

68731-0

68731-0

FILED  
JUL 1 2011  
COURT OF APPEALS  
DIVISION 1  
SEATTLE, WA  
: 50



NO.:

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

---

WILLARD GIBSON

APPELLANT

v.

MARIE-CLAIRE PAGH

RESPONDENT

---

**APPELLANT'S BRIEF ON APPEAL**

---

Laura Christensen Colberg, WSBA #26434  
Attorney for Appellant

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

TABLE OF CONTENTS

Page No.

I. Assignment of Error ..... 1

1.1 Error #1. The court erred in ordering a judgment on the 11/28/2011 Writ of Garnishment. CP 65. .... 1

1.2 Error #2. The court erred in finding that no bill for legal services had been produced at the time the Writ was served. CP 66..... 1

1.3 Error #3. The court erred in finding that RPC 1.15A had not been followed. CP 66..... 1

1.4 Error #4. The court erred in finding that funds in the attorney trust account remained presumptively the client’s. CP 66..... 1

1.5 Error #5. The court erred in finding that the funds in the IOLTA account at the time the Writ was served were subject to garnishment. CP 66. .... 1

1.6 Error #6. The court erred in ordering attorney fees to the Respondent. CP 66..... 1

1.7 Error #7. The court erred in denying Appellant’s Motion for Reconsideration. CP 692-729. .... 1

1.8 Error #8. The court erred in finding that Garnishee (Gibson’s attorney) had in its possession or control funds of Gibson. CP 135 ..... 1

1.9 Error #9. The court erred in finding that Respondent Pagh was *defending* the controversion motion. CP 136 ..... 2

1.10 Error #10. The court erred in awarding a judgment against Garnishee (\$5,000). CP 136 ..... 2

1.11 Error #11. The court erred in finding that RCW 6.27.230 does not preclude an award of fees to Respondent Pagh (Petitioner below) as prevailing party in the controversion. CP 136 ..... 2

1.12 Error #12. The court erred in ordering further fees against Gibson for the controversion (\$4,164). CP 136 ..... 2

1.13 Error #13. The court erred in not applying the statutory cap on garnishment fees ..... 2

.....

Issues Pertaining to Assignment of Error ..... 2

- A. Whether the protection afforded to a client to ensure proper billing practices under RPC 1.15A allows a third party to intervene with a property claim. .... 2
- B. Whether funds held to cover fees earned but not yet billed are subject to garnishment..... 2
- C. When funds held in trust to cover attorney fees are earned by the attorney ..... 2
- D. Whether fees billed and not disputed by the client thus shifted ownership of same to the attorney, upon compliance with RPC 1.15A, notwithstanding the intervening service of a Writ by a third party. .... 3
- E. Whether the client had free access to the funds deposited into attorney trust once charges were earned or billed, by way of presumption or any other theory ..... 3
- F. Whether attorney’s fees could be awarded to the Respondent under RCW 6.27.230..... 3
- G. Whether attorney’s fees should be awarded to the Appellant under RCW 6.27.230 . .... 3
- H. Whether attorney’s fees pertaining to garnishment are capped at

	\$250 under RCW 6.27.090 .....	3
II.	Statement of the Case .....	3
	2.1 Background and Procedure .....	3
	2.2 Statement of Facts .....	4
III.	Legal Argument .....	7
	3.1 <u>Standard of Review</u> .....	7
	3.1.1 Standard of review for statutory construction is <i>de novo</i> .....	7
	3.1.2 Standard of review is <i>de novo</i> where only documents are considered .....	8
	3.1.3 Attorney fees awarded under statutory authority are also reviewed <i>de novo</i> .....	8
	3.2 <u>Garnishment against attorney trust account did not apply because there was no indebtedness—fees had been earned</u> .....	8
	3.3 <u>Funds remained in attorney’s trust in order to comply with RPC 1.15A, to protect the client, not a third party.</u> .....	12
	3.4 <u>Right to dispute fees is between attorney and client, not third parties.</u> .....	14
	3.5 <u>Even in the event of a fee dispute, there is no presumption in favor of the client as to funds held in attorney trust.</u> .....	14
	3.6 <u>Case law interpreting disputes regarding attorney trusts apply between attorney and client only</u> .....	15
	3.7 <u>Attorney fees to garnishment Plaintiff are not allowed in</u>	

<u>controversion</u> .....	17
3.8 <u>The court disregarded the statutory cap on garnishment fees</u> .....	18
3.9 <u>Gibson is entitled to fees on appeal</u> .....	19
IV. Conclusion .....	20

**TABLE OF AUTHORITIES**

**Table of Cases**

**Page No.**

<b><i>Buck v Bailey</i></b> , 82 Wash. 398, 144 P. 533 (1914) .....	16
<b><i>Crane Co. v Paul</i></b> , 15 Wn. App. 212, 548 P.2d 337 (1976)..9, 15, 16	
<b><i>Fireman’s Fund Ins. Co. v NW Paving &amp; Constr. Co. Inc.</i></b> , 77 Wash. App. 474, 478-479, 891 P.2d 747, 750 (Wash. Ct. App. 1995) ..	17
<b><i>Golden v Hyde</i></b> , 117 Wash. 677, 202 P.272 (1921) .....	16
<b><i>Gottstein v Harrington</i></b> , 25 Wash. 508, 65 P. 753 (1901).....	16
<b><i>Graves v Duerden</i></b> , 51 Wn. App. 642, 754 P.2d 1027 (1988).....	16
<b><i>Griffin</i></b> , 114 Wn.2d 773, at 779, 791 P.2d 519 (1990).....	19
<b><i>Hubbard v. Dep’ t of Labor &amp; Indus.</i></b> , 140 Wn.2d 35, 43, 992 P.2d 1002 (2000) .....	7
<b><i>Jensen v Kohler</i></b> , 93 Wash. 8, 159 P.978 (1916).....	16
<b><i>Johnson v. Kittitas County</i></b> , 103 Wn.App. 212, 216, 11 P.3d 862 (2000) .....	7
<b><i>Krein v Nordstrom</i></b> , 80 Wn.App. 306, 908 P.2d 889 (1995).....	15
<b><i>Marriage of Rideout</i></b> , 150 Wn.2d 337, 351, 77 P.3d 1174 (2003)...8	
<b><i>Price v. Chambers</i></b> , 148 Wash. 170, 268 P.143 (1928).....	16
<b><i>Ross v. Scannell</i></b> , 97 Wn.2 598, 604, 647 P.2d 1004 (1982).....	16
<b><i>In re the Matter of Sather</i></b> , 3 P.3d 403 (2000).....	9
<b><i>Sports Imaging of Arizona, LLC v Meye Hendricks &amp; Bivens, PA</i></b> , 2008 WL 4516397 (Ariz. App. Div. 1).....	10
<b><i>State v. Azpitarte</i></b> , 140 Wn.2d 138, 142, 995 P.2d 31 (2000) .....	8
<b><i>State v. J.P.</i></b> , 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing <i>Nat’l</i>	

*Elec Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999) ..... 7

**State v. Watson**, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) ..... 8

**State v. Wentz**, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing *City of Pasco v. Pub. Emp’t Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)) ..... 7

Table of Statutes and Regulations

RCW 4.84.185 ..... 19

RCW 6.27 ..... 7, 8

RCW 6.27.060 ..... 9

RCW 6.27.090 ..... 18

RCW 6.27.230 ..... 17, 18, 20

RCW 6.40.010 ..... 15

Other Authorities

RAP 14.2 ..... 19

RAP 14.3 ..... 19

RAP 18.1 ..... 19

## **I. ASSIGNMENTS OF ERROR**

1.1 Error #1. The court erred in ordering a judgment on the 11/28/2011 Writ of Garnishment. CP 65.

1.2 Error #2. The court erred in finding that no bill for legal services had been produced at the time the Writ was served. CP 66.

1.3 Error #3. The court erred in finding that RPC 1.15A had not been followed. CP 66.

1.4 Error #4. The court erred in finding that funds in the attorney trust account remained presumptively the client's. CP 66.

1.5 Error #5. The court erred in finding that the funds in the IOLTA account at the time the Writ was served were subject to garnishment. CP 66.

1.6 Error #6. The court erred in ordering attorney fees to the Respondent. CP 66.

1.7 Error #7. The court erred in denying Appellant's Motion for Reconsideration. CP 692-729.

1.8 Error #8. The court erred in finding that Garnishee (Gibson's attorney) had in its possession or control funds of Gibson. CP 135.

1.9 Error #9. The court erred in finding that Respondent Pagh was *defending* the controversion motion. CP 136.

1.10 Error #10. The court erred in awarding a judgment against Garnishee (\$5,000). CP 136.

1.11 Error #11. The court erred in finding that RCW 6.27.230 does not preclude an award of fees to Respondent Pagh (Petitioner below) as prevailing party in the controversion. CP 136.

1.12 Error #12. The court erred in ordering further fees against Gibson for the controversion (\$4,164). CP 136.

1.3 Error #13. The court erred in not applying the statutory cap on garnishment fees. CP 136.

#### **Issues Pertaining to Assignments of Error**

- A. Whether the protection afforded to a client to ensure proper billing practices under RPC 1.15A allows a third party to intervene with a property claim.
- B. Whether funds held to cover fees earned but not yet billed are subject to garnishment.
- C. When funds held in trust to cover attorney fees are earned by

the attorney.

- D. Whether fees billed and not disputed by the client thus shifted ownership of same to the attorney, upon compliance with RPC 1.15A, notwithstanding the intervening service of a Writ by a third party.
- E. Whether the client had free access to the funds deposited into attorney trust once charges were earned or billed, by way of presumption or any other theory.
- F. Whether attorney's fees could be awarded to the Respondent under RCW 6.27.230.
- G. Whether attorney's fees should be awarded to the Appellant under RCW 6.27.230 .
- H. Whether fees pertaining to garnishment are capped at \$250 per RCW 6.27.090.

## **II. STATEMENT OF THE CASE**

**2.1 Background and Procedure:** This case is about whether a third party can take advantage of the delay required by the Rules of Professional Conduct to allow a client to review an attorney's billing before effectuating a transfer of trust funds deposited for the purpose of

paying for attorney services which are in fact provided. The Respondent here served a Writ to attach funds from attorney trust that had been earned, even if the billing/approval/transfer period had not yet passed. The Judgment from which the Writ was generated was the subject of a pending appeal at the time the Writ was served, further calling into question the Respondent's ultimate right to those funds.

## **2.2 Statement of Facts:**

Appellant Willard Gibson and Respondent Marie-Claire Pagh were parties to litigation in a Domestic Violence Protection Order matter and paternity case in which Orders were entered on 2/15/2011. Those Orders are the subject of Appeal in this court, under Case No. 66833-1-I, on grounds unrelated to the issues presented here (jurisdictional, primarily). Those Orders, entered by default, included a judgment against Will in favor of Marie-Claire for \$45,876.48. Will filed a timely appeal of those Orders.

On June 5, 2011, Will hired present counsel to represent him in the appeal process, paying \$5,000. CP 94-96. Because of a transfer of attorneys between firms, Marie-Claire objected and the issue of qualification of counsel first had to be addressed. That was resolved in

October 2011. CP 77. Counsel was cleared to work on appellate briefing which was extended while a CR 60 Motion was pursued. CP 50.

On 7/11/2011, 8/10/2011, 9/8/2011 and 10/10/2011 transfers totaling \$5,000 were made from Will's trust account to pay for services billed. CP 47. On 10/24/2011 and 11/9/2011 sums totaling an additional \$5,000 were transferred from Will's trust to pay for services billed (including an outstanding balance through 10/25/2011). CP 47. On 12/14/2011 (\$2,919.11—balance due 11/21/2011) and 1/10/2012 (\$2,080.89—balance through 11/29/2011), sums totaling a third \$5,000 were transferred from Will's trust funds to pay for services billed. CP 47.

The billing prior to the 12/14/2011 transfer was for services through 11/21/2011. CP 98-99. Funds from Will's mother, Pamela Gibson, had been deposited on 11/9/2011. CP 100. After the anticipated funds transfer, \$2,080.99 remained to cover work done after 11/21/2011. CP 100.

On 11/29/2011, the Writ in question was served on counsel's office. CP 55. Total work through that date totaled \$15,104.11, an

amount \$104.11 more than had been deposited on Will's behalf. CP 47. A billing statement was generated for work from 11/22/2011 through 12/22/2011. CP 101-102. Funds to apply to charges made and earned through 11/29/2011 (\$2,080.89) were transferred on 1/10/2012. CP 103. Will owed \$89.17 after that transfer. CP 103.

An Answer to Writ was sent on 12/16/2011 (before the above accounting was processed). CP 26-29.

Marie-Claire moved for controversion on the Writ on 2/6/2012. CP 3-6. Oral argument occurred on 2/14/2012. Judge Laura Inveen issued her Order on 3/2/2012 granting the Motion and requiring Garnishee to pay the \$5,000 that was in trust on 11/29/2011. CP 64-66. Will moved for Reconsideration on 3/12/2012. CP 76-88. Reconsideration was denied on 3/19/2012. CP 133-134. The Judgment on Answer to Pay was entered on the same date, including an award of attorney's fees in favor of Respondent, \$4,164. CP135-136.

Will timely appealed. CP 137. A deposit (Cash Bond) on his behalf was paid by Pamela Gibson in the amount of \$5,600 (to cover the judgment plus interest) to the Clerk of the Court on 3/30/2012. *Supplemental Clerk's Papers.*

As a courtesy to the court, a summary timeline of events contained in the record is provided as **Appendix A**.

### **III. LEGAL ARGUMENT**

#### **3.1 Standard of Review.**

##### 3.1.1 Standard of review for statutory application is *de novo*.

Garnishment rights are a statutory creation. RCW 6.27. Construction of a statute is a question of law reviewed *de novo*. ***State v. Wentz***.<sup>1</sup> A court interpreting a statute must discern and implement the legislature's intent. ***State v. J.P.***<sup>2</sup>

When an action turns on the correct interpretation of a statute, the standard of review is *de novo*. ***Johnson v. Kittitas County***<sup>3</sup>.

"The purpose of statutory interpretation is to effectuate the legislature's intent." ***Hubbard v. Dep' t of Labor & Indus.***<sup>4</sup> Absent ambiguity, the court relies on the statute's language alone. ***State v.***

---

<sup>1</sup>149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992))

<sup>2</sup>149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999))

<sup>3</sup>103 Wn.App. 212, 216, 11 P.3d 862 (2000)

<sup>4</sup>140 Wn.2d 35, 43, 992 P.2d 1002 (2000)

**Azpitarte.**<sup>5</sup> But, if a statute is ambiguous, the court will resort to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it. **State v. Watson.**<sup>6</sup>

3.1.2 Review of a decision based on documentation only is *de novo*.

Furthermore, the general rule is that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases *de novo* because that court is in the same position as trial courts to review written submissions. **Marriage of Rideout.**<sup>7</sup>

3.1.3 Attorney fees awarded under a statute are reviewed *de novo*.

The award of attorney's fees on the Order being appealed also involves statutory interpretation and review is thus *de novo*.

3.2 Garnishment against attorney trust account did not apply because there was no indebtedness—fees had been earned

The garnishment statute, RCW 6.27, does not delineate a list of persons or entities who are appropriate "garnishees" but requires only that the person seeking the Writ state that the intended garnishee "has

---

<sup>5</sup>140 Wn.2d 138, 142, 995 P.2d 31 (2000).

<sup>6</sup>146 Wn.2d 947, 955, 51 P.3d 66 (2002)

<sup>7</sup>150 Wn.2d 337, 351, 77 P.3d 1174 (2003)

reason to believe . . . that the garnishee is indebted to the defendant . . . or has possession or control of personal property or effects.” RCW 6.27.060. The Writ served on Garnishee asserted the claim of indebtedness as the basis for the Writ. CP 11.

An attorney who receives funds from or on behalf of a client holds those funds in trust until they are earned. There is no Washington case law that directly addresses the point at which an attorney “earns” such fees, but in ***Crane Co. v Paul***,<sup>8</sup> the court upheld an attorney’s right to keep funds of the client (received in collection efforts) to cover fees that had been earned but not yet paid by the client. If the attorney has a claim on money in his possession from sources other than a “fee deposit,” the claim for earned fees against funds deposited just for such a person is even stronger. A case out of Colorado, ***In re the Matter of Sather***,<sup>9</sup> held that an attorney earns fees “by conferring a benefit on or performing a legal service for the client.” ***Id.***, at 405. This court would do well to adopt this definition in absence of one clearly set forth in Washington case law. In the present case, services were performed for Gibson on various dates

---

<sup>8</sup>15 Wn. App. 212, 548 P.2d 337 (1976)

<sup>9</sup>3 P.3d 403 (2000)

from 6/1/2011 through and including the date of garnishment (and afterward).

The question in this case is whether, when the Writ was served upon the attorney for Gibson, the fees that had been deposited into trust for purposes of representation had been earned. And if they had been earned, was there any indebtedness to Gibson to which the Writ would apply? Because charges through 11/29/2011 (the date of service) exceeded the sums paid into trust as of that date, there was no indebtedness to Gibson on the part of the garnishee.

There is an Arizona case directly on point. In ***Sports Imaging of Arizona, LLC v Meye Hendricks & Bivens, PA***,<sup>10</sup> an attorney's retainer was garnished by the judgment creditor seeking to enforce payment on a \$9 million judgment. The defendant had paid \$50,000 to secure the attorney's post-trial representation; fees had been transferred/paid to the attorney from this sum prior to receipt of the Writ, leaving \$35,438.49 at the time the Writ was served. The attorney receiving the writ of garnishment subtracted from those remaining funds an amount representing fees earned, but not yet removed from the account, \$1,015.09. The Arizona court found this

to be an appropriate approach, stating, “the fees became [the attorney’s] property when earned, and could not be garnished as [the debtor’s] property.” The attorney was entitled to his earned fees.

That is the situation at bar. Judge Inveen seemed to recognize that the attorney garnishee had a right to fees earned, but inexplicably found that charges had not yet been “billed” to the client. At CP 46-47. (Curiously, Judge Inveen in a subsequent and unrelated matter, denied the same type of relief that was granted here in what appears to be a parallel situation.<sup>11</sup>—**Appendix B.**) The court had available a summary of billing charges, at the end of which dates of transfers from trust for payment are reflected, in monthly increments. This was a more efficient way of presenting the entire billing history for the client—but itemized, monthly billing statements were also made available to clarify this initial exhibit to the court on reconsideration. CP 98-103. There is no evidence to support the court’s finding that charges had not been billed. The trust transfers reflected in CP 47 are

---

<sup>10</sup>2008 WL 4516397 (Ariz. App. Div. 1)

<sup>11</sup>“Although at the time the writ was served, fund were in Budigan’s trust account as an advance fee deposit, the court finds that given Budigan had performed work equal to the amount of fees on deposit, and that he had begun the process of withdrawing the funds through the required first step of generating a bill for same (11/30/11) pursuant to RPC 15A [sic] the fees

consistent with the regular billing and review period required by RPC 1.15A.

Of the \$5,000 the court ordered garnishee/attorney to pay to the judgment creditor, \$2,919 had been earned and billed as of 11/21/2011. The remainder, \$2,081, was billed between 11/22/2011 and 11/29/2011, the date the Writ was served. Even more was owed by that date than had been deposited. Thus, there was no debt owing to Gibson which could have been diverted to the judgment creditor under the terms of the Writ.

**3.3 Funds remained in attorney's trust in order to comply with RPC 1.15A, to protect the client, not a third party**

The Rules of Professional Conduct require an attorney not to withdraw fees from a client's trust account until the client has had "sufficient time to review the billing statement" and contact the attorney with concerns. WSBA Advisory Opinion 2177 issued in 2008 (**Appendix C**, hereto) advises that even a transfer simultaneous with billing does not satisfy this requirement. The Writ in this case came between the billing to Gibson of the \$2,919 in earned fees (11/21/2011) and the transfer of those funds from trust on 12/14/2011.

---

were no longer Grossman's."

Compliance with RPC 1.15A is the only reason those funds had not already been transferred in payment. Under RPC 1.15A(h)(6), trust account records do not even have to be reconciled more frequently than once a quarter (if bank statements are generated quarterly).

The purpose of the RPCs in Washington is to protect clients from improper practices on the part of attorneys. The goal and effect should not be to give third parties an advantage, “sneaking in” between the date of earning, billing and transfer” to lay claim to funds intended to secure the legal services of counsel. Such a result would eliminate the “advance fee deposit” system from being a reasonable structure by which to pay for, and secure both legal services and the payment for same.

In this case, had fees earned not met or exceeded the sums deposited into Gibson’s trust account, the residual, if any, would have been subject to garnishment because Gibson (or rather, his mother, the payor, Pamela Gibson, CP 100), would have had a right to request their return. In the event of such a request, garnishee would have been “indebted” to Gibson or the other payor—to return funds not yet earned.

### **3.4 Right to dispute fees is between attorney and client, not third parties.**

The issue of a fee dispute is not something that a third party can raise. There is no evidence of any fee dispute between the client (Gibson) and garnishee/attorney. Thus the fees were earned and owed to the garnishee/attorney as of the date the Writ was served, not the other way around. Without any indebtedness to Gibson, the Writ had no effect. Even after the review period for fees charged between 11/22/2011 and 11/29/2011 (billed 12/22/2011 and transferred 1/10/2012), Gibson had no dispute with the charges.

### **3.5 Even in the event of a fee dispute, there is no presumption in favor of the client as to funds held in attorney trust**

The court found a “presumption” in favor of the client as to the funds in trust that had not yet fully been transferred, but had been earned and billed. There is no such “presumption” language in the RPCs or elsewhere. In fact, the language in RPC 1.15A(g)<sup>12</sup> suggests just the opposite—that funds remain *in trust* until the dispute is resolved

---

<sup>12</sup>(g) If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must **maintain the property in trust** until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

(if client ownership were presumed, funds would be held by the client).

Moreover, RCW 6.40.010 operates to give the attorney an automatic possessory/retaining lien against property of the client in the event of a dispute about fees. (See **Crane**, above, in which the attorney holding client funds until the fee dispute was resolved had acted appropriately—the client didn't have the right to those funds in the interim, presumptive or otherwise.) This further undermines the theory of any presumption in a client's favor to any property held by the attorney—not just fee deposit funds.

### **3.6 Case law interpreting disputes regarding attorney trusts apply between attorney and clients only**

The Washington authority available on attorney trust fund disputes is not particularly helpful in this situation—which involves defining the rights of a third party where ownership of funds as between the attorney and client is not in dispute. Cases regarding attorney trust account disputes address only rights between the clients and attorneys. A brief summary of that case law was provided to Judge Inveen (CP 86).<sup>13</sup> Funds held by in attorney trust that were adjudicated

---

<sup>13</sup> See **Krein v Nordstrom**, 80 Wn.App. 306, 908 P.2d 889 (1995). Attorney named on settlement check did not endorse it so funds were not available until “summary”

to belong to third parties (Note payments paid by the attorney's client into trust instead of to the Note holders while the dispute was pending) were reachable by garnishment and court order specifically against the attorney in **Graves v Duerden** (finding the attorney was in contempt of court for not delivering the funds to the third parties after ownership

---

proceeding in which the court determined the amount of reasonable attorney fees due to the attorney. Funds were not disbursed until adjudication. [Issues on appeal were due process and amount of fees, not whether the lien was appropriate.]

**Crane Co. v. Paul**, 15 Wn.App. 212, 548 P.2d 337 (1976). Attorney was able to keep and offset against fees those sums obtained in collection actions on behalf of client. Dispute about fees triggered lien such that client was no longer "entitled" to receive the funds in attorney's possession.

**Ross v. Scannell**, 97 Wn.2 598, 604, 647 P.2d 1004 (1982). Attorney filed a lien against real property in order to collect from client based on contingency fee agreement, where attorney did not substantially complete the contract. Issue was whether clouding title to real property was appropriate collection measure (No).

**Price v Chambers**, 148 Wash. 170, 268 P.143 (1928). Attorney received funds for client's use and benefit, but retained a portion to cover fees. Issue on appeal was whether dispute warranted a jury trial for resolution (No).

**Buck v Bailey**, 82 Wash. 398, 144 P. 533 (1914). Attorney held warrants received in the course of representation. Attorney sold warrants based on disputed contractual terms. Issue of amount of fees was addressed in a separate proceeding. Issue on appeal was whether contract to sell was valid (No).

**Golden v Hyde**, 117 Wash. 677, 202 P.272 (1921). Attorney received a diamond stick pin as part of payment for fees, then sold it. Client wanted it back after offering to pay in cash the difference for which the pin had been given. Issue was whether attorney was in contempt for failure to return the pin (No). Case was dismissed, finding the attorney lien did not apply to articles given to pay for attorney's fees.

**Jensen v Kohler**, 93 Wash. 8, 159 P.978 (1916). Attorney retained a portion of funds collected on a client's claim contrary to stipulation in which he agreed to surrender all proceeds to trustee for distribution. In doing so, he waived his right to assert an attorney lien, without having included that exception in the stipulation. [Case remanded to determine appropriate reasonable attorney fee.]

**Gottstein v Harrington**, 25 Wash. 508, 65 P. 753 (1901). Attorney held a note and mortgage, the end result of collection efforts by attorney on behalf of client. Buyer purchased the property from the client, satisfying all recorded obligations, and attorney surrendered papers and asserted a claim on the proceeds. Issue was

had been adjudicated),<sup>14</sup> but that is not the fact pattern here. The funds in MWB&A trust were paid by Pamela Gibson for Will Gibson's representation and were not adjudicated to belong to Pagh.

### **3.7 Attorney fees to garnishment Plaintiff are not allowed in controversy**

RCW 6.27.230 states that the "prevailing party" in a controversy is entitled to costs/fees, with a PROVISIO: "PROVIDED, That no costs or attorney's fees in such contest shall be taxable to the defendant in the event of a controversy by the plaintiff." This is a case of a controversy by the plaintiff (Pagh) and in that situation "no cost or fees shall be taxable to the defendant" (Gibson). The "prevailing party" entitled to fees is thus either the Defendant or the Garnishee. A third party (intervening party) can also be a "prevailing party" entitled to fees—as in *Fireman's Fund Ins. Co. v NW Paving & Constr. Co. Inc.*<sup>15</sup> (Fidelity, and intervening party, controverted a bank's Answer to Writ). The court's award of \$4,164 in fees against defendant Gibson violates the clear meaning and application of this statute.

---

whether *bona fide* purchasers took title clear of attorney's claim which was not of record (Yes).

### **3.8 The court disregarded the statutory cap on garnishment fees**

While it becomes moot if the Order/Garnishment is vacated altogether on the grounds stated herein, the statutory cap on garnishment fees was also disregarded in this case. Without explanation, Judge Inveen found that the statutory cap in RCWw 6.27.090(2)<sup>16</sup> did not apply. Gibson's objections to fees that duplicated those in the Application (in excess of \$250—now \$300 in 2012) are set forth in the Response to Presentation re Fees (CP 104-118). This statute, read in conjunction with RCW 6.27.230 which denies fees to the plaintiff in a controversion, shows consistency in the intent to limit fees to be paid by the defendant. Otherwise, the cap language in RCW 6.27.090 would be rendered meaningless, as all the Plaintiff would have to do in every event is to file a

---

<sup>14</sup>51 Wn. App. 642, 754 P.2d 1027 (1988)

<sup>15</sup>77 Wash. App. 474, 478-479, 891 P.2d 747, 750 (Wash. Ct. App. 1995).

<sup>16</sup>(2) Costs recoverable in garnishment proceedings, to be estimated for purposes of subsection (1) of this section, include filing and ex parte fees, service and affidavit fees, postage and costs of certified mail, answer fee or fees, other fees legally chargeable to a plaintiff in the garnishment process, and a garnishment attorney fee in the amount of the greater of one hundred dollars or ten percent of (a) the amount of the judgment remaining unsatisfied or (b) the amount prayed for in the complaint. The garnishment attorney fee shall not exceed three hundred dollars.

[2012 c 159 § 2; 2000 c 72 § 2; 1988 c 231 § 24; 1987 c 442 § 1009; 1969 ex.s. c 264 § 9. Formerly RCW 7.33.090.]

controversion of Answer in order to exceed that cap (under the Mother's interpretation).

**3.9 Gibson is entitled to fees on appeal and to defend below**

For the reasons and on the statutory authority stated above and under **RAP 18.1**, Gibson is entitled to fees as the prevailing party in defending the Writ, both in the trial court and on appeal. An Affidavit of Fees will be provided in Reply and/or to comply with RAPs.

Fees can be also awarded to the prevailing party in a frivolous action under **RCW 4.84.185**. In awarding attorney fees on appeal, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties. *Griffin*.<sup>17</sup>

**RAP 14.2** allows for costs to the prevailing party and **RAP 14.3** includes reasonable attorney's fees as allowable costs. The Mother, upon receipt of the Response to Affidavit Controverting Writ, could have recognized that no debt was owed to Gibson when the Writ was served. She chose to proceed to a hearing that required further fees to defend.

---

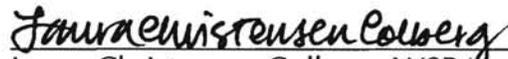
<sup>17</sup>114 Wn.2d 773, at 779, 791 P.2d 519 (1990)

#### IV. CONCLUSION

The funds paid by Gibson to MWB&A for fees were entirely earned and nothing remained as a debt to Gibson from the garnishee as of 11/29/2011. Even if Gibson had the right to dispute the fees billed between date of earning, billing and review period, that protection is for him to ensure proper billing and not for a third party. There is no presumption of ownership in such a situation, as disputed fees remain in trust until a billing dispute is resolved. No charges were disputed, as between attorney and client. There is no authority that supports the Writ or the Order on Judgment entered as a result of the action to Controvert the Answer. As the prevailing party, Gibson is entitled to his fees; even if he doesn't prevail, the Plaintiff (Pagh) is not entitled to further fees against Gibson under RCW 6.27.230, nor can garnishment fees exceed the statutory cap intended to protect debtors. The Order should be vacated and the funds deposited to the clerk of court should be returned to the payor, Pamela Gibson.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

MICHAEL W. BUGNI & ASSOCIATES



Laura Christensen Colberg, WSBA

#26434

Attorney for Appellant/Father

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of September, 2012, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

Via US Mail:

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

Attorneys for Petitioner via US Mail:

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



\_\_\_\_\_  
Dona Harris

# *Appendix A*

**GIBSON/PAGH**  
**Appeal No. 687310-1 I**  
**Summary Timeline (Appendix A)**

<b>Date</b>	<b>Event</b>	<b>Source</b>	
2/15/2011	Final Orders/Paternity & DVPO action	[Docket ]	
6/1/2011	Gibson hires attorneys MWB&A	CP 94-96	
7/11/2011	Monthly payment from Trust	CP 47	
8/10/2011	Monthly payment from Trust	CP 47	
9/8/2011	Monthly payment from Trust	CP 47	
10/10/2011	Monthly payment from Trust	CP 47	
10/24/2011	Transfer from Trust	CP 47	
10/25/2011	End of billing cycle	CP 98	
11/9/2011	Monthly payment from Trust	CP 47	
11/21/2011	End of billing cycle	CP 98	
11/28/2011	Application for Writ of Garnishment	[Docket ]	
11/29/2011	Service of Writ on Gibson's attorney	CP 53	
12/14/2011	Monthly payment from Trust	CP 47	
12/19/2011	Answer to Writ served on Pagh's attorney	CP 15-18	
12/22/2011	End of billing cycle	CP 101	
1/6/2012	Affidavit to Controvert Writ received by Gibson's counsel	CP 55	
1/10/2012	Monthly payment from Trust	CP 47	
1/24/2012	End of billing cycle	CP 103	
1/25/2012	Reply Memorandum re Writ (from Gibson)	CP 31-47	
2/6/2012	Motion on Controversion of Answer	CP 3	
2/10/2012	Response from Gibson's counsel filed	CP 48-55	
2/10/2012	CR 60 Motion/Order	CP 62-63	
2/13/2012	Reply from Pagh's counsel	CP 56-63	
2/14/2012	Hearing before Judge Inveen	CP 1	
3/2/2012	Order Granting Motion/Controversion of Answer	CP 64-65	
3/12/2012	Motion for Reconsideration	CP 76-103	
3/19/2012	Order Denying Reconsideration	CP 133-134	
3/19/2012	Judgment on Answer/Order to Pay	CP 135-136	
3/30/2012	Notice of Appeal filed	CP 137	

# *Appendix B*



he had begun the process of withdrawing the funds through the required first step of generating a bill for same (11/30/11) pursuant to RPC ISA. The fees were no longer Grossman's.

The garnishment issue relating to Indaba Center is moot, such having been finalized February 8, 2012.

The request for CR 11 sanctions is denied. attorneys, and the clear statements to the court and counsel of the third-party source of the subject trust funds was already provided to counsel. Furthermore, petitioner shall not garnish any attorney of respondent who has formally appeared and remains counsel for respondent at the time of any attempt to garnish by petitioner, but instead shall first ask permission of this court to be allowed to garnish said counsel upon presentation to this court of sufficient indication that such counsel may be holding funds far in excess of that necessary for representation.

The request for orders prohibiting future garnishments is Denied.

ORDERED, ADJUDGED AND DECREED that ~~and it is further~~

DONE IN OPEN COURT this 15 day of JUNE

1996.2012.

Julia C. Stuer  
JUDGE/COURT COMMISSIONER

PRESENTED BY:

William C. Budigan WSBA #13443

Attorney for Respondent / now Garnishee

Approved as to Form;  
Copy Received;  
Notice of Presentation Waived:

# *Appendix C*



**Advisory Opinion:** 2177

**Year Issued:** 2008

**RPC(s):** RPC 1.15A (h)(3)

**Subject:** Withdrawing funds from client trust account upon billing client

---

## I. QUESTION PRESENTED:

The inquiring attorney asks whether, with respect to hourly fee agreements, his practice of disbursing “funds from the clients trust account upon billing to the client for fees earned” is ethical under RPC 1.15A (h) (3). He states his practice is to withdraw the funds from his trust account at the time he sends his billing statement to the client. If a client disputes a charge after receipt and review of a billing statement, the attorney returns the disputed amounts to the trust account until the dispute is resolved.

## II. BRIEF ANSWER:

The committee does not, as a matter of policy, comment on specific language. RPC 1.15A (h) (3), however, requires lawyers to give clients “reasonable notice” “through a billing statement or other document” of intent to withdraw earned fees from a trust account before making the withdrawal. To comply with RPC 1.15A, the lawyer should not withdraw fees from the trust account until his client has had sufficient time to review the billing statement and contact him with concerns.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved

by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.