

No. 77689-0-David W. Tingey v. Lloyd, et ux

SUPREME COURT
STATE OF WASHINGTON

DAVID L. TINGEY,

Petitioner

v.

LLOYD HAISCH and LUCY HAISCH, husband and wife,

Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONER DAVID L TINGEY

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A. Assignments of Error

1. Court of Appeals, Division Three, Panel Nine, Court of Appeals No. 23289-1-III, on August 18, 2005 erroneously ruled that the term “account receivable” in RCW 4.16.040(2) meant “open account” and that because a client balance owed an attorney was not an open account, the statute did not apply.

2. The issue for review is:

Issue: Is the limitation of actions six years for collection of a balance owed by a client to his/her attorney for fees incurred on behalf of the client on an hourly fee basis without a written fee agreement as provided in RCW 4.16.040(2)?

Standard for review: This issue was resolved by the trial court in favor of the petitioner Tingey on motion for summary judgment. The standard of review of an order of summary judgment is de novo. *Sheikh v. Choe*, 156 Wash.2d 441, 447, 128 P.3d 574, 577(Wash., 2006). This issue also involves statutory interpretation, which the Supreme Court also considers de novo. *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, 121 P.3d 82, 84 (Wash., 2005)

B. Statement of the Case

Attorney David L. Tingey (Tingey) provided legal services to Lloyd and Lucy Haisch (Haisch) more than three years from the date the instant lawsuit was filed without a written fee agreement between the parties. Tingey charged monthly for services rendered over several months prior to the last date of service. Haisch paid the amount billed each month in full until a few months prior to the last service date. All of the charges invoiced to Haisch were for various legal services requested by Haisch comprising multiple transactions and resulting in charges on the client's account and a fluctuating balance as charges accrued and payments were made over time. Each of the invoices named Tingey and Haisch, described services rendered, noted charges incurred, noted time incurred, noted payments made, and concluded with a balance due. (CP 122-124; CP 44-45)

On Tingey's motion for summary judgment on the issue of the statute of limitation, the trial court ruled that the applicable statute of limitations was RCW 4.16.040(2) providing for a 6 year limitation of actions and that Tingey's claim was not time-barred. (129 Wash.App. 109 at 112)

C. Argument

The Court Of Appeals first found ambiguity in the term “account receivable” as given in the statute and then through its statutory construction found that the term meant “open account.” The Court of Appeals then found that a balance owed by a client to his attorney was not an open account and therefore the statute did not apply, concluding therefore that the proper limitation of actions was three years and not six years.

The Court of Appeals erred in finding ambiguity in a term having a plain meaning. It also erred in not following accepted protocol for statutory construction. It did not accept its own dictionary definition of a term it found to be ambiguous. And after erroneously finding that “account receivable” really meant, “open account” it misapplied facts to the “open account” definition that it obtained from *Black’s Law Dictionary* and *Am.Jur 2D* for the meaning of “open account.” (129 Wash.App. 109 at 116).

(1) Plain meaning forecloses ambiguity

Review begins with the plain language of the statute. *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn.App. 925, 930, 946 P.2d 1235 (1997) (citing *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*,

128 Wn.2d 40, 53, 905 P.2d 338 (1995). An "account receivable" is a plain, well-recognized financial term in Washington law.

Because the statute's meaning is plain, the courts must give effect to that plain meaning without resort to the tools of statutory construction. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). As stated by this court in *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, 121 P.3d 82, at 84 (Wash., 2005),

Where statutory language is " 'plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.' " *Bravo v. Dolsen Cos.*, 125 Wash.2d 745, 752, 888 P.2d 147 (1995) (quoting *Krystad v. Lau*, 65 Wash.2d 827, 844, 400 P.2d 72 (1965)). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." *Burton v. Lehman*, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005) (quoting *State v. Stannard*, 109 Wash.2d 29, 36, 742 P.2d 1244 (1987)). "Only where the legislative intent is not clear from the words of a statute may the court 'resort to extrinsic aids' " *Burton*, 153 Wash.2d at 423, 103 P.3d 1230 (quoting *Biggs v. Vail*, 119 Wash.2d 129, 134, 830 P.2d 350 (1992)).

This clear meaning of the term is consistent with the Washington Uniform Commercial Code that broadly defines accounts to include "any right to payment of a monetary obligation." RCW 62A.9A-102(a)(2)(A). The Court of Appeals did not address this definition. Where a definition of a term is provided within the

body of Washington law for same circumstances, there is no need to look outside of Washington law.

The clear meaning of the term "account receivable" is stated in *Black's Law Dictionary*:

An account reflecting a balance owed by a debtor; a debt owed by a customer to an enterprise for goods or services.
Black's Law Dictionary (8th ed. 2004)

The term is also set forth in a well-recognized practice treatise:

"An account receivable incurred in the ordinary course of business is also subject to the six year statute of limitations; this 1989 addition does not require a written contract. "Account receivable" is not defined in the limitation statute, but under Uniform Commercial Code Article 9, "account" means "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance."
Washington Practice, Vol. 27, Section 5.45.

This understanding of the statutory meaning is consistent with usage in our sister states in civil matters, of which Iowa and California are representative (a more complete review is found in Petitioner's Answer to ACA Amicus Memorandum). The California statute finds its definition by looking within its body of law to its commercial code:

"Accounts receivable" means "account" as defined in paragraph (2) of subdivision (a) of Section 9102 of the Commercial Code. West's Ann.Cal.C.C.P. § 680.130, Code of Civil Procedure, Part 2, Title 9, Division 1, Chapter 1:

The California Commercial Code then provides

- (a) In this division:
(2) "Account," except as used in "account for," means a right to payment of a monetary obligation, whether or not earned by performance, (i) ... (ii) for services rendered or to be rendered,¹

The Iowa statute provides

"As used in this section, ... "account receivable" means a debt arising from the retail sale of goods or services or both on credit; " I.C.A. § 535.11, Title XIII. Commerce, Subtitle 3 Money and Credit, Chapter 535

¹ West's Ann.Cal.Com.Code § 9102
§ 9102. Definitions and index of definitions

- (a) In this division:
(1) *(intentionally omitted)*
(2) "Account," except as used in "account for," means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health care insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

Money and Interest, 535.11. Finance charge on accounts receivable, paragraph (5).

There are no states that use or define “accounts receivable” inconsistent with these definitions and usages.

(2) Statutory construction

As provided in the Amicus Curiae Memorandum Of ACA International, the Court of Appeals believed the statute was ambiguous, 129 Wn. App. 109 at 111 by relying on legislative history. More specifically, the Court of Appeals relied on a debate between two legislators to find ambiguity and to find legislative intent. In this, the Court of Appeals also erred. Statutory construction requires that ambiguity cannot be found by reviewing legislative history. *Dep’t of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

If necessary after considering the plain meaning of a statute, one considers legislative intent. A valuable source in determining legislative intent is the legislative history of the statute. A summary of the legislative history of the statute is provided in the ACA memorandum so it will not be reproduced herein. As stated therein, the bill was initially related to open accounts but was broadened in a subsequent version to all accounts receivable and it

was this subsequent version that passed into statute. The Court of Appeals did not acknowledge this intent of the legislature to extend the application of the statute beyond open accounts to all accounts receivable. Rather, the Court of Appeals chose to ignore the statute and interpret the effect of the statute in accordance with a prior version of the bill that was rejected by the Legislature.

As summarized in the ACA Memorandum, “even if the Court had properly resorted to consideration of the bill’s legislative history, it did so inappropriately. This Court has often warned that a single legislator’s floor remarks are not enough to establish legislative intent on a measure. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992); *City of Yakima v. Int’l Ass’n of Firefighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991). This is particularly true where those remarks are not those of the bill’s sponsor or the committee chair of the committee that heard the bill. *In re Marriage of Kovacs*, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993). The remarks of a bill’s opponent do not establish the Legislature’s intent. *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992).” The Court of Appeals erred in extracting definitions and legislative intent from a discussion between two legislators.

If the meaning is unclear from the statute, then a nontechnical statutory term may be given its dictionary meaning. *State v. McDougal*, 120 Wash.2d 334, 841 P.2d 1232 (1992). The Court of Appeals referred to *Black's Law Dictionary* for the meaning of "account receivable" and found that "any balance owed by a debtor is considered an "account receivable." (129 Wash.App. 109 at 114; *Black's Law Dictionary*, 8th Edition, at 18). The dictionary meaning relied upon by the Court of Appeals should have ended its inquiry. The Court of Appeals had its definition. The definition put a balance owed by a client to his attorney squarely within the meaning of the statute – the limitations of actions was six years. There was no justification for the Court of Appeals to proceed further. And its dictionary definition of the term was consistent with the unambiguous plain meaning of the words of the statute; it was consistent the body of Washington law given in RCW 62A.9A-102(a)(2)(A); and it was consistent with the Washington Practice treatise.

Only after improperly finding ambiguity did the Court of Appeals then determine that the term "account receivable" meant an "open account" as that term is defined in *Black's Law Dictionary* (8th ed. 2004). 129 Wn. App. 109 at 112, 114. Washington law

directs against such a substitution. This court in *Gheen v. Constr. Equip. Co.*, 49 Wn.2d 140, 143, 298 P.2d 852 (1956) found that an open account is one in which some item of the contract is not settled by the parties. However, all elements of contract exist between an attorney and his client: e.g., amount charged, services rendered, obligations of the parties. Under the *Gheen* holding, because there was no essential item of contract not settled between an attorney and his client, a client's outstanding balance to an attorney is not an open account. There is no valid rationale for the Court of Appeals to substitute "open account" for "account receivable" as given in the statute.

(3) Misapplication Of Law And Facts

As stated above, the Court of Appeals substituted "open account" for the term "account receivable" in RCW 4.16.040 (2) and then looked to *Black's Law Dictionary* and *Am.Jur 2D* for the meaning of "open account." (129 Wash.App. 109 at 116) (The term "open account" is not defined in Washington statutes.) Then having done so, it then misapplied the term. Before applying the facts to the requirements of an open account, the Court of Appeals first introduced and applied a new term, "charge account" and found that the debtor's obligation to the attorney was not a charge

account and therefore RCW 4.16.040(2) did not apply to client debt to an attorney. There is no rationale given for this deduction and it appears to be inappropriate.

Next, the Court of Appeals applied the facts to the requirements of an open account and concluded that RCW 4.16.040(2) did not apply because a debt owed an attorney by a client is not an open account reasoning that such a debt does not involve a fluctuating balance involving multiple transactions as an open account must. In this the Court of Appeals also erred. It is normal that an attorney will perform more than one service over a period of time causing multiple charges against the client account. It is also normal that a client will make payments against the debt, both of which will cause the balance to fluctuate over a period of time due to multiple charges, or transactions, and client payments, which are also transactions. In the instant matter, such was the case. If the Court of Appeals had correctly applied the facts, by its criteria a debt to an attorney was an open account and by the reasoning of the Court of Appeals, the statute would have applied. (This petitioner attorney does not suggest that the Court Of Appeals was correct in characterizing the term "account receivable" as meaning "open account" nor that the instant facts would satisfy the

actual requirements of an open account, namely that an essential term was left unresolved.) The Court then concluded for all attorney accounts (not limited to their misstatement of facts on the instant matter) that an attorney account with a balance due is not an “open account” and therefore RCW 4.16.040(2) did not apply. (129 Wash.App 109 at 117)

The logic of the Court of Appeals leads to an absurd result, which must be avoided. *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, 121 P.3d 82, at 84 (Wash., 2005). Even if the Court of Appeals were justified in substituting “open account” for “account receivable,” which it was not, the meaning of the statute cannot turn on whether the attorney charged his/her client once or more than once or whether or not the balance fluctuated over time as charges were incurred and payments were made against a balance owed. Nor can the statute of limitations turn on whether or not the attorney provided services on one or more issues, such as providing a will and also defending the client in a lawsuit, or whether there were many charges for services on a single issue. The statute appropriately requires only that there is a balance on account (“account receivable”) incurred in the ordinary course of business.

(4) Historical continuity and consistency

Although this is a matter of first impression to the Washington Supreme Court, the statute has been effective for seventeen years. It can be reasonably inferred, and the court may take judicial notice, that businesses, attorneys and courts have relied on the statute for seventeen years, accepting the clear meaning of the term “account receivable” and conducting their commercial affairs accordingly. It is imperative that Washington commerce be able to rely on the stability of Washington statutes.

(5) Prior Case Authority

(a) Contrary to Division I Court of Appeals.

Though decided on other grounds, the court in *Bogle & Gates v. Zapel*, 121 Wash.App. 444, 90 P.3d 703 (2004) explicitly states that in a suit by an attorney for collection of unpaid attorney fees “RCW 4.16.040 (2) provides that such a suit must commence within six years.”

(b) Misstatement of Authority from Division I, Court of Appeals.

The decision of the Court of Appeals, Division III, cited *Bogle & Gates v. Holly Mountain Resources*, 108 Wn.A00. 557, 32 P.3d 2 (2001) from the Court of Appeals, Division I, as authority from a

sister court. The Division III court misstates the ruling of the Division I court. Contrary to the statement of the Court of Appeals, Division III, the Division I court explicitly declined to interpret RCW 4.16.040(2). Any reliance by the Division III court on this cited case was erroneous.

D. Conclusion

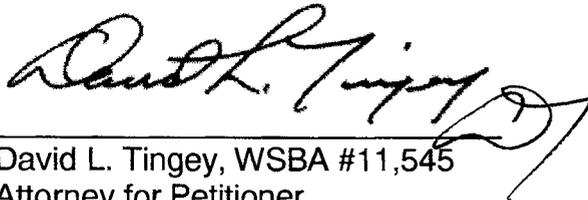
The Court of Appeals, Division III decision (1) finds ambiguity where there is clear meaning; (2) is inconsistent with a statutory definition of “account,” (3) is in conflict with a prior Court of Appeals, Division I statement, (4) is contrary to a Washington Practice statement on RCW 4.16.040(2) and *Black’s Law Dictionary* definition of the term “account receivable,” (5) is inconsistent with use of the term throughout Washington’s sister states, and (6) if upheld would upset a long-standing commercial practice in Washington. The Court of Appeals also fails to follow accepted protocols of statutory construction. It also fails to recognize and implement clear legislative intent even after it erroneously finds ambiguity where there is none.

The Division III Court of Appeals decision bars attorneys’ from the “right to payment for ... services rendered ...” under RCW 4.16.040(2). The holding leaves unanswered how the statute

would apply under the Court of Appeals holding to other licensed professionals such as accountants, architects, and physicians, etc. but implies without stating that these professionals would also be excluded from the statute.

This Court should reverse the Court of Appeals decision.

Respectfully submitted this day of May 31, 2006.



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