27.220. See *Mahomet v. Hartford Ins. Co.*, 3 Wn. App. 560, 565, 477 P.2d 191 (1970).

⁵³ *Id.*

that Bell retained ownership of the distributed funds. Because the distributed funds stayed in YdN's trust account, they were subject to garnishment and were not beyond the reach of Bell's creditors. Finally, Mayers made the poor tactical decision to release his writ of garnishment and pursue a UFTA action against Bell.

YdN requests the Court to affirm the trial court's decision and to deny Mayers's appeal.

DATED this 27th day of April, 2011 at Seattle, Washington.

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By 

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⁵⁴ RCW 6.27.230. The statute further provides that "no costs or attorney's fees in such contest shall be taxable to the defendant in the event of a controversion by the plaintiff."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 27, 2011, a copy of the foregoing Respondents' Brief was delivered at the following address via the methods indicated:

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Federal Express Hand Delivery
 Fax Electronic Mail

DATED this 27th day of April, 2011 at Seattle, Washington.



Karrie R. DeWall