

FILED

OCT 28 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No: 299716-III

COURT OF APPEALS, DIVISION III

M. Stanley Sloan

Appellant

v.

Horizon Credit Union,
Respondent.

BRIEF OF RESPONDENT

Stanley E. Perdue
Perdue Law Firm
41 Camino De Los Angelitos
Galisteo, New Mexico 87540
Tele. 1.509.624.6009

Attorney for Respondent.

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Table of Contents

I. Counter Statement of the Case.....1

II. Argument.....6

 1. Mr. Sloan and Mr. Clayton had no Standing in the Superior Court and Neither Mr. Sloan or Mr. Clayton are Aggrieved Parties before this Court.....6

 2. An Assignment of Judgment Relieved Horizon of Any Obligation and Rights under the Judgment.....12

 3. RAP 12.8 is only between “judgment Debtors” who pay and “judgment creditors”.....17

 4. Howard Herman and Mr. Clayton did not intend that the Sanctions Judgment be Satisfied.....20

 5. Unjust Enrichment Requires that Mr. Clayton to have paid Horizon on the judgment.....22

 6. Frivolous Appeal and Attorney Fees.....24

 7. Conclusion.....25

Table of Authorities

CASES

<i>Allstate Ins. Co. v. Peasley</i> , 131 Wash.2d 420, 424, 932 P.2d 1244 (1997)	19
<i>Hollis v. Garwall, Inc.</i> , 137 Wash.2d 683, 695, 974 P.2d 836 (1999).	19
<i>Cooper v. City of Tacoma</i> , 47 Wash.App. 315, 316, 734 P.2d 541 (1987).....	9
<i>American Discount Corp. v. Shepherd</i> , 160 Wash. 2d 93, 101, 156 P. 3d 858 (2007).	14
<i>Bailie Communications, LTD v. Trend Business Systems, Inc.</i> 61 Wash. App. 151, 159- 160, 810 P. 2d 12 (1998).....	22
<i>Bort v. Parker</i> , 110 Wash.App. 561, 574, 42 P.3d 980 (2002).	19
<i>Davenport v. Washington Educ. Ass'n</i> , 147 Wn. App. 704, 732-733, 197 P.3d 686 (2008).	17
<i>DeBenedictus v. Hagen</i> , 77 Wash. App. 284, 289, 890 P. 2d 329 (1995).....	14
<i>Federal Financial Co. v. Gerard</i> , 90 Wash. App. 169, 177, 949 P.2d 412 (1998).....	12
<i>First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC.</i> , 161 Wash. App. 474, 844, 259 P. 3d 835 (2011).....	23
<i>Hall v. Custom Craft Fixtures, Inc.</i> , 87 Wash. App. 1, 9, 937 P. 2d 1143	19
<i>International Ass'n of Firefighters, Local 17890 v. Spokane Airports</i> , 103 Wash. App. 754, 768, 12 P. 3d 193 (2000).....	20
<i>Johnson v. Dahlquist</i> , 150 Wash. 29, 30, 225 P. 817 (1924).	12
<i>Klinke v. Famous Fried Chicken, Inc.</i> 24 Wash. App. 202, 203, 500 P. 2d 1034 (1994). ..	8
<i>Lachner v. Myers</i> , 121 Wash. 172, 175, 208 P. 1095 (1922).	21
<i>Lewis v. Third Street and S. Ry. Co.</i> 26 Wash. 28, 31, 66 P. 100 (1901).....	15
<i>Lutz Tile, Inc. v. Krech</i> , 136 Wash.App. 899, 906, 151 P.3d 219 (2007).....	24
<i>Mottet v. Stafford</i> , 94 Wash. 572, 376 P. 1001 (1917).	12

<i>Puget Sound Nat'l Bank v. Dep't of Revenue</i> , 123 Wash.2d 284, 292, 868 P.2d 127 (1994)	13
<i>Smith v. Twohy</i> , 70 Wash. 2d 721, 725, 425 P. 2d 12 (1967)	8
<i>Sprague v. Sysco Corp.</i> , 97 Wash. App. 169, 176, 982 P.2d 1202 (1999)	7
<i>State v. A.N.W. Seed Corp.</i> , 56 Wash. App. 763, 764, 785 P. 2d 838 (1990)	16
<i>State v. Link</i> , 136 Wash. App. 685, 692, 150 P. 3d 610 (2007)	20
<i>Walker v. Munro</i> , 124 Wash. 2d 402, 419, 879 P. 2d 920 (1994)	20
<i>Yurtis v. Phipps</i> , 143 Wash.App. 680, 696, 181 P.3d 849 (2008)	24

RULES

RAP 18.9(a)	24
RAP 12.8	passim
RAP 3.1	10
CR 11	passim

STATUTES

RCW 19.36.010	8
RCW 4.56.090	16
RCW 6.64.050	16
RCW 6.17.030	1

I. Counter Statement of the Case

Appellant Mervin Stanley Sloan (“Mr. Sloan”) moved the Superior Court of Spokane County, pursuant to RAP 12.8 (Effect of Reversal on Intervening Rights), to require Horizon Credit Union (“Horizon”) to restore to Mr. Sloan, in particular, the “full principal amount” of CR 11 sanctions (\$15,097.32, plus interest) ordered by the Superior Court, imposed on Mr. Sloan and Attorney Dennis Clayton (“Mr. Clayton”) and paid to Horizon on September 16, 2009. CP 65-66. The Superior Court denied the “Motion for Order of Restitution, Pursuant to RAP 12.8”, in part, because Horizon was no longer the judgment creditor, having assigned its judgment interest to Attorney Howard Herman. CP 198-201.

The RAP 12.8 motion by Mr. Sloan emanated from a Division III, Court of Appeals (“Division III”), reversal of the Superior Court’s CR 11 sanctions judgment against Mr. Clayton and Mr. Sloan and in favor of Horizon. CP 70-127. Mr. Sloan argued before the Superior Court that a restitution order was required because the Court of Appeals reversed the trial court’s CR 11 sanctions against him. *Id.* Horizon

argued that because Attorney Howard Herman had asked for and received an assignment of the CR 11 sanctions judgment Horizon held against Mr. Sloan and Mr. Clayton, Horizon was no longer a judgment creditor and not a proper party to a RAP 12.8 motion for restitution. CP 180-189. Further, Horizon believed that because Mr. Sloan never paid any money to Horizon, and Mr. Sloan was the only moving party below, Mr. Sloan had no standing to ask for restitution under RAP 12.8. *Id.* In Mr. Sloan's "Memorandum in Support of Motion for Restitution, Pursuant to RAP 12.8" below, although the "Motion for Restitution" asks the Superior Court to remit the CR 11 sanction funds to Mr. Sloan, the Memorandum in support of the motion asks that the money be distributed to non-party Attorney Howard Herman and Attorney Dennis Clayton. CP 70-127. Neither Mr. Clayton or Mr. Sloan paid any money to Horizon or satisfied the sanctions judgment. CP 180-189. Howard Herman is the only unnamed, non-party who actually paid any money to Horizon. CP 67-69. Howard Herman made no claim against Horizon below and did not seek to intervene. CP 67-69.

In exchange for the payment of \$15,097.32, Howard Herman garnered for himself an Assignment of Judgment (“CR 11 Sanctions Judgment”) from Horizon. CP 67-69. Howard Herman claims, by declaration, to hold the sanctions judgment against Mr. Sloan and Mr. Clayton by assignment, ostensibly for security for an alleged loan to Dennis Clayton in the amount of the sanctions judgment. *Id.*

Although the Appeal Notice states Dennis Clayton appeals the denial of the Motion for Restitution, Mr. Clayton was not, per the pleadings, the moving party before the Superior Court. CP 203-209, CP 65-66.

Howard Herman requested and purchased, by assignment, a \$15,097.32 judgment from Horizon on September 16, 2009. CP 67-69. On September 16, 2009, the day of the judgment assignment to Howard Herman, there existed no written loan agreement between Howard Herman and Mr. Clayton, nor any written agreement between them that Howard Herman would satisfy the CR 11 sanctions judgment for Mr. Clayton or Mr. Sloan. CP 67-69. Howard Herman is also not a named party in these proceedings, nor has he sought to join,

intervene or made a motion for substitution as a party defendant and judgment creditor. Horizon received funds only from Howard Herman for the assignment and not from either Mr. Clayton or from Mr. Sloan. CP 67-69.

The precipitating events leading to this RAP 12.8 motion include the fact that Mr. Sloan filed a lawsuit on March 11, 2009 (“2009 Lawsuit”) against Horizon. CP 70-127. The 2009 Lawsuit was dismissed by the Superior court because it was determined that the 2009 Lawsuit involved the same parties, the same cause of action and the same subject matter (res judicata) as the dismissed lawsuit Mr. Sloan filed on March 11, 2005 (“2005 Lawsuit”) against Horizon. *Id.* Mr. Sloan claimed in 2005 that Horizon failed to provide him with notice of a deed of trust foreclosure sale. *Id.* Mr. Sloan claimed in 2009 that Horizon failed to provide him with notice of deed of trust foreclosure sale regarding the same property and the same foreclosure event. *Id.* The Superior court imposed CR 11 sanctions against both Mr. Sloan and Mr. Clayton for bringing the 2009 Lawsuit. *Id.* Mr. Sloan appealed the court’s dismissal order and the order imposing CR

11 sanctions to Division III. Division III affirmed the dismissal of the 2009 Lawsuit on res judicata grounds, concluding the 2009 Lawsuit was the same as the dismissed 2005 Lawsuit, but reversed the order imposing sanctions against both Mr. Sloan and Mr. Clayton. *Id.*

In the time between the Superior court's order imposing sanctions against Mr. Sloan and Mr. Clayton, Howard Herman purchased, by assignment, Horizon's judgment for \$15,097.32, which equaled the amount of the sanctions order, plus interest, and Howard Herman, as requested by him, received a total and complete sale and assignment of the sanctions judgment against Mr. Clayton and Mr. Sloan. CP 67-69. There are no other agreements between Horizon and Howard Herman.

The focus of Mr. Sloan and Mr. Clayton is RAP 12.8 and an argument for unjust enrichment. The appeal is without merit, as was Mr. Sloan's 2005 Lawsuit and appeal and certainly his 2009 Lawsuit and subsequent appeal.

II. ARGUMENT

1. MR. SLOAN AND MR. CLAYTON HAD NO STANDING IN THE SUPERIOR COURT AND NEITHER MR. SLOAN OR MR. CLAYTON ARE AGGREIVED PARTIES BEFORE THIS COURT

Mr. Sloan was the only person moving the Superior Court for relief of any kind under RAP 12.8. (“Plaintiff hereby moves the court for an order requiring that, pursuant to RAP 12.8, Defendant remit to Plaintiff the full principal amount [of] the CR 11 sanction paid to Defendant on September 16, 2009”, Motion for Order of Restitution, Pursuant to RAP 12.8) CP 65-66. Mr. Clayton made no motion before the court below. *Id.* As we noted above Mr. Sloan desired that the order of restitution require monies be distributed to Mr. Clayton and Attorney Howard Herman, even though Mr. Clayton and Attorney Howard Herman were not movants. CP 70-127. In some strange sense then Mr. Sloan was attempting to represent the interests of Mr. Clayton and Howard Herman without citing any case law for such representation.

It is also conceded by Mr. Clayton and Attorney Howard

Herman that Mr. Sloan made no payments of any kind to Horizon toward satisfaction of the CR 11 sanctions judgment. CP 67-69.

RAP 12.8 provides: “If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution.” The RAP rule begins with the assumption that the party requesting restitution relief is in fact the party who “partially or wholly satisfied a trial court decision”. It is required that Mr. Sloan have paid monies to Horizon for Mr. Sloan to use RAP 12.8. *Matter of Marriage of Mason*, 48 Wash. App. 688, 691 740 P. 2d 3565 (1987).

Further, Mr. Sloan had neither standing nor was the real party in interest in the superior court. Standing requires that the plaintiff demonstrate an injury to a legally protected right. *Sprague v. Sysco Corp.*, 97 Wash. App. 169, 176, 982 P.2d 1202 (1999). The real party in interest is the person who possesses the right sought to be enforced.

Id. Mr. Sloan has no demonstrated injury to support standing since he did not pay any money to Horizon. Mr. Sloan is not the real party in interest under RAP 12.8 because the right to prosecute the claim for restitution belongs only to a party who satisfied wholly or partially a judgment and that person could not be Mr. Sloan. CP 67-69.

Part of Mr. Sloan's theory on this appeal is that Mr. Clayton and Howard Herman had an agreement whereby Howard Herman satisfied the judgment on behalf of Mr. Clayton or a loan agreement existed between the two of them. The claimed promissory note is void and is against the Statute of Frauds. RCW 19.36.010. A verbal agreement to put in writing a contract which will require more than one year to perform is within the Statute of Frauds and is void. *Klinke v. Famous Fried Chicken, Inc.* 24 Wash. App. 202, 203, 500 P. 2d 1034 (1994). The Statute of Frauds is not a doctrine of equity but a positive statutory mandate, which renders void those undertakings which offend it. *Smith v. Twohy*, 70 Wash. 2d 721, 725, 425 P. 2d 12 (1967). Mr. Clayton must have had a valid agreement between he and Howard Herman on the date Howard Herman paid monies to Horizon

and received the assignment for there to be even an argument that Mr. Clayton satisfied the CR sanctions judgment. First, such an argument is directly contrary to the language in the Assignment, which states that the money was given to Horizon in exchange for an assignment and not in satisfaction of a judgment. Second, an indication that any alleged agreement was not to be performed within one year is the fact the promissory note signed by Mr. Clayton provided for a term from March 22, 2011 through January 1, 2013, which exceeds one year. CP 126-127. In essence, no loan agreement between Mr. Clayton and Howard exists and therefore it was impossible for Mr. Clayton to have been a person who satisfied a judgment and hence he has no standing to argue before this court as an aggrieved party.

“Only an aggrieved party may seek review by the appellate court.” RAP 3.1. “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. City of Tacoma*, 47 Wash.App. 315, 316, 734 P.2d 541 (1987). Neither Mr. Clayton or Mr. Sloan are aggrieved parties and because they are aware of their status as parties who are not aggrieved each, jointly and severally,

should be sanctioned with the imposition of attorney fees for filing a frivolous appeal, as argued below.

Mr. Sloan is not an aggrieved party because his proprietary, pecuniary, or personal rights have not been affected. It is conceded, on the record, that Mr. Sloan did not pay any money, whatsoever, to Horizon. CP 67-69. And yet, Mr. Sloan sought restitution of monies he did not pay and when his argument was rejected by the superior court he appealed to this court to seek monies he did not pay. CP 65-66. On the contrary, Howard Herman states that he is the only person who paid money to Horizon for the assignment of judgment and Mr. Sloan did not. CP 67-69. Therefore, there can be no argument that Mr. Sloan's proprietary, pecuniary, or personal rights have been effected.

Mr. Clayton also states that he appeals the decision of the trial court made on June 3, 2011 ("M. Stanley Sloan and Dennis Clayton appeal to the Court of Appeals, Division III, the order of June 3, 2011..."). CP 203-209. Yet, Mr. Clayton made no motion in the superior court and hence could not be an aggrieved party since he did not ask the superior court for relief of any kind.

Mr. Clayton may argue his proprietary, pecuniary, or personal rights were substantially affected by the decision of the superior court. But, the superior court ruled only that Mr. Sloan, in particular, was not entitled to restitution for monies Mr. Sloan did not pay. CP 198-201. How then are property, money or personal rights of Mr. Clayton effected by “Mr. Sloan” not receiving restitution? The Motion of Mr. Sloan in superior court also asked that a joint check from Horizon be made payable to Mr. Sloan, Mr. Clayton and Howard Herman. CP 70-127. Ostensibly, Mr. Clayton contends that he would have shared in the proceeds of a restitution order in favor of Mr. Sloan.

As we noted above the fundamental flaw in this position is that Mr. Sloan never paid any money to Horizon, Howard Herman did. And Howard Herman was not a party to the superior court proceeding and, like Mr. Clayton, never made a request to the superior court for restitution. CP 65-66. Mr. Clayton can only build his case on the premise that he is an aggrieved party on the imperfect and absolutely flawed principles that Mr. Sloan was entitled to restitution when Mr. Sloan did not make a transfer of money or property to wholly or

partially satisfy a superior court judgment or that there was a loan agreement between Mr. Clayton and Howard Herman. Neither of these principles are supported in the record or the law.

2. AN ASSIGNMENT OF JUDGMENT RELIEVED HORIZON OF ANY OBLIGATION AND RIGHTS UNDER THE JUDGMENT

It is conceded by Mr. Clayton and Howard Herman that Howard Herman requested, paid for and received an assignment of the Horizon CR 11 sanctions judgment and that Howard Herman considers himself the owner of the CR 11 sanctions judgment. CP 65-66. Generally, an assignee “steps into the shoes of the assignor” and has all the rights of the assignor. *Federal Financial Co. v. Gerard*, 90 Wash. App. 169, 177, 949 P.2d 412 (1998). A judgment, in particular, “...may be assigned by any person and by any method competent and sufficient for the assignment...” *Mottet v. Stafford*, 94 Wash. 572, 376 P. 1001 (1917). “On a valid assignment of a judgment the assignee succeeds to all the rights, interest and authority of his assignor, including the debt or claim upon which the judgment is based.” *Johnson v. Dahlquist*, 150 Wash. 29, 30, 225 P. 817 (1924). In

Johnson, Plaintiff obtained a judgment against Defendant but assigned the judgment to his attorney to pay his attorney bill before the judgment was reversed on appeal. *Id.* The court reasoned that the assignment was complete and left nothing in the assignor and “The only person who, under the circumstances, would be interested, would be the owner of the claim [the assignee]...” *Id.* (Emphasis Added). Based on this reasoning, Horizon is not a proper party to this case after a valid assignment of the judgment creditor position to Howard Herman.

An assignment carries with it not only whatever contract rights may have been assigned but also all applicable statutory rights and liabilities.” *Puget Sound Nat'l Bank v. Dep't of Revenue*, 123 Wash.2d 284, 292, 868 P.2d 127 (1994). In *Puget Sound National Bank*, an escrow agent assigned to individuals its right of action against an insurer which had contracted with the agent to provide a required fidelity bond. Under the principle that the assignee steps into the shoes of the assignor, the court held that the bond statute, RCW 18.44.050, rendered the insurer liable to the assignees. *Id.* Similarly, where a retail

installment contract originally entered into by the assignor failed to comply with specific statutory provisions applicable to such contracts, the assignee was denied full recovery of the amount due under the assigned retail installment contract because of the failure to comply with the statutory requirements. Puget Sound Nat'l Bank, 123 Wash.2d at 292, 868 P.2d 127. “Thus, both statutory benefits and burdens imposed by statute [or court rule] on a party apply equally to an assignee”. American Discount Corp. v. Shepherd, 160 Wash. 2d 93, 101, 156 P. 3d 858 (2007). The assignment to Howard Herman included both the benefit, the ability to execute on the judgment as suggested by Howard Herman and the obligations of Horizon under the judgment as “judgment creditor”. Lastly, the sale between Howard Herman and Horizon was a complete sale and left no equitable ownership in Horizon, as would be the case of an assignment for collection. DeBenedictus v. Hagen, 77 Wash. App. 284, 289, 890 P. 2d 329 (1995).

There are also numerous statutory support for the notion that judgment assignments are common place and approved. RCW

4.08.080 (Action on Assigned Choses in Action) states that an assignee of a judgment may sue and maintain an action on the judgment, in his or her name. RCW 4.56.090 provides judgments may be assigned. RCW 6.17.030 provides that the assignee of a judgment's name may be entered on the execution docket. So, it is clear that assignment of judgments are permitted and a complete sale of the judgment, as in this case, carries with it all of the incidents of ownership. Lewis v. Third Street and S. Ry. Co. 26 Wash. 28, 31, 66 P. 100 (1901).

Horizon is no longer a judgment creditor and has no rights or obligations under the judgment itself after the judgment was assigned. Howard Herman rightfully concludes that he is the only person who owns the judgment and the only person who could execute upon the judgment, not Horizon. CP 67-69. If the judgment had been affirmed on appeal, Horizon could not have pursued Mr. Clayton or Mr. Sloan to satisfy the judgment after it assigned its interest to Howard Herman. If the judgment were reversed Howard Herman would be left with a worthless receivable, a bargain that was struck between Howard

Herman and Horizon. As the assignee of the judgment creditor Horizon "...the judgment creditor [Howard Herman] must bear the risk of the consequences of a reversal.... RAP 12.8" State v. A.N.W. Seed Corp., 56 Wash. App. 763, 764, 785 P. 2d 838 (1990). Contrary to assertions made by Howard Herman, Horizon made no written or oral agreement with him that if the judgment for CR 11 sanctions were reversed that Horizon would repay Mr. Herman and cancel and terminate the assignment of the judgment. Regardless, Mr. Herman is not a party to these proceedings, has not made a claim here and neither has he sought to intervene or join. Most importantly, there is no indication in the record Howard Herman has sought relief from Horizon in any other venue.

In actuality Mr. Clayton is the only party seeking relief under RAP 12.8 and he paid no funds to Horizon and cannot be restored to property that was not taken from him. On the contrary, the assignment document indicates, quite clearly, that Howard Herman paid the \$15,097.32 to Horizon and not Mr. Clayton.

3. RAP 12.8 IS ONLY BETWEEN “JUDGMENT DEBTORS” WHO
PAY AND “JUDGMENT CREDITORS”

“RAP 12.8 provides that if a judgment debtor pays rather than supersedes all or part of a judgment pending appeal, but the judgment is later reversed or modified before becoming final, the trial court must "restore to the [judgment debtor] any property taken from [the judgment debtor], the value of the property, or in appropriate circumstances, provide restitution." *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 732-733, 197 P.3d 686 (2008). The restoration must be from the transferee of the money or property, the “judgment creditor”. *Id* at 33. Initially, Mr. Clayton, as a “judgment debtor” must establish that he satisfied a judgment or that property was taken from him as “judgment debtor”. The facts, as told by Howard Herman, are that in exchange \$15,097.32 paid to Horizon he received an assignment of the sanctions judgment. CP 67-69. It was Howard Herman’s opinion that he wanted to be the owner of the judgment so that he could execute on the judgment if desired. *Id*.

Mr. Clayton (who made no motion in superior Court and

should therefore not be an appellant in this appeal) and Mr. Sloan (who paid no money to satisfy a judgment), contend that Howard Herman loaned Dennis Clayton \$15,097.32, without any supporting documents. CP 65-66, CP 67-69. Ostensibly, 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. This 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. CP 167-168. The debt to Howard Herman from Mr. Clayton was created long after the assignment was purchased by Howard Herman from Horizon. CP 126-127.

The law places limits on what Mr. Clayton may argue when there are documents (assignment of judgment) to establish the true intent of the parties to an assignment contract. "...we examine the parties' objective manifestations of intent, but not their unilateral or subjective purposes and intentions about the writing's meaning." *Hall*

v. Custom Craft Fixtures, Inc., 87 Wash. App. 1, 9, 937 P. 2d 1143 (1997). In other words, courts strive to ascertain the meaning of what is written in the contract, and not what the parties intended to be written but did not memorialize. Bort v. Parker, 110 Wash.App. 561, 574, 42 P.3d 980 (2002). If the contract's language is clear and unambiguous, then courts must enforce the contract as written. Allstate Ins. Co. v. Peasley, 131 Wash.2d 420, 424, 932 P.2d 1244 (1997). Extrinsic evidence offered to contradict the terms of an unambiguous contract is inadmissible. Hollis v. Garwall, Inc., 137 Wash.2d 683, 695, 974 P.2d 836 (1999). The assignment agreement between Howard Herman and Horizon is clear and unambiguous and does not include any recourse against Horizon if the CR 11 sanctions judgment is later reversed and does not mention that, in any fashion, Howard Herman is acting on behalf of Mr. Clayton in seeking and obtaining the judgment assignment. CP 167-168. And, most importantly, Howard Herman is not a party to these proceedings. CP--

Ultimately, under RAP 12.8 Mr. Clayton must show that he paid money to Horizon to be a judgment debtor entitled to argue for

restitution. As we noted above this is essentially a ‘standing’ issue.

Standing is a jurisdictional issue. *International Ass’n of Firefighters, Local 17890 v. Spokane Airports*, 103 Wash. App. 754, 768, 12 P. 3d 193 (2000). The “Standing Doctrine” prohibits a litigant from raising another’s legal rights. *Walker v. Munro*, 124 Wash. 2d 402, 419, 879 P. 2d 920 (1994). Standing is a party’s right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wash. App. 685, 692, 150 P. 3d 610 (2007). Howard Herman’s true position is that the judgment was never satisfied. CP 67-69. Regardless, as we argue below, Horizon is not the “judgment creditor” any longer from whom restitution may be sought.

4. HOWARD HERMAN AND MR. CLAYTON DID NOT INTEND
THAT THE SANCTIONS JUDGMENT BE SATISFIED

It is well settled Washington law that in structuring this transaction in the way Mr. Clayton and Howard Herman did, the judgment was not and could not be satisfied because Howard Herman received a contemporaneous assignment of the judgment as security for a loan.

“If a debtor pays his judgment creditor a sum equal to the amount of the judgment, and thereupon causes the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee.’ Lachner v. Myers, 121 Wash. 172, 175, 208 P. 1095 (1922).

In *Lachner*, as here, the parties allegedly intended to use the assigned judgment as security for a loan to the judgment debtor and did not intend that the assigned judgment be extinguished, satisfied or discharged. *Id.* Howard Herman states, “He felt that owning the judgment was perfect security for the loan...” CP 67-69. The legal effect is that the judgment continued unsatisfied in the hands of Howard Herman, if affirmed on appeal. An unsatisfied judgment cannot then be the subject of a RAP 12.8 motion for restitution against either Horizon by Mr. Clayton.

We cannot know the true nature of the arrangement between Mr. Clayton and Howard Herman and why Howard Herman paid the \$15,097.32, since no such facts exist in the record. But, it appears there are two options. First, Howard

Herman befriended Mr. Clayton with the payment but wanted some security and so he took the judgment as a way to ensure he had some ability to get his money back. Second, indeed Mr. Clayton and Howard Herman agreed that Howard Herman would loan \$15,097.32 to Mr. Clayton and the judgment would, as Howard Herman indicates, be security for the Clayton loan. Of course, as we said above, without facts, these options are mere speculation. But, in engaging in this exercise it is abundantly clear that regardless of which option is true, it does not matter ultimately. Howard Herman always intended to take, and keep by assignment, Horizon's position as judgment creditor.

5. UNJUST ENRICHMENT REQUIRES THAT MR. CLAYTON TO
HAVE PAID HORIZON ON THE JUDGMENT

The heart of the theory of unjust enrichment is that a benefit has been conferred upon one party by another. *Bailie Communications, LTD v. Trend Business Systems, Inc.* 61 Wash. App. 151, 159-160, 810 P. 2d 12 (1998). In *Bailie*, Wosepka, President of Trend Colleges

along with Suburban Investments, defrauded the Bailies out of \$175,000.00 to infuse working capital into Trend Colleges. The court ruled that Trend Colleges had been unjustly enriched by the Bailies. The opposite factual pattern exists in our case. Mr. Clayton has not paid any money to Horizon to enable him to argue that he should be restored to property he never paid. And, since Horizon assigned its total interest in the CR 11 sanctions judgment to Howard Herman, Horizon is no longer liable as “judgment creditor” based on any theory of unjust enrichment.

Mr. Sloan and Mr.. Clayton argue that the theory of “unjust enrichment” trumps the assignment between Howard Herman and Horizon and that somehow “unjust enrichment” can invalidate the assignment contract. Unjust enrichment is the method of recovery for the value of the benefit retained *absent any contractual relationship*. *First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC.*, 161 Wash. App. 474, 844, 259 P. 3d 835 (2011). In the case before this court, there was an assignment contract, valid in all respects, and hence acts as an exception to an unjust enrichment claim

by Mr. Clayton. The court should take note that no one, not even Mr. Clayton, contends that the assignment was not lawful.

5. FRIVOLOUS APPEAL AND ATTORNEY FEES

RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” RAP 18.9(a). “Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P. 3d 849 (2008). 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).

As we said above since Howard Herman was not a party below and not aggrieved party in this court no argument can be made that a

reversal could be in his favor, based on any argument by Mr. Sloan or Mr. Clayton.

An attorney fee award should be made in favor of Horizon because Mr. Sloan's motion for restitution was properly denied by the superior court because Mr. Sloan did not satisfy a judgment. Mr. Clayton bases his argument for reversal and that he is an aggrieved party on the argument Mr. Sloan is entitled to restitution and, lastly, Howard Herman is not a party to these proceedings. By definition this is a frivolous appeal.

Considering the entire record, the court must be convinced that the appeal by Mr. Sloan or Mr. Clayton present no debatable issues upon which reasonable minds might differ as neither is an aggrieved party and that it is so devoid of merit that there is no possibility of a reversal made in their favor because neither lost anything in the trial court.

CONCLUSION

In summary, an appeal by Mr. Sloan is egregious since everyone agrees he paid no money to Horizon and he should be sanctioned and Mr. Clayton should be included in the sanction order, as his attorney.

An appeal by Mr. Clayton is also egregious because Howard Herman paid monies to Horizon for an assignment and all parties then acknowledged Horizon was no longer a party to the sanctions judgment. In the face of this clear understanding Mr. Clayton pursues this appeal to obtain monies he did not pay. He should be sanctioned doubly.

Date this 26 day of October 2011

Perdue Law Firm

A handwritten signature in black ink, appearing to read 'Stanley E. Perdue', written over a horizontal line.

Stanley E. Perdue, #10922

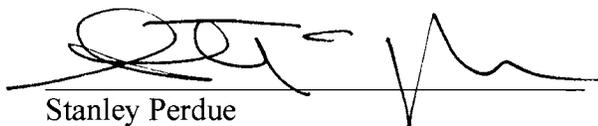
ATTORNEY FOR RESPONDENT

On the 26 day of October, I delivered by First Class Mail, postage prepaid, a true copy of the following document: **BRIEF OF RESPONDENT** addressed to the following:

Dennis Clayton at 421 West Riverside, Suite 911, Spokane, Washington 99201,

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

DATED: October 26, 2011, at Galisteo, New Mexico.


Stanley Perdue