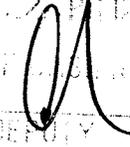


COURT OF APPEALS
DIVISION II

COURT OF APPEALS NO. 393654 – II

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STATE OF WASHINGTON
BY  _____
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

GORDON H. RINKE and JANE DOE RINKE,
husband and wife,

Appellants,

v.

JAMIE SESSOM and STACY RAY SESSOM,
husband and wife,

Respondents.

REPLY BRIEF

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ORIGINAL

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I. ARGUMENT

1. THE LANGUAGE OF RCW 6.17.020(3) IS UNCLEAR

As applied to judgments that have been rendered prior to the 1994 effective date of RCW 6.17.020(3), the language of the statute is unclear.¹

In 1994, the Legislature amended RCW 6.17.020, to permit a ten-year extension of the life of a judgment by adding a new Subsection 3, which reads, in pertinent part as follows:

After June 9, 1994, a party in whose favor a judgment has been ... rendered pursuant to subsection (1) or (4) of this section... may, within ninety days before the expiration of the original ten-year period, apply ... for an order granting an additional ten years during which an execution, garnishment, or other legal process may be issued. RCW 6.17.020(3)

The statute as written, with no legislative history to support an argument that the statute was intended to retroactively apply to judgments entered prior to the enactment of the statute, can be read to limit extension of judgments to those rendered after the enactment date of the extension provision. SESSOM reads the statute to apply to all unexpired

¹ As applied to judgments that have been *rendered after the 1994 effective date*, the language of the statute is clear. The statute applies to such judgments.

judgments previously rendered at the time of the effective date of the statute and all judgments rendered after the effective date. RCW 6.17.020 does not make clear whether the Legislature intended the extension to apply only to judgments rendered after the effective date of the statute or to also apply to unexpired judgments rendered prior to the effective date of the statute.

As argued in Appellant's Brief, citing examples of express language of intent, had the Legislature intended the statute to apply to judgments rendered prior to the effective date of the statute, it could have so stated as it has done in enacting other statutes. (See also RCW 60.40.010 Attorney Lien Statute, Purpose –Intent –Application -2004 c 73: "This statute should be liberally construed to effectuate its purpose. This act is curative and remedial ... Thus, except for RCW 6.40.010(4), the statute is intended to apply retroactively.")

2. **RCW 6.17.020 (3) WAS APPLIED RETROACTIVELY TO RINKE JUDGMENT**

The trial court concluded that the Legislature intended the extension amendment to RCW 6.17.020(3) to be both remedial and retroactive [CP 118, RP July 25, 2008, page 7].

SESSOM fails, on appeal, to make any arguments regarding retroactivity. Instead, SESSOM argues, for the first time on appeal, that the extension amendment is not retroactive but operates prospectively only [Brief of Respondent, Page 3, “by the very terms of the statute there is no question presented to this court regarding retroactive application of RCW 6.17.020 (3)"]. The general rule prevailing in Washington is that issues not presented to the trial court cannot be raised for the first time on appeal, SESSOM’S argument addressing prospective application should not be reviewed by this court. *Riblet v. Ideal Cement*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961).

A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment. *In Re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). Therefore, the question for analysis in the RINKE case is whether the precipitating event was the entry of the original ten

year judgment or the ninety day period prior to the expiration of the original ten year judgment. To determine the precipitating event giving rise to the application of the statute (to determine if the statute operates prospectively) a court may look to the subject matter regulated by the statute. *State v. T.K.*, 139 Wn.2d 320, 330, 987 P.2d 63 (1999) (citing *In Re Burns*).

In *Burns*, at issue was whether DSHS had a right to recover on a TEFRA Medicaid lien from a decedent's estate (to recover medical care costs provided to the decedent by Medicaid) when the statute authorizing the lien became effective after the decedent became a Medicaid client. *In Re Burns* at 108-109.

Specifically, the question was whether the precipitating event was the acceptance of benefits or the creation of the estate after the Medicaid recipient died. The *Burns* court found that the precipitating event was acceptance of benefits and the statute could be applied only prospectively to Medicaid recipients who accepted benefits after enactment of the statute and not retroactively to persons who accepted benefits prior to enactment of the statute. *In Re Burns* at 120. Therefore, DSHS could not recover from the *Burns* estate. *In Re Burns* at 120.

Citing *Landgraf v. USI Film Prods.*, the *Burns* court stated that courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions. *In Re Burns* at 131 Wash. 2d at 110 [citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994) (stating that a statute has a genuinely retroactive effect if it impairs rights a party possessed when he acted, increases his liability for past conduct, or imposes new duties with respect to completed transactions)].

In determining which activity the challenged statutory provision regulated (acceptance of benefits or creation of estate), the *Burns* court turned to the language of the statute. *In Re Burns* at 112. The court found that the purpose of the statute was to regulate the collection of debts owed by Medicaid recipients, not the disposition of their estates, *In Re Burns* at 113, and found that the statute relating to collection of TEFRA liens can be applied prospective only, and cannot be applied retroactively to impose on Medicaid recipients new obligations with respect to past transactions with DSHS. *In Re Burns* at 120.

In RINKE, the plain language of the statutory provision at issue, RCW 6.17.020(3), allows a creditor to extend the time for execution on an original judgment for an additional ten years. The subject matter of the statute is the original judgment. The precipitating event is entry of the original judgment, not the ninety day period prior to the expiration of the original judgment. Because the original judgment was entered against RINKE prior to enactment of the statute, the statute cannot be applied retroactively.²

In essence, RINKE argues that the statute is prospective only as applied to judgments that have been rendered after the effective date of the statute allowing extension. As applied to judgments that have been rendered prior to enactment, the statute is retroactive and impairs a vested right.

A statute operates prospectively when the precipitating event for operation of the statute occurs after the effective date. In RINKE, the extension of the lien, under RCW 6.17.020(3),

² SESSOM'S Response (Page 4) cites dicta in the dissenting opinion of *American Discount Corp. v. Shepherd*, 160 Wn.2d 93, 102, 156 P.3d 858 (2007) to argue that the statute applies to RINKE'S judgment entered six years prior to the effective date of the amended statute. Judge Madsen's statement in *Shepherd* is dicta as the issue was not in front of the court. The issue in *Shepherd* was whether the Legislature could revive an expired judgment by retroactive amendment. *Shepherd* at 99.

applies to a debt (1998 default judgment creating the debt- the precipitating event) in existence prior to the effective date of the extension provision.

Although, RCW 6.17.020(3) can be prospective (when applied to judgments entered after the effective date), in RINKE'S case the statute was applied retroactively. The unfairness of imposing new burdens on persons after the fact justifies the presumption against applying statutes retroactively. See *Landgraf*, 511 U.S. 244. Retroactive application of the extension statute to RINKE imposes new burdens on RINKE, after the fact, after the entry of the default judgment. The cessation of lien statute in existence at the time of the default absolutely and unequivocally barred collection on the judgment after ten years.

No suit, action or other proceeding shall ever be had on any judgment rendered in this state by which the lien shall be extended or continued in force for any greater or longer period than ten years.

RCW 4.56.210. (*Italics added*).

Retroactive application of RCW 6.17.020 imposes new burdens on RINKE: an additional ten year liability for the default judgment, impairment of RINKE'S credit, and exposure to threat

of collection/execution efforts for an additional ten years (such an extension was absolutely barred by the cessation of lien statute in effect at the time the judgment was entered. RCW 4.56.210).

3. CITED DIVISION I AND III CASES ARE NOT CONTROLLING

The arguments contained in RINKE'S Appellate Brief regarding Division III *State v. Morgan* and Division I *Summers v. Department of Revenue* are incorporated herein by reference as though fully set forth.³

This Court is not required to follow the decision of other Divisions, *State v. Schmitt*, 124 Wn. App. 662, 669, 102 P.3d 856 (2004). As argued in the Appellate Brief, *Morgan* simply relied on *Summers* (a tax warrant case) stating that a recent Division I case indicated that the statute applied to judgments rendered prior to the effective date of RCW 6.17.020(3). *Morgan* at 157.

³ *State v. Morgan*, 107 Wn. App. 153 (2001) - Division III (*review denied State v. Morgan*, 145 Wn.2d 1024, 41 P.3d 484 (Wash. Feb 05, 2002) (Table, NO. 71620-0)

Summers v. Department of Revenue, 104 Wn. App. 87 (2001) - Division I (*review denied Department of Revenue v. Summers*, 144 Wn.2d 1004, 29 P.3d 718 (Wash. Jul 10, 2001) (Table, NO. 70810-0)

The issues of retroactivity and impairment of a substantive right were not at issue and not addressed in *Summers*. The issue addressed in *Summers* was whether statutes governing civil judgments applied to tax liens. *Summers* at 90-92.

4. PRE-AMENDMENT VERSION OF THE STATUTE GOVERNS THIS CASE BECAUSE RINKE'S SUBSTANTIVE RIGHTS AFFECTED

RINKE has a substantive right to the 1989 judgment being treated as expired in 1999. As argued herein and in the Appellate Brief, enlargement of time for enforcement of a judgment affects a substantive right. The fact that RCW 6.17.020 was amended does not preclude the pre-amendment version of the statute from governing in this case and being applied to a judgment rendered prior to the amendment. See *In Re F.D. Processing, Inc.*, 119 Wn.2d 452, 461-62, 832 P.2d. 1303 (1992) (In action relating to statute extending lien protection to agricultural processors, pre- amendment version of statute governed because amendment of definition to agricultural products affected bank's vested right in security interest, and was, therefore, not retroactively applied).

Contrary to SESSOM'S argument that the statute at

issue is a statute of limitation and that a statute of limitation may be changed and applied to causes of action accrued at the time of the legislation [Brief of Respondent, Pages 7-8], RCW 6.17.020(3) is not a statute of limitation. *Hazel v. Van Beek*, 135 Wash.2d 45, 60-61, 954 P.2d 1301 (1998).⁴ The *Van Beek* court, in distinguishing equitable liens from judgment liens stated as follows:

The nature of a statutory judgment lien has been fully analyzed by the Supreme Court through the years:

A statute creating a lien right for a definite period of time only, is something that is in addition to the cause of action or substantive right in question and is not a statute of limitations, because it does not exist outside of the period during which it is conferred. *Hazel v. Van Beek* at 60-61.

The *Van Beek* court would not toll the period for enforcement of a judgment because outside of the terms of the statute creating the lien, no lien exists. *Van Beek* at 61.

⁴ It should be noted here that SESSOM relies on *Hazel v. Van Beek* (Response Brief, Page 4-5 stating in the Brief that “the court in *Van Beek* ... indicated that RCW 6.17.020(3) was prospective and not retroactive because, by its terms, it only permitted applications to be made to extend judgments if the applications were made during the last 90 days of the original 10 year judgment period.” In fact, the *Van Beek* court simply stated that “the Legislature explicitly made the new exception prospective only.” *Van Beek* at 64. SESSOM’S citation is misleading in that it attributes its own analysis to the *Van Beek* court.

Similarly, in *Grub v. Fogle's Garage, Inc.*, 5 Wn. App. 840, 842, 491 P. 2d 258 (1971) the court distinguished a statute creating a lien right from a statute of limitation:

A statute creating a lien right for a definite length of time only, is something that is in addition to the cause of action or substantive right in question and is not a statute of limitations, because it does not exist outside of the period during which it is conferred.

The lien here in question may not be invoked outside of the period during which it is conferred by the statute.

This is not because of a statute of limitations that would be overcome by Rem. Rev. Stat., § 167, but because, outside of the terms of the statute creating the lien, no lien exists. Discussing the nature of a predecessor statute containing essentially the same language in *Roche v. McDonald*, 136 Wash. 322, 239 P. 1015, 44 A.L.R. 444 (1925), the court said, at page 326:

This statute, we think, is not a mere statute of limitation affecting a remedy only. It is more than that. It not only makes a judgment cease to be a "charge against the person or estate of the judgment debtor" after six years from the rendering of the judgment, but also in terms expressly takes away all right of renewal of or action upon the judgment looking to the continuation of its duration or that of the demand on which it rests, for a longer period than six years from the date of its rendition. It does not tell us when an

action upon a judgment may be commenced. It simply tells us that no judgment can be rendered extending the period of duration of a judgment, or of the claim or demand upon which it rests, beyond the period of six years following its rendition. (Emphasis – underline added).
Grub at 842.

At the time the judgment was entered, execution on the RINKE judgment was expressly, absolutely, limited by statute to ten years: “[no suit, action or other proceeding *shall ever be had* on any judgment rendered in this state by which the lien shall be extended or continued in force for any greater or longer period than ten years.” RCW 4.56.210 [Italics added]. The language of RCW 4.56.210 is clear. The RINKE lien expired in 1999, ten years after entry: the subsequent extension of the lien should have been voided by the trial court. RCW 6.17.020(3) cannot be retroactively applied as doing so impairs a vested right to cessation of the lien and enforcement or collection of the judgment.

5. GROUNDS EXIST FOR AN AWARD OF FEES

RINKE argued in the Appellate Brief that a wrongful extension of the judgment in this case is analogous to cases

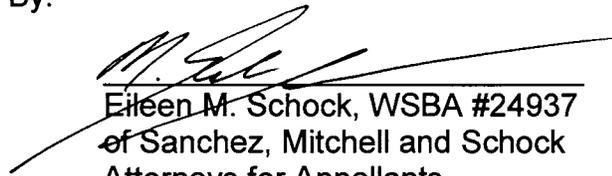
involving wrongful attachments and garnishments and that fees should be recoverable against SESSOM if the judgment extension in this case is voided. Cited precedence allows this court to award fees if RINKE prevails on appeal. RINKE'S efforts to void the wrongful lien extension are analogous to efforts to avoid a wrongful garnishment and/or attachment.

II. CONCLUSION

For the reasons cited on the record below and the record on appeal, the decision of the trial court should be reversed and fees awarded to RINKE on appeal and at the trial court level.

Respectfully submitted this 22nd day of June, 2009.

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COURT REPORTERS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II -TACOMA**

JAMIE SESSOM and STACY RAY
SESSOM, husband and wife,

Respondents,

vs.

GORDON H. RINKE and JANE DOE
RINKE, husband and wife,

Appellants.

NO. 393654-II

AFFIDAVIT OF SERVICE

On the 22nd day of June, 2009, I caused to be delivered, via U.S. Mail, in a properly addressed and postage prepaid envelope, a copy of Appellant's Reply Brief, and a copy of this Affidavit of Service, to Drake D. Mesenbrink, counsel for Respondents, at P.O. Box 1112, Poulsbo, WA 98370.

I also arranged to serve a copy of Appellant's Reply Brief and a copy of this Affidavit of Service by delivering the copies to the office of Thomas O'Hare, co-counsel for

1 Respondents, at Smith & O'Hare, P.S., Inc., 2843 NW Kitsap Place, Silverdale,
2 Washington, 98383.

3 I declare under penalty of perjury under the laws of the State of Washington that the
4 foregoing is true and correct.

5 DATED this 22nd day of June, 2009, at Bremerton, Washington.

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10 Eileen M. Schock, WSBA #24937
11 of Sanchez, Mitchell & Schock
12 Attorneys for Appellant
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