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54017-3

77974-1

No. 54017-3-1

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

JOY SHEPHERD,

Appellant

v.

UNITED COLLECTION SERVICE, INC.,

Respondent.

RESPONDENT'S BRIEF

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Does the retroactive application provision in an amendment to a statute passed after a Court decision construing the original statute constitute an unconstitutional violation of the separation of powers doctrine when the original statute was not ambiguous, the retroactive amendment is not curative and does not purport to correct the prior judicial interpretation of the original statute?

2. Can the appellant now ask for relief that had not been requested in the lower court?

STATEMENT OF THE CASE:

Joy Shepherd was one of the defendants in the lower court and is the appellant herein.

Judgment was entered in favor of the plaintiff and against the defendants in the Superior Court case in this matter on August 21, 1986. Joy Shepherd was named as Jane Doe Shepherd in that case, and is referred to herein as Shepherd. She was at all time material hereto married to W. Austin Shepherd, Jr. It is not contested that Joy Shepherd is the defendant named as Jane Doe Shepherd in the judgment.

The judgment was assigned to United Collection Service, Inc., hereinafter referred to as United, the respondent herein, on October 19, 1987. On July 8, 1996, United caused an order to be entered pursuant to R.C.W. 6.17.020 extending the judgment for ten years.

The Supreme Court of the State of Washington in *J.D. Tan, L.L.C. v. Summers*, 107 Wn. App. 266, 26 P.3d 1006 (2001), held that the plain unambiguous language of R.C.W. 6.17.020 did not permit anyone other than the original judgment creditor to extend the judgment.

In 2002 the Washington State Legislature amended R.C.W. 6.17.020, hereinafter the 2002 amendment, to provide that the assignee of a judgment, among others, could extend the judgment for ten years, and made the amendment retroactive so as to validate all extensions of judgments made after June 9, 1994.

Shepherd brought a motion to vacate the order extending the judgment for the reason that retroactive application of the 2002 amendments to R.C.W. 6.17.020, as provided in R.C.W. 6.17.020(8) would be unconstitutional. On March 5, 2004, the lower court entered an order denying the defendant's motion to vacate the order extending the judgment for ten years.

Shepherd has appealed from that order.

Appellant has, in addition to her appeal from the order denying her motion, introduced into this appeal a request for relief from the judgment against her beyond the relief sought in her motion to vacate the order extending judgment. Appellant's brief 2, 3,5,18 and 19.

SUMMARY OF ARGUMENT:

1. The 2002 amendment of R.C.W. 6.17.020 providing for retroactive application of the statute is not an unconstitutional violation of the doctrine of separation of powers because there was no prior judicial interpretation of an ambiguity in the statute.

2. The request of the appellant Joy Shepherd for relief from the judgment in this matter should be denied because she has not asked for this relief in the lower court and should not now be able to seek that relief in the appellate court.

ARGUMENT:

The 2002 amendments to R.C.W. 6.17.020 are not unconstitutional.

There is no restriction in the Constitution of the State of Washington or the Constitution of the United States that prohibits passage of the amendments.

The legislature has the power to make any law not prohibited by the state or federal constitution. In *Union High Etc. v. The Taxpayers Etc.*, 26 Wn.2d 1, 172 P. 2d 591 (1946), the court said at pages 5 and 6:

It is an elementary principle of constitutional law, universally accepted, that, where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. 11 Am. Jur. 776, Constitutional Law, § 128. This court has upheld that principle many times. In *Robb v. Tacoma*, 175 Wash. 580, 28 P. (2d) 327, 91 A. L. R. 1010, we said:

In passing upon the constitutionality of a legislative enactment, several things must always be kept in mind. Courts do not sit to review or revise legislative action, but rather to enforce the legislative will when acting within its constitutional limits. A legislative act carries with it the presumption of its constitutionality, and will not be declared void unless its invalidity appears beyond a reasonable doubt. If the act is fairly and reasonably open to more than one construction, that construction will be adopted which will harmonize the statute with the constitution and avoid a conflict therewith.

In *State v. Hanlen*, 193 Wash. 494, 76 P. (2d) 316, the court declared:

It is presumed that the statute in question is constitutional and the burden rests upon appellant [the attacking party] to establish clearly its invalidity.

And further at pages 6 & 7:

Closely allied to the foregoing principle, and as a proposition to be kept in mind when considering the power of the legislature to make laws, is another fundamental and elementary rule that the power of the legislature in that respect is unrestrained unless expressly or by fair inference it is prohibited by the state or Federal constitution.

It is elementary constitutional law that the legislature of a state may enact any law not expressly or inferentially prohibited by the constitution of the state or nation. *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

In this respect, there is a distinct difference between the operative effect of the Federal constitution and that of a State constitution. The Federal constitution is a *grant* of power, whereas the state constitution is a *limitation* upon legislative power.

The state constitution is a limitation upon the actions and powers of the legislature, instead of a grant of power. So far as the power of the legislature is not limited by the constitution, it is unrestrained. *Standard Oil Co. v. Graves*, 94 Wash. 291, 307, 162 Pac. 558.

With these principals in mind the court must ask “was there a constitutional limitation on the power of the legislature to pass the 2002 law amending R.C.W. 6.17.020 and making the amendment retroactive?”

The answer is no. Shepherd does not argue that the legislature did not have the power to pass the 2002 amendment to R.C.W. 6.17.0020 in the absence of either 1. conflict with a prior court decision construing the statute sought to be amended, 2. interference with a vested right, or 3. interference with a contractual right.

Shepherd urges that the 2002 amendment to R.C.W. 6.17.020 providing that all extensions of judgments subsequent to June 9, 1994 made by assignees of the original judgment creditor shall be valid, is unconstitutional because it conflicts with a prior decision of this court in *J.D. Tan, L.L.C. v. Summers*, *supra*, construing that amendment. United

submits that there is no conflict between the court decision and the 2002 amendment.

In all of her arguments Shepherd fails to address the true question in this case which is: Does the retroactive application provision of a law amending a statute after a court decision determining that the original statute is unambiguous constitute an unconstitutional attempt by the legislature to overrule the prior judicial decision when the amendment does not purport to correct the prior judicial decision regarding the original statute?

Shepherd argues that the retroactive provisions of the 2002 amendment to R.C.W. 6.17.020 were beyond the power of the legislature to make in that it was an unconstitutional attempt to usurp the power of the court and become a "court of last resort".

In *McGee Guest Home v. DSHS*, 142 Wn.2d 316, 12 P.3d 144 (2000), the court said:

"Generally, statutory amendments apply prospectively. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 181, 930 P.2d 307 (1997). However, an amendment will be applied retroactively if, "(1) the legislature so intended; (2) it is 'curative'; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition." *State v. Cruz*, 139 Wn.2d 186, 191, 985 P.2d 384 (1999)..."

It is to be noted that in *McGhee Guest House, supra*, the court did not mention a prior inconsistent court decision and approved application

of the amendment retroactively because it was curative, and thus a different case than the case before this court.

The legislature clearly intended the 2002 amendment to be applied retroactively. It reads in part:

The chapter 261, Laws of 2002 amendments to this section apply to all judgments currently in effect on June 13, 2002, to all judgments extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed, and to all judgments filed or rendered, or both, after June 13, 2002.

Landgraf v. USI Film products, 511 U.S. 244 (1994) cited by Shepherd for the proposition that there is a presumption that a law is to operate prospectively is not applicable here. The presumption of prospective operation is overcome by the clear legislative intent of the statute. *Landgraf* further held that there was no legislative intent that the statute before it was to operate retroactively.

The 2002 amendment to R.C.W. 6.17.020 is not curative. An amendment is curative only if it clarifies or technically corrects an ambiguous statute. *In Re F.D. Processing*, 119 Wn.2d at 452, 119 P.2d 1303 (1992). Ambiguity only exists when a law "can be reasonably interpreted in more than one way." *Vashon Island v. Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995).

The court in *J.D. Tan v. Summers*, *supra*, did not construe an ambiguous statute. The court in that case held that the provision of R.C.W. 6.17.010 before it was not ambiguous, and that was the basis of

the court's decision. United submits that if the court could have found an ambiguity, it could have and would have found that an assignee of a judgment could extend the judgment under the 1994 statute.

Wishing that retroactive application of the 2002 amendment is unconstitutional will not make it so, and stating over and over again that retroactive application of the 2002 amendment is unconstitutional, as Shepherd does in her brief, likewise will not make it so.

Shepherd does not cite one case that is on point in this case that supports her position.

Defendant Shepherd agrees that *J.D. Tan, L.L.C. v. Summers*, *supra*, declares the 1994 statute to be unambiguous and urges this point in her brief on pages 7, 8 and 14, quoting that case on page 14 of her brief as follows:

Since the statute is not amenable to more than one interpretation, it is not ambiguous, and the trial court did not err in enforcing it as written. 107 Wn. App. 266, 269.

A statute which is clear on its face is not subject to judicial interpretation. *Johns v. Erhart*, 85 Wn. App. 607, 934 P.2d 701 (1997); *Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993)

The legislature did not by its 2002 amendments seek to overrule what it thought to be an incorrect judicial interpretation of an ambiguity in R.C.W. 6.17.020. It is necessary that an amendment must have been an amendment of an ambiguous statute which has been the subject of a

prior judicial interpretation and the amendment must contravene that judicial interpretation before the retroactive application of a statute will be held to be an unconstitutional attempt by the legislature to usurp the power of the court. *Marine Power v. Human Rights Comm 'n*, 39 Wn. App. 609, 694 P.2d 697 (1985).

Shepherd has cited many cases for the proposition that the legislature may not amend an unambiguous statute and give the amendment retroactive effect after the court has interpreted the statute prior to the amendment where the amendment is contrary to the judicial interpretation because such power would make the legislature a court of last resort. Shepherd contends that would be a breach of the doctrine of separation of powers between the legislative branch and the judicial branch of the state government.

Johnson v. Morris, 87 Wn. 2d, Wn.2d 922, 557 P.2d 1299 (1976), is not a ruling on this issue. The court declined to reach that issue. As to the issue posed in this case, *Johnson, supra*, contains merely dicta.

The court in *Johnson v. Morris, supra*, went on to find that retroactive application of the amendment before it would be a violation of the restriction on ex post facto laws and held retroactive application of the statute would be unconstitutional because it would inflict a greater restriction on the defendant's liberty, saying on page 927:

“A statute is ex post facto when it inflicts a greater punishment for the commission of a crime than that which was originally annexed to the crime when committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1796).

And at page 928:

It is true that the ex post facto prohibition applies only to laws respecting criminal punishment. *Johannessen v. United States*, 225 U.S. 227, 56 L. Ed. 1066, 32 S. Ct. 613 (1912); *State ex rel. Hagen v. Superior Court*, 139 Wash. 454, 247 P. 942 (1926).”

Appellant’s brief contains a quote from *Johnson, supra*, on page 15 of the brief to the effect that the legislature does not have the power to retroactively “clarify” an existing statute when that “clarification” would in effect over-rule a previous construction of the statute as determined by a decision of that court. That rule has no bearing in this case because the 2002 amendment before this court is not a clarification of the existing unambiguous statute.

Further and much more pertinent quotes from that case are:

However, we need not decide here whether the legislature has such authority. 87 Wn.2d at 926

and:

There is a presumption, well established, that a new legislative enactment is an amendment rather than a clarification of existing law. *Bowen v. Statewide City Employees Retirement Sys., supra*, (72 Wn.2d 397, 433 P.2d 150 (19676)); *Fisher Flouring Mills Co. v. State*, 35 Wn.2d 482 213 P.2d 938 (1950). 87 Wn.2d at 926

The ruling in *Johnson v. Morris, supra*, had nothing to do with the issue now before the court. That ruling held that the statute before the

court, which gave the juvenile court the power to extend its jurisdiction over a juvenile from age 18 to age 21, could not be retroactively applied because it resulted in an increased restraint of liberty and was ex post facto punishment, although the law may be deemed civil, rehabilitative or remedial.

While *Johnson v. Morris*, *supra*, did not rule on the issue before this court, nevertheless, United agrees that the dicta in that case is the law in the State of Washington, but urges that it is not germane to this case.

The court said in *Marine Power v. Human Rights Comm'n*, *supra*:

" The usual purpose of a special interpretive statute is to correct a JUDICIAL INTERPRETATION of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is PROSPECTIVE ONLY. Any other result would make the legislature a court of last resort. (Footnote omitted. Italics ours.) 1A C. Sands, STATUTORY CONSTRUCTION 27.04, at 313 (4th ed. 1973). The Washington Supreme Court recognized this exception in JOHNSON v. MORRIS, SUPRA at 925-26. The JOHNSON court did not decide whether the Legislature may retroactively clarify an existing statute when that clarification contravenes a prior state Supreme Court interpretation of the statute. However, citing the treatise quoted above, the court suggested that such legislative authority would create serious issues concerning the doctrine of separation of powers. JOHNSON, at 926. We find this dicta persuasive. The Legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute.

However, direct confrontation of this issue may be avoided in this case if the 1983 enactment amends, rather than clarifies, an existing statute.

The following cases cited by Shepherd are not determinative here because they do not involve the same facts as the case before the court.

Carpenter v. Butler, 32 Wn.2d 371, 201 P.2d 704 (1949) did not involve a prior judicial interpretation of a statute amended by the legislature, and thus has no application to this case. The court did, however, in that case hold the amendment was remedial and should be construed broadly to accomplish its purpose. The court failed to find interference with a contractual right, as urged by the appellant, and gave the amendment retroactive effect.

In re Estate of Burns, 131 Wn.2d 104, 928 P.2d 1094 (1997) is a case where the parties and the court agreed that the legislature only intended prospective application of the amendment. Retroactive application of the statute was never an issue. That case is not apropos to the instant case.

In re F.D. Processing, supra, did not involve a judicial construction of a statute prior to its amendment. There was no separation of powers issue. Further the court held that there was no indication that the legislature intended the amendment to operate retroactively. The

court held that the amendment could not operate retroactively because it interfered with a vested right.

Magula v. Benton Franklin County Title Co., 131 Wn.2d 171, 930 P.2d 307 (1997) involved a case where the legislature amended an ambiguous statute that the court had previously construed, which amendment was in conflict with the previous court decisions. The case held that the amendment could not be applied retroactively citing *Johnson v. Morris, supra*, and *Overton v. Economic Assistance Authority*, 96 Wn.2d 552, 637 P.2d 652 (1981). That decision is in accord with the law, but is not the case that is now before the court.

Overton v. Economic Assistance Authority, supra involved an amendment clarifying an ambiguous statute, which had not been the subject of judicial review. The court found that the amendment in question was not a substantive change in the meaning or intent of the statute.

State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999) stated that there is a presumption that statutes operate prospectively only, absent a legislative intent, express or implied, that the statute shall operate retroactively. The court in this case found that there was no intent that the statute should operate retroactively.

State v. Dean, 113 Wn. App. 691, 54 P.3d 243 (2002) involved an amendment to an ambiguous statute that contravened a prior judicial construction of the statute. The court vacated the defendant's sentence and remanded the matter for proper sentencing.

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987) involved an amendment to an ambiguous statute that had previously been the subject of a judicial interpretation. The court declined to apply the amendment retroactively.

State v. Edwards, 45 Wn. App. 378, 725 P.2d 442 (1986) is a case involving a statute enacted in 1981 and its application to a criminal case occurring in 1985. There is no mention of an amendment to the original statute. The case was remanded for sentencing because the trial court had incorrectly construed the sentencing statute and had improperly calculated the defendant's sentence.

State v. Taylor, 47 Wn. App. 118, 734 P.2d 505 (1987) involves an amendment clarifying an ambiguous statute where there was no prior judicial interpretation of the statute. The court further indicates that the amendment before it did not change the existing law. The court found no reason not to apply the amendment retroactively.

State v. T.K., 139 Wn.2d 320, 987 P.2d 63 (1999) is a case in which there was no prior court decision interpreting the statute. The court held the amendment to be prospective only because it conflicted with a vested right.

Succinctly stated, the law is, as Shepherd urges, that the legislature may not pass a retroactive amendment to an ambiguous statute contravening a prior court decision interpreting the ambiguous statute, because to hold otherwise would make the legislature a “court of last resort” and constitute an unconstitutional intrusion on the court’s authority.

However, that is not the case before this court. This case involves retroactive amendment of an unambiguous statute which was not subject to interpretation

The 2002 amendment to R.C.W. 6.17.020 is remedial. United submits that the controlling law is set forth in *Marine Power v. Human Rights Comm’n*, *supra*. That case involved a claim for an award for damages for emotional distress as a result of discrimination suffered by the claimant prior to February, 1982, pursuant to R.C.W. 49.60.250. That statute was interpreted in *Human Rights Comm’n v. Cheny Sch.*, 97 Wn.2d 118, 641 P.2d 163 (1982) as failing to provide hearing tribunals operating under it with any authority to award monetary damages for any

type of discrimination. In 1983 the legislature amended R.C.W. 49.650.250, adding a provision that the hearing tribunal could award monetary damages for discrimination. The court, finding a legislative intent to do so, applied the amendment retroactively and awarded the claimant damages in the amount of \$1,000.00.

At pages 614 and 615 the court said:

We now address the significance of the 1983 amendment. The Commission contends the 1983 amendment applies retroactively because it clarifies the original statute and thereby overrules the *Cheney* decision. Alternatively, the Commission argues that the 1983 amendment applies to the present case because the legislative action is remedial, and remedial statutes, absent legislative intent to the contrary, apply retroactively. Concerning the first prong of their argument, the Commission asserts that the 1983 amendment is an interpretation or a clarification correcting an erroneous judicial interpretation of the Legislature's original intent. Though legislative clarifications, as opposed to amendments, are generally retroactive and effective from the original date of the statute, *Johnson V. Morris*, 87 Wn.2d 922, 925, 557 P.2d 1299 (1976), an exception to this rule is applicable here. The exception may be stated as follows:

" The usual purpose of a special interpretive statute is to correct a *judicial interpretation* of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is *prospective only*. Any other result would make the legislature a court of last resort."

(Footnote omitted. Italics ours.) 1A C. Sands, *Statutory Construction* 27.04, at 313 (4th ed. 1973). The Washington Supreme Court recognized this exception in *Johnson V. Morris*, *supra* at 925-26. The *Johnson* court did not decide whether the Legislature may retroactively

clarify an existing statute when that clarification contravenes a prior state Supreme Court interpretation of the statute. However, citing the treatise quoted above, the court suggested that such legislative authority would create serious issues concerning the doctrine of separation of powers. *Johnson*, at 926. We find this dicta persuasive. The Legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute. However, direct confrontation of this issue may be avoided in this case if the 1983 enactment amends, rather than clarifies, an existing statute. «2»

«2» Separation of powers problems arise when the Legislature attempts to perform a judicial function. The function of a legislature is to make laws, not to construe them. Nor can the Legislature construe the intent of other legislatures. The latter functions are primarily judicial. Thus, legislative clarifications construing, or interpreting existing statutes are unconstitutional when they contravene prior judicial interpretations of a statute. However, the Legislature is empowered to change or amend existing laws and may, in certain situations, apply such amendments retroactively.

Under Washington law, a new legislative enactment is presumed to be an amendment rather than a clarification of existing law. *Johnson*, at 926. This presumption may be rebutted, however, if circumstances indicate that the Legislature intended to clarify an existing statute. *Johnson*, at 926. One well recognized indication of legislative intent to either clarify or amend is the existence or nonexistence of ambiguities in the original act. *Bowen V. Statewide City Employees Retirement Sys.*, 72 Wn.2d 397, 403, 433 P.2d 150 (1967). In general, legislative amendments change unambiguous statutes and legislative clarifications interpret *ambiguous* statutes. *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 557, 637 P.2d 652 (1981); *Vita Food Prods., Inc. V. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978); see *Bowen V. Statewide City*

Employees Retirement Sys., supra at 403. In the present case, since the *Cheney* court held that the original discrimination statute contained no express or implied authority for granting the damage awards at issue, any ambiguities in the statute regarding such authority were resolved as of the date of *Cheney*. We conclude, therefore, that the 1983 enactment was intended to amend the original statute and provide an additional remedy which, according to *Cheney*, had not previously existed. This conclusion is supported by *Johnson V. Morris, supra*, and *Fairley V. Department Of Labor & Indus.*, 29 Wn. App. 477, 483, 627 P.2d 961, *review denied*, 95 Wn.2d 1032 (1981).

And at page 616, the court said:

The *Fairley* and *Johnson* opinions indicate that legislative enactments which respond to judicial interpretations of a prior statute, and which materially and affirmatively change that prior statute, are not "clarifications" of original legislative intent. Rather, such enactments are amendments to the statute itself. Since the 1983 Legislature's response to CHENEY was to add a remedy, rather than to clarify prior intent, we think the 1983 enactment at issue in the present case amends, rather than clarifies, the original statute.

The legislature in this case was not clarifying an ambiguous statute. It was amending an unambiguous statute. *J.D. Tan, L.L.C. v. Summers, supra*. The 2002 amendment is a remedial statute. It provides for a change in a procedure for enforcement of judgments, i.e. a change in the statute of limitation.

In *Marine Power v. Human Rights Comm'n, supra*, the court indicated that the legislature is empowered to change or amend existing laws. The legislature in this case changed a statute of limitation. The

provisions of R.C.W. 6.17.020 are a statute of limitation in so far as the statute restricts a judgment creditor to ten years, or twenty years in those cases where the judgment has been extended, within which he may obtain a writ of execution to enforce his judgment.

The 2002 amendment is remedial. In *Tellier v. Edwards*, 56 Wn.2d 652, 354 P. (2d) 925 (1960) the court said:

A statute is remedial and has a retroactive application when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right. *Nelson v. Department of Labor & Industries*, 9 Wn. (2d) 621, 115 P. (2d) 1014; and cases cited; *Bodine v. Department of Labor & Industries*, 29 Wn. (2d) 879, 190 P. (2d) 89. See, also, 50 Am. Jur., Statutes, 505, § 482; 82 C. J. S., Statutes, 996, § 421. The reason for this rule is that a party does not have a vested right in any particular form of procedure. *White v. Powers*, 89 Wash. 502, 154 Pac. 820.

Remedial statutes are applied retroactively. *State v. McClendon*, 131 Wn.2d 853, 935 P.2d 1334 (1997); *Olesen v. State*, 78 Wn. App. 910, 899 P.2d 837 (1995); *Seek Systems v. Scully-Walton, Inc.*, 55 Wn. App. 318, 777 P.2d 560 (1989)

Shepherd claims that the judgment has expired and asks the court to find that she has a vested right not to have the judgment extended and argues that the retroactive application of the 2002 amendment is an unconstitutional interference with that right.

United submits that the judgment had not expired prior to the 2002 amendments. The judgment still existed, only the right of the judgment creditor to obtain a writ of execution was limited.

The limitation contained in R.C.W. 6.17.020 limiting the right of the judgment creditor to obtain a writ of execution pursuant to a judgment to ten years is a statute of limitation. *Smith v. Whatcom County District Court*, 149 Wn.2d 98 (2002); *Marriage of Capetillo*, 85 Wn. App. 311, 932 P.2d 691 (1997); *Marriage of Hunter*, 52 Wn. App. 265, 758 P.2d 1019 (1988)

The bar provided to a debtor preventing a creditor from enforcing a right does not extinguish the obligation. A number of cases so hold. In *Walcker v. Benson & McLaughlin*, 79 Wn. App. 739, 904 P.2d 1176 (1995), the court said:

In addition, a statute of limitation does not invalidate a claim, but rather "deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim." *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985).

The court said in *Jordan v. Bergsma*, 63 Wn. App. 825, 822 P.2d 319 (1992):

Although enforcement of an obligation may be barred by the statute of limitations, the obligation does not become void. In *Lane v. Department of Labor & Indus.*, 21 Wn.2d 420, 426, 151 P.2d 440 (1944), the Supreme Court stated that in regard to a true statute of limitations, "although a

remedy may become barred thereunder, the right or obligation is not extinguished." The court echoed this reasoning in *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985), stating, "[a] statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim." (Italics ours.)

And in *Lombardo v. Mottola*, 18 Wn. App. 227, 566 P.2d 1273 (1977)

the court said:

[1] The general rule prevailing in most jurisdictions, including our own, is that the running of the statute of limitations on a debt does not extinguish the debt but merely bars the remedy for the recovery of the debt. IN RE ESTATE OF SMITH, 179 Wash. 417, 38 P.2d 244 (1934).

In *Opitz v. Hayden*, 17 Wn.2d 347, 373, 135 P. (2d) 819 (1943), the

court said:

With reference to appellant's contention that the statute of limitations had run against any claim which respondent might have had for seduction, it is sufficient to say that, while the statute may have barred an action for damages on that score, it did not extinguish the claim nor render it insufficient to support a subsequent promise to compensate for the wrong done. The statute runs against the remedy only, not against the right. In re Smith's Estate, 179 Wash. 417, 38 P.2d 244 (1934)

And in *Blodgett v. Orton*, 14 Wn.2d 270, 274, 127 P.2d 671 (1942) the

court said:

[2] It is said, however, that the statute of limitations had run against the note, and, therefore, there would be no prejudice. Admitting, without deciding, that the statute of

limitations had run against the note, nevertheless the amount thereof could be offset against the amount which the appellant would receive under Mrs. Zulauf's will, because the general rule is, with respect to debts and money judgments, that a statute of limitations bars the remedy, but does not extinguish the debt. In re Smith's Estate, 179 Wash. 417, 38 P. (2d) 244; In re Tibbits' Estate, 9 Wn. (2d) 415, 115 P. (2d) 381.

And finally the court has said in *In Re Tibbits Estate*, 9 Wn.2d 415, 417, 115 P. (2d) 381 (1941):

[1] There is no merit in the first of these contentions. This was not an action on a note, but a claim to offset an indebtedness. By the weight of authority, this may be done, even though the statute of limitations has run, since the running of the statute merely prevents the bringing of an action; it does not cancel the indebtedness. We have, on that theory, consistently allowed such offsets in the settlement of estates. The reasons for so doing are quite fully set out in the opinion in *In re Smith's Estate*, 179 Wash. 417, 38 P. (2d) 244.

The foregoing strong, consistent statement of the law establishes that the judgment had not expired. The judgment creditor was merely unable to obtain a writ of execution to enforce the judgment.

Shepherd urges the court to conclude that the entry of the order extending the judgment was void ab initio and it was error for the lower court not to vacate it. The order was not void. The judgment was still in existence, only the procedural remedy of execution was unavailable. The 2002 amendment gave the remedy of execution to those assignees of judgments or the current holders of judgments who had extended their

judgments. The legislature must have intended that such orders extending judgments were not void.

Shepherd has further urged that the retroactive application of the 2002 amendment to this case would interfere with a contractual right. She does not set out what that contractual right might be.

Shepherd raises the question as to what the effect of applying the 2002 amendments retroactively would have on mortgages, deeds of trust, sales of real property, etc., made after extension of a judgment by anyone other than the person in whose favor the judgment was entered and before the effective date of the 2002 amendments. United submits that in such cases retroactive application of the 2002 amendments might be unconstitutional to the extent the 2002 amendments conflict with a vested right or a contractual right, and the question should be considered on a case by case basis.

Next Shepherd would have the court read the 2002 amendment in a torturous manner by reading the words by the original judgment debtor into the amendment so as to make retroactive application of the 2002 amendment constitutional. The court can no more read these words into the 2002 amendment than it could have read the words “or assignee or the current holder thereon” into the original 1994 statute.

United agrees with the appellant. Where a statute is susceptible to more than one interpretation, it is the duty of the legislature to adopt a construction sustaining its constitutionality if at all possible.

In addition, if alternative interpretations are possible, the one that best advances the overall legislative purpose should be adopted.

Weyerhaeuser v. Dept of Ecology, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

The court has stated in *Anderson v. O'Brien*, 84 Wn.2d 64, 67, 524 P.2d 390 (1974):

The primary objective of statutory construction is to carry out the intent of the legislature.

And that is just what the court should do in this case, find a way to give effect to the legislature's intent in the 2002 amendment, rather than, as Shepherd urges, find a way not to give effect to the legislature's intent.

It is clear from the foregoing that retroactive application of the 2002 amendment to R.C.W. 6.17.020 is not unconstitutional.

Joy Shepherd seeks to have this court rule that the judgment against her is not really a judgment against her in her individual capacity.

She asks this court to "clarify that the judgment only applied to Joy Shepherd's community interests." Appellant's Brief pg. 2, 18, 19
This relief was not sought in the motion to vacate the order extending

judgment nor in her memorandum in support of motion to vacate order extending judgment. The only reference in the lower court to exempting Ms. Shepherd from this judgment in her individual capacity is in her reply memorandum in support of her motion to vacate the order extending judgment. CP 42

This court should not consider matters that were not presented to the lower court. In *Martin v. Metro. Seattle*, 90 Wn.2d 39, 578 P.2d 525 (1978) the court said:

“This court has consistently held that claims not presented at trial will not be considered upon appeal. *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978). *International Tracers of America v. Hard*, 89 Wn.2d 140, 570 P.2d 131 (1977). More particularly, we have declined to pass on the rights of parties where relief asked for on appeal was not part of either the prayer for relief or the theory of the case presented to the trial court. *Stewart v. Johnston*, 30 Wn.2d 925, 195 P.2d 119 (1948). We also recently have stressed that "We are committed to the rule that, insofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund v. Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976). Appellant's request is not consistent with these cases.”

Appellant is making this request for relief because she failed to appeal from the order granting summary judgment and cannot now make that appeal.

Shepherd further suggests to the court that the judgment should be vacated pursuant to CR 60(b). The lower court did not have such a

motion before it and the appellant has failed to follow the provisions of CR 60(b) for relief from the judgment.

In short, there is nothing on appeal relating to relief for Joy Shepherd from the judgment.

In the event the court decides to consider the defendant's request to relieve her from the judgment, United suggests that the judgment is plain and unambiguous and not now subject to disturbance. The judgment is

“...against *defendants W. Austin Shepherd, Jr. and Jane Doe Shepherd, his wife, and their marital community...*”
(Italics mine) CP 1

There simply is no basis for changing the judgment. Joy Shepherd, who was represented by counsel in this matter had her opportunity to make her defenses to the motion for summary judgment at the time the motion was made. The summary judgment order recites:

“... the court having examined the records and files herein including the Exhibits attached to plaintiff's motion, the affidavit of Alex Shulman, with attachments, and counsel for plaintiff, the court having heard argument of counsel for plaintiff and for defendants Shepherd, and it appearing from the Pleadings, Affidavits and Exhibits and said arguments that *defendants W. Austin Shepherd, Jr. and Jane Doe Shepherd, his wife, and their marital community* are liable to plaintiff...” (Italics mine) CP 2

The intent of the trial court to enter the judgment against the defendant Joy Shepherd could not be more plainly demonstrated, and the judgment should not be disturbed.

CONCLUSION:

The 2002 amendment to R.C.W. 6.17.020 is not unconstitutional and the lower court's order denying Shepherd's motion for an order vacating the order extending the judgment should be denied.

Respectively submitted December 30, 2004.

W.D. Palmer, Sr.

A handwritten signature in black ink, appearing to read "W.D. Palmer Sr.", written over a horizontal line.

Attorney for Respondent
United Collection Service, Inc.
Washington State Bar Association
No. 2274

APPENDIX:

1. R.C.W. 6.17.020 as amended by Chapter 261, Laws of 2002.

RCW 6.17.020

Execution authorized within ten years -- Exceptions -- Fee --

Recoverable cost.

(1) Except as provided in subsections (2), (3), and (4) of this section, the party in whose favor a judgment of a court has been or may be filed or rendered, or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued for the collection or enforcement of the judgment at any time within ten years from entry of the judgment or the filing of the judgment in this state.

(2) After July 23, 1989, a party who obtains a judgment or order of a court or an administrative order entered as defined in RCW 74.20A.020(6) for accrued child support, or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued upon that judgment or order at any time within ten years of the eighteenth birthday of the youngest child named in the order for whom support is ordered.

(3) After June 9, 1994, a party in whose favor a judgment has been filed as a foreign judgment or rendered pursuant to subsection (1) or (4)

of this section, or the assignee or the current holder thereof, may, within ninety days before the expiration of the original ten-year period, apply to the court that rendered the judgment or to the court where the judgment was filed as a foreign judgment for an order granting an additional ten years during which an execution, garnishment, or other legal process may be issued. If a district court judgment of this state is transcribed to a superior court of this state, the original district court judgment shall not be extended and any petition under this section to extend the judgment that has been transcribed to superior court shall be filed in the superior court within ninety days before the expiration of the ten-year period of the date the transcript of the district court judgment was filed in the superior court of this state. The petitioner shall pay to the court a filing fee equal to the filing fee for filing the first or initial paper in a civil action in the court, except in the case of district court judgments transcribed to superior court, where the filing fee shall be the fee for filing the first or initial paper in a civil action in the superior court where the judgment was transcribed. The order granting the application shall contain an updated judgment summary as provided in RCW 4.64.030. The filing fee required under this subsection shall be included in the judgment summary and shall be a recoverable cost. The application shall be granted as a matter of right, subject to review only for timeliness, factual issues of full or partial satisfaction, or errors in calculating the

judgment summary amounts.

(4) A party who obtains a judgment or order for restitution, crime victims' assessment, or other court-ordered legal financial obligations pursuant to a criminal judgment and sentence, or the assignee or the current holder thereof, may execute, garnish, and/or have legal process issued upon the judgment or order any time within ten years subsequent to the entry of the judgment and sentence or ten years following the offender's release from total confinement as provided in chapter 9.94A RCW. The clerk of superior court, or a party designated by the clerk, may seek extension under subsection (3) of this section for purposes of collection as allowed under RCW 36.18.190, provided that no filing fee shall be required.

(5) "Court" as used in this section includes but is not limited to the United States supreme court, the United States courts of appeals, the United States district courts, the United States bankruptcy courts, the Washington state supreme court, the court of appeals of the state of Washington, superior courts and district courts of the counties of the state of Washington, and courts of other states and jurisdictions from which judgment has been filed in this state under chapter 6.36 or 6.40 RCW.

(6) The perfection of any judgment lien and the priority of that judgment lien on property as established by RCW 6.13.090 and chapter 4.56 RCW is not altered by the extension of the judgment pursuant to the provisions of this section and the lien remains in full force and effect and does not have to be rerecorded after it is extended. Continued perfection of a judgment that has been transcribed to other counties and perfected in those counties may be accomplished after extension of the judgment by filing with the clerk of the other counties where the judgment has been filed either a certified copy of the order extending the judgment or a certified copy of the docket of the matter where the judgment was extended.

(7) Except as ordered in RCW 4.16.020 (2) or (3), chapter 9.94A RCW, or chapter 13.40 RCW, no judgment is enforceable for a period exceeding twenty years from the date of entry in the originating court. Nothing in this section may be interpreted to extend the expiration date of a foreign judgment beyond the expiration date under the laws of the jurisdiction where the judgment originated.

(8) The chapter 261, Laws of 2002 amendments to this section apply to all judgments currently in effect on June 13, 2002, to all judgments

extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed, and to all judgments filed or rendered, or both, after June 13, 2002.

[2002 c 261 § 1; 1997 c 121 § 1; 1995 c 231 § 4; 1994 c 189 § 1; 1989 c 360 § 3; 1987 c 442 § 402; 1980 c 105 § 4; 1971 c 81 § 26; 1929 c 25 § 2; RRS § 510. Prior: 1888 p 94 § 1; Code 1881 § 325; 1877 p 67 § 328; 1869 p 79 § 320; 1854 p 175 § 242. Formerly RCW 6.04.010.]

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COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

JOY SHEPHERD,)
)
Appellant,)
)
vs.)
)
UNITED COLLECTION SERVICE, INC.,)
)
Respondent.)
_____)

No. 54017-3-1

DECLARATION OF MAILING

2005 JUN -3 AM 10:59
[Handwritten mark]

W.D. Palmer, Sr., the undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby declares:

1. That he is the attorney for the Respondent in the above entitled matter.
2. That on December 31, 2004, he placed in the United States mail, first class postage prepaid, an envelope containing a true copy of the respondent's brief in the above entitled matter and this declaration, said envelope being addressed to Marc S. Stern, Attorney at Law, 5610 20th Avenue NW, Seattle, WA 98107.

Dated this 31st day of 2004.

[Handwritten signature: W.D. Palmer, Sr.]
W.D. Palmer, Sr.

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