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COURT OF APPEALS
SEATTLE, WASHINGTON

**WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 299716

M. STANLEY SLOAN,

Appellants,

v.

HORIZON CREDIT UNION,

Respondent

APPELLANTS' REPLY BRIEF

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A. STATEMENT OF THE CASE — REBUTTAL

Horizon has distorted several facts that are central to the proper disposition of this case.

First, Horizon claims that Dennis Clayton did not seek relief before the trial court pursuant to RAP 12.8, and therefore lacks standing to appeal the trial court's ruling.

Second, Horizon claims that Dennis Clayton did not pay the CR 11 judgment, and therefore lacks standing to seek relief under RAP 12.8.

Third, Horizon claims that neither Dennis Clayton nor Howard Herman *intended* to satisfy the CR 11 judgment but, rather, intended that the judgment remain “unsatisfied in the hands of Howard Herman.”

The foregoing factual assertions are addressed and rebutted in the following responses to Horizon's arguments set forth in the Brief of Respondent.

B. SUMMARY OF ARGUMENT

The trial court imposed a CR 11 sanction of \$15,097.32 in favor of Horizon Credit Union, against Mr. Sloan and his attorney, Dennis Clayton. The CR 11 judgment was satisfied in full. Thereafter, this Court reversed the CR 11 judgment. Therefore, Mr. Sloan and Mr. Clayton

sought restitution of the sanction, plus interest, pursuant to RAP 12.8. The trial court denied RAP 12.8 relief, ruling that Mr. Sloan and Mr. Clayton lacked standing, that Horizon was no longer a “judgment creditor” within the meaning of RAP 12.8, and that the only person with standing to seek relief under RAP 12.8 was the person who provided the money to satisfy the CR 11 judgment, and he was not a party to the action.

Mr. Sloan and Mr. Clayton contend the trial court erred in all respects, and that this Court should reverse the ruling and order Horizon to disgorge \$15,097.32, plus interest.

C. ARGUMENT

Horizon asserts four primary arguments, and several supplemental arguments, in support of its contention that it is not liable for restitution pursuant to RAP 12.8. Each argument lacks merit, and is addressed below in the order presented in the Brief of Respondent.

1. Mr. Sloan and Mr. Clayton had Standing in the Superior Court and Both Mr. Sloan and Mr. Clayton are Aggrieved Parties before this Court.

Horizon argues that Mr. Sloan and Mr. Clayton had no standing in the Superior Court and that neither are “Aggrieved Parties” before this Court. Brief of Respondent, p. 9.

The doctrine of standing requires that a person must have a personal stake in the outcome of the case in order to assert a claim. Our Supreme Court has stated that "one seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right." *DeFunis v. Odegaard*, 82 Wn.2d 11, 24, 507 P.2d 1169 (1974). Standing is a "...party's right to make a legal claim or seek judicial enforcement of a duty or right." *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007).

Only an aggrieved party may seek judicial review. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949); *Temple v. Feeney*, 7 Wn. App. 345, 499 P.2d 1272, review denied, 81 Wn.2d 1005 (1972).

An attorney sanctioned pursuant to CR 11 is an aggrieved party as a matter of law. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000): (attorney sanctioned under CR 11 is an aggrieved party and may appeal the sanction).

Horizon raises four primary points in support of its contentions regarding standing and "aggrieved parties" for purposes of RAP 12.8 and RAP 3.1.

First, Horizon asserts that Dennis Clayton did not move for RAP 12.8 relief before the superior court. Brief of Respondent, pp. 1, 6, 18. Yet, in the superior court, Horizon acknowledged repeatedly that Dennis Clayton was moving pursuant to RAP 12.8 for an order requiring disgorgement of the CR 11 judgment proceeds:

- “Dennis Clayton ("Mr. Clayton") moves, pursuant RAP 12.8....”
Horizon’s Trial Court Memorandum, p. 1, at CP 138, line 17
- “As the court can surmise there are several debilitating problems with Mr. Clayton's motion...”
Horizon’s Trial Court Memorandum, p. 2, at CP 139, line 7
- “The other impediments to Mr. Clayton's motion include...”
Horizon’s Trial Court Memorandum, p. 2, at CP 139, line 9
- “There are some essential and undisputed facts that totally undermine Mr. Clayton's motion...”
Horizon’s Trial Court Memorandum, p. 2, at CP 139, line 19
- “The focus of Mr. Clayton's motion is RAP 12.8 and an argument for unjust enrichment.”
Horizon’s Trial Court Memorandum, p. 4, at CP 141, line 4
- “Mr. Clayton is the only party seeking relief under RAP 12.8...”
Horizon’s Trial Court Memorandum, p. 6, at CP 143, line 9

In the course of proceedings before the trial court, Horizon addressed Mr. Clayton's status as that of a movant under the RAP 12.8 motion. Consequently, viewing Mr. Clayton as a movant, Horizon argued that he lacked standing because Howard Herman purportedly paid the CR 11 judgment, concluding that Mr. Clayton had no connection with such payment. Obviously, it would make no sense for Horizon to argue that Mr. Clayton lacked standing unless Mr. Clayton was, in fact, viewed by Horizon as a movant himself — as he was.

Burdened with repayment of a loan (as discussed below) whereby the CR 11 judgment was satisfied, it was appropriate and obvious that Dennis Clayton was a movant seeking relief pursuant to RAP 12.8. Horizon's assertion to the contrary is without merit, and the trial court's corresponding Finding No. 2 (CP 199) is unsupported by the record.

Second, Horizon argues that Mr. Sloan and Mr. Clayton lack standing to seek relief pursuant to RAP 12.8 they did not pay the CR 11 judgment and, therefore have lost no property and sustained no injury caused by Horizon's retention of the CR 11 judgment proceeds. Brief of Respondent, pp. 2, 6-9, 19-21.

On September 16, 2009, the CR 11 judgment was paid in full, in the amount of \$15,097.32, resulting in three distinct and legally consistent

occurrences. First, Horizon executed a Satisfaction of Judgment. CP 42. Second, the supplemental debt collection proceedings against Mr. Sloan and Mr. Clayton, set for the following day, were abandoned. Third, Horizon assigned the CR 11 judgment to Howard Herman. CP 166; CP 124, ¶¶ 10 and 11.

Howard Herman testified by declaration that Dennis Clayton agreed to repay him the \$15,097.32. Horizon presented no *evidence* — merely speculation — that such an arrangement did not underlie satisfaction of the CR 11 judgment. Horizon infers that it should not have to disgorge the CR 11 judgment proceeds because there was no *written* agreement between Herman and Clayton *at the time* the CR 11 judgment was satisfied, but has cited no legal authority supporting such a proposition, either in the trial court or before this Court.¹ See Horizon’s “MEMORANDUM IN OPPOSITION TO MOTION FOR

¹ Horizon contends that Clayton’s commitment to repay Herman is void because it was not in writing, thus violating the statute of frauds, RCW 19.36.010. Brief of Respondent, p. 8. As discussed hereafter, Horizon offers no explanation as to why it might have standing to raise the statute of frauds with respect to a debt owed by Clayton to Herman, nor does it suggest any legal basis to complain about Clayton’s obligation to repay Herman. Mr. Clayton’s promise to pay Mr. Herman is not within the statute of frauds, simply because there is no evidence in the record suggesting that repayment of the loan would “by its terms” (see RCW 19.36.010(1)) “*require* more than a year to be performed.” [Emphasis added.] See *Klinke v. Famous Recipe Fried Chicken, Inc.*, 24 Wn. App. 202, at 205, 600 P.2d 1034 (1979).

RESTITUTION PURSUANT TO RAP 12.8,” at p. 3, CP 140; and Brief of Respondent, p. 3.

Regardless of whether there was a written agreement between Mr. Herman and Mr. Clayton *at the time* the CR 11 judgment was satisfied, Mr. Clayton agreed at that time to repay Mr. Herman, and from that point forward certainly had a moral obligation to repay Mr. Herman, enforceable pursuant to equitable principles.²

When the Supreme Court denied review of the CR 11 judgment and Horizon refused to repay the judgment proceeds, Mr. Clayton executed a promissory note in favor of Mr. and Mrs. Herman. CP 126. Mr. Clayton is unequivocally obligated to pay Mr. and Mrs. Herman or their heirs \$15,097.32, plus interest. Contrary to Horizon’s contention regarding standing, Mr. Clayton is an aggrieved party who has a personal stake in the outcome of these proceedings and, consequently, has standing to pursue relief in the trial court pursuant to RAP 12.8 and before this court pursuant to RAP 3.1.

² Even in the absence of Mr. Clayton executing a promissory note in favor of Mr. and Mrs. Herman, the latter can undoubtedly recover the money from Mr. Clayton based on unjust enrichment. See, e.g., *Pierce County v. State*, 144 Wn. App. 783, at 830, 185 P.3d 594 (2008): (State unjustly enriched by County caring for State’s patients). Recovery for the value of the recipient’s unjust gain is measured by the cost of the benefit provided or by the increase in value to the property or interests of the recipient. *Young v. Young*, 164 Wn.2d 477, 487, 191 P.3d 1258 (2008). Upon Mr. Clayton repaying Mr. Herman, he would have an equitable right of contribution against Mr. Sloan.

Similarly, Mr. Sloan himself has standing pursuant to RAP 12.8 and RAP 3.1. The doctrine of contribution is one of equality in bearing a common burden. 18 Am.Jur.2d Contribution § 1 (1965). The CR 11 judgment was entered against both Mr. Sloan and Mr. Clayton: It was (and remains) a legal and financial burden to both parties, as to which joint and several liability attaches. CP 91.

One who has paid the whole of a common obligation is entitled to recover one half of his payment from one who is equally obligated. *Hanson v. Hanson*, 55 Wn.2d 884, 350 P.2d 859 (1960). In the event Horizon is allowed to retain the CR 11 judgment proceeds, Mr. Clayton will be obligated to pay Mr. and Mrs. Herman from his own pocket. Under such circumstances, upon paying Mr. and Mrs. Herman, Mr. Clayton will have an equitable right of contribution for reimbursement from Mr. Sloan for fifty-percent of the CR 11 judgment, plus interest. Therefore, Mr. Sloan has a stake in the outcome of these proceedings, and has "... a clear legal or equitable right and a well-grounded fear of immediate invasion of that right," as well as "proprietary, pecuniary, or personal rights" that will be substantially affected if Horizon is allowed to retain the CR 11 judgment proceeds.

Third, Horizon argues that it is not subject to an order of restitution under RAP 12.8 because the repayment agreement between Mr. Herman

and Mr. Clayton was not in writing and was therefore void pursuant to the statute of frauds, RCW 19.36.010. Brief of Respondent, p. 8. Horizon is mistaken.

The statute of frauds, RCW 19.36.010(1) provides, in relevant part, as follows:

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof...

Courts will examine the surrounding circumstances to ascertain the terms of the contract and to determine whether, by those terms, the contract *must of necessity* require more than one year to perform. "That the contract was not performed within a year, is of no significance; nor does it matter that it was highly improbable that the contract could be performed within one year." *Gronvold v. Whaley*, 39 Wn.2d 710, 717-18, 237 P.2d 1026 (1951). "The contract must contain 'terms' showing that it is *not* to be performed within a year." *Barash v. Robinson*, 142 Wash. 118, 127, 252 P. 680 (1927) (emphasis added).

The repayment agreement between Mr. Herman and Mr. Clayton was described by Mr. Herman: He would be repaid pursuant to RAP 12.8

or Mr. Clayton would undertake repayment himself. CP 124, ¶ 8. Nothing about the foregoing repayment agreement suggests that it cannot, by its terms, be performed within one year. And, indeed, it was entirely possible that the agreement could have been performed in less than a year, because this Court reversed the trial court's CR 11 judgment within ten months following filing of the notice of appeal. CP 99; CP 100.

There is an additional reason to reject Horizon's argument regarding the statute of frauds. RCW 19.36.010 states, in part, that "...any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and *signed by the party to be charged therewith...*" The statute of frauds is an affirmative defense. CR 8(c). It is properly raised by one against whom any agreement, contract and/or promise is asserted. In the present case, nobody is asserting any agreement, contract and/or promise against Horizon. Rather, Mr. Sloan and Mr. Clayton are asserting a right of restitution, expressly adopted by the Supreme Court, reflective of the principles set forth in the Restatement of Restitution, Section 74. Horizon lacks standing to raise the statute of frauds.

In the course of trial court proceedings, Horizon questioned the authenticity and/or legal impact of the repayment agreement between Mr. Herman and Mr. Clayton. E.g., CP 144, lines 3-9. Horizon did not

mention the statute of frauds at any time or in any manner during the course of trial court proceedings.

In summary, the statute of frauds, by its very terms, is inapplicable to the present case, Horizon has no legal bases upon which to advance such a defense, and the issue of the statute of frauds is being raised for the first time before this Court. *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996); RAP 2.5(a).

Fourth, Horizon cites *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 982 P.2d 1202 (1999) in support of its contention that Mr. Sloan is not the “real party in interest” with respect to RAP 12.8 relief. Brief of Respondent, pp. 8-9. This assertion is based on the claim that because Mr. Sloan did not pay the CR 11 judgment, he has not been injured.

In *Sprague*, appellant Sprague appealed the trial court's order denying her motion under CR 17(a) to substitute her bankruptcy trustee as plaintiff in her discrimination action against Respondent Sysco Corporation. In the course of determining that the bankruptcy trustee was the “real party in interest” and that the trial court had erred, the Court noted that “CR 17(a) is identical to Federal Rule of Civil Procedure 17(a). Thus, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive.” The *Sprague* Court further noted that “The modern function of the rule is ‘to protect the defendant against a

subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.’ FED.R.CIV.P. 17(a) advisory committee’s note to 1966 amendment.”

Mr. Sloan is a real party in interest in the present case because, as discussed above, Mr. Sloan has a stake in the outcome of these proceedings, and has "... a clear legal or equitable right and a well-grounded fear of immediate invasion of that right," as well as “proprietary, pecuniary, or personal rights” that will be substantially affected if Horizon is allowed to retain the CR 11 judgment proceeds. This is necessarily so, inasmuch as he is liable for equitable contribution regarding any monies Mr. Clayton may be required to pay Mr. and Mrs. Herman from his own pocket.

As noted in *Sprague*, the desired result of having a real party in interest prosecuting a claim is that a final judgment will protect the defendant (in this case, Horizon) from subsequent litigation brought by the party actually entitled to recover, thus producing appropriate res judicata effect. In this case, two persons are entitled to relief pursuant to RAP 12.8: Mr. Sloan and Mr. Clayton — for the reasons previously discussed.

Mr. Herman is not entitled to relief under RAP 12.8, inasmuch as he was not a party to the underlying litigation, nor the appeal thereof, nor did the assignment he received from Horizon provide any contractual right

of recourse. And, of course, he cannot enforce the CR 11 judgment itself because it has been reversed and vacated and is therefore void. Mr. Herman is in the same position as would be Wells Fargo or Chase Bank had Mr. Clayton borrowed the money from either or both to satisfy the CR 11 judgment: Mr. Herman's sole recourse is to recover the money he loaned to Mr. Clayton from Mr. Clayton, based on either equitable principles regarding unjust enrichment, or upon the promissory note executed in his favor by Mr. Clayton.

2. **An Assignment of the CR 11 judgment after it was satisfied could not relieve Horizon of the duty to refund CR 11 judgment proceeds under RAP 12.8.**

Horizon contends it is not subject to RAP 12.8 because "...Horizon assigned its total interest in the CR 11 sanctions judgment to Howard Herman, [therefore] Horizon is no longer liable as "judgment creditor" based on any theory of unjust enrichment." Brief of Respondent, p. 23, and pp. 1, 3, 15, 26.

Horizon erroneously concludes that Mr. Herman "stepped into the shoes" of Horizon and, therefore, is now the CR 11 judgment creditor. Horizon's position disregards a central and dispositive fact: That is, Horizon was a judgment creditor *at the moment in time* when it accepted \$15,097.32 in satisfaction of the CR 11 judgment, and it received that

money only because it was a judgment creditor. The fact that Howard Herman is now owns the worthless CR 11 judgment has no bearing on Horizon's status as a judgment creditor when it accepted payment of the judgment in full.

RAP 12.8 and rules pertaining to unjust enrichment and restitution are directed at determining *whether* a party possesses an asset which it is not entitled to retain, not *how* it subsequently disposed of the mechanism by which it obtained the asset.

Again, the fact that Mr. Herman purportedly "stepped into the shoes" of Horizon and now owns a worthless judgment Horizon once owned is utterly irrelevant to the central issues of (a) whether Horizon has been unjustly enriched, and (b) whether Horizon must provide complete restitution pursuant to RAP 12.8. Mr. Herman's request for an assignment of the CR 11 judgment *after* it was satisfied was based on nothing more nor less than a desire to obtain some type of security for the loan he advanced to Mr. Clayton in order to satisfy the judgment and instantly abate Horizon's supplemental debt collection proceedings against Mr. Clayton and Mr. Sloan. The fact that the CR 11 judgment was assigned to Mr. Herman, or the fact that it subsequently became worthless, has no logical connection with nor legal bearing upon the central issue of unjust enrichment.

Horizon obtained \$15,097.32 based upon its *legal status* as a judgment creditor. For purposes of RAP 12.8 analysis, that status has not changed, despite Horizon's disposal of the CR 11 judgment after it was satisfied. Consequently, Horizon's extensive examination of the law pertaining to assignments of judgments is irrelevant and should be ignored by this Court.

3. **RAP 12.8 is applicable to Horizon because it was a "judgment creditor" when it received money from a "judgment debtor" to satisfy the CR 11 judgment that was subsequently reversed.**

Horizon argues that Mr. Clayton did not pay the CR 11 judgment, and that by seeking restitution under RAP 12.8, "Mr. Clayton is making an attempt to bootstrap himself into a position as a judgment debtor who satisfied a judgment so that he can create standing to claim restitution." Focusing exclusively on its assignment of the CR 11 judgment to Mr. Herman, and ignoring the fact that satisfaction of the CR 11 judgment preceded the assignment, Horizon further asserts that "This [Mr. Clayton's] position, of course, contradicts the language of the assignment that provides, indeed, the \$15,097.32 was paid for the assignment by Howard Herman, not for a satisfaction of the CR 11 sanctions judgment and clearly not in the name of Mr. Clayton or Mr. Sloan."

To be sure, there is no objective evidence in the record of this case to suggest that Mr. Herman's request for assignment of the CR 11 judgment was motivated in the slightest by a desire to enhance his portfolio — especially by the acquisition of a judgment that he believed would be rendered worthless by this Court's reversal. CP 124, ¶ 9.

Thus, in essence, Horizon is arguing that it should be relieved of paying restitution based on the *manner* and *method* Mr. Clayton adopted to make sure the judgment was satisfied *promptly*. In point of fact, the manner in which the judgment was satisfied was no different than if Mr. Clayton had obtained a loan from a bank and, having obligated himself to repay the bank, instructed the bank to deliver its own check to the judgment creditor, Horizon.

The *manner* and *method* whereby Mr. Clayton arranged to have the CR 11 judgment satisfied has no legal or logical bearing on the issues raised by a motion pursuant to RAP 12.8: I.e., is Horizon retaining monies under circumstances which render such retention unjust, as measured under *Restatement of Restitution* § 74. See, *A.N.W. Seed Corp.*, 116 Wn.2d 39, 45-46, 802 P.2d 1353 (1991): (using § 74 and related comment to determine whether restitution warranted under RAP 12.8).

Based upon the method adopted by Mr. Clayton to pay Horizon on September 16, 2009, Mr. Clayton remains fully liable for repayment of

monies paid in full satisfaction of the CR 11 judgment. Horizon's contention that Mr. Clayton did not pay the judgment and that it is therefore entitled to retain the CR 11 judgment proceeds is without merit.

4. **There is no evidence supporting the trial court's finding that Mr. Herman and Mr. Clayton did not intend that the CR 11 judgment be satisfied.**

There is virtually no evidence in the record to support the trial court's finding number 7 (CP 200), stating that "Attorney Dennis Clayton and Howard Herman did not intend that the judgment of August 18, 2009 be satisfied in any way...." Brief of Appellant, p. 20.

Horizon states that "We cannot know the true nature of the arrangement between Mr. Clayton and Mr. Herman and why Howard Herman paid the \$15,097.32, since no such facts exist in the record." Brief of Respondent, p. 21. On the contrary, evidence in the record reflects several facts describing precisely the nature of the arrangement between Mr. Clayton and Mr. Herman.

First, Mr. Herman had asked Mr. Clayton to represent Mr. Sloan, which resulted in a CR 11 sanction. CP 123, ¶ 3.

Second, Horizon had ordered Dennis Clayton to appear for judgment debtor examination, scheduled for the very next day, September 17, 2009.³ CP 11.

Third, Mr. Herman expressly stated that the purpose of satisfying the CR 11 Judgment was to avoid subjecting Dennis Clayton to supplemental debt collection proceedings. CP 68, ¶ 8.

Fourth, Mr. Herman and Mr. Clayton agreed that Mr. Herman would be repaid either by obtaining reversal of the CR 11 judgment and refund of the judgment proceeds from Horizon pursuant to RAP 12.8 or, if the judgment was not reversed, payment by Mr. Clayton personally. *Id.*, and CP 68, ¶ 11. Neither Mr. Herman nor Mr. Clayton imagined that Horizon would refuse to refund the monies if the CR 11 judgment were reversed.

Fifth, when Horizon refused to refund the CR 11 judgment proceeds, Mr. Clayton executed and delivered a promissory note, obligating himself, as agreed, to repay the loan.

Horizon surmises that the arrangement between Mr. Clayton and Mr. Herman took one of two forms. First, Mr. Herman merely befriended Mr. Clayton with act of gratuitous charity by paying the CR 11 judgment, and took assignment of the judgment to “ensure he had some ability to get

³ See CP 11-12, reflecting the degree of intrusion into the personal affairs of Mr. Clayton

his money back.” Or, second, it was agreed that satisfaction of the CR 11 judgment would be a loan from Mr. Herman to Mr. Clayton, and assignment of the judgment would be security for the loan. Brief of Respondent, p. 22.

Horizon concludes that, based on *Lachner v. Myers*, 121 Wash. 172, 175, 208 Pac. 1095 (1922), it is irrelevant which of the two options occurred because, in either event, Mr. Herman always *intended* to take and maintain Horizon’s position as a judgment creditor. Brief of Respondent, p. 22.

In *Lachner*, the Court determined, in part, that an assignment of a judgment by a judgment creditor, Goddard, to his attorney, Myers, was not intended to fully extinguish the judgment/debt, but was to be security for unpaid attorney fees owed Myers by Goddard.

From this latter element of the *Lachner* case, Horizon wrongly extrapolates the idea that it should not have to pay restitution pursuant to RAP 12.8 because neither Mr. Herman nor Mr. Clayton *intended* to satisfy the CR 11 judgment, but intended the CR 11 judgment to stand as security for the loan from Mr. Herman to Mr. Clayton. Horizon further asserts that the CR 11 judgment has never been satisfied, but remains “unsatisfied in the hands of Mr. Herman.” Brief of Respondent, p. 21. Horizon next

and/or Mr. Sloan occasioned by supplemental debt collection proceedings.

reasons that, within the meaning of RAP 12.8, the CR 11 judgment was not “...partially or wholly satisfied” because “Howard Herman and Mr. Clayton did not intend that the sanctions judgment be satisfied.” Finally, Horizon concludes that, not having been satisfied, nothing has occurred that comes within the meaning and remedy contained in RAP 12.8, and “An unsatisfied judgment cannot then be the subject of a RAP 12.8 motion for restitution against either Horizon by Mr. Clayton.”

Lachner v. Myers is inapplicable to the present case. First, *Lachner* did not involve RAP 12.8. Second, it did not involve unjust enrichment and restitution. Third, the Edwards judgment assigned by Goddard to Myers was never reversed and thereby voided on appeal — as occurred with the CR 11 judgment, rendering irrelevant any intent Mr. Herman or Mr. Clayton may have entertained regarding the judgment’s viability as security for a loan.

Horizon’s contention that Mr. Herman and Mr. Clayton did not intend to satisfy the CR 11 judgment and therefore Horizon has not been unjustly enriched is without merit. The only way to abate the supplemental debt collection proceedings launched by Horizon was to satisfy the CR 11 judgment, which was done. Horizon has been unjustly enriched at the expense of Mr. Clayton, in that he is legally obligated to

repay the loan extended by Mr. Herman for the purpose of satisfying the CR 11 judgment.

5. The present appeal is not frivolous.

Horizon contends that the present appeal is frivolous. Brief of Respondent, p. 24. The latter contention itself borders on, or is in fact, frivolous.

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P. 3d 219 (2007).

This appeal raises significant and debatable issues regarding the application of RAP 12.8, as well as the characteristics of an “aggrieved party” for purposes of RAP 3.1. This point of Horizon’s reply does not merit further discussion.

D. CONCLUSION

Horizon Credit Union presently retains \$15,097.32, plus interest, obtained pursuant to a judgment that has been reversed and is a nullity. Thus, the justification upon which Horizon obtained the money no longer exists because this Court has ruled that the CR 11 violation identified by

the trial court did not occur. Horizon's continued retention of the CR 11 judgment proceeds, and interest thereon, constitutes unjust enrichment. This Court should stridently reject Horizon's arguments, and remand to the superior court with clear instructions that an order be entered granting relief pursuant to RAP 12.8.

DATED this 7th day of December, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

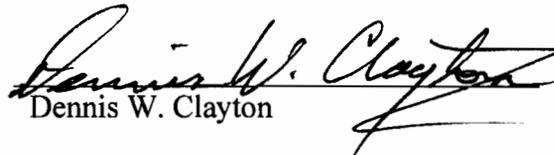
Dennis W. Clayton declares as follows, under penalty of perjury of the State of Washington:

1. I am over the age of 18 years, competent to testify herein, and do so based upon personal knowledge of the matters stated.

2. On December 7, 2011, I personally served a copy of this Appellants' Reply Brief by emailing a copy to Stanley Perdue at the following email address, pursuant to agreement and as Mr. Perdue's preferred method of service:

perduelaw@me.com

DATED this 7th day of December, 2011.


Dennis W. Clayton

[Sloan v Horizon CU et al2009 Contract Action\Appeal.COA.2011\Pleadings\ReplyAppellant 10.28.11.doc]