

78353-5

FILED
FEB 27 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. 53645-1-I

No. _____

IN THE SUPREME COURT
STATE OF WASHINGTON

SAYED ZIA EHSANI, a single man, and GUITTY ZAMANI, a single woman,

Plaintiffs/Respondents

v.

THE MCCULLOUGH FAMILY PARTNERSHIP, a Washington partnership, et. al.,

Defendants

and

DAVID D. CULLEN, an individual,

Petitioner

2006 JUN 18 PM 1:49

PETITION FOR REVIEW

Christopher I. Brain, WSBA #5054
A. Janay Ferguson, WSBA #31246
Tousley Brain Stephens PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
(206) 682-5600

Attorneys for Petitioner

ORIGINAL

2-2287

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER	1
II. CITATION TO COURT OF APPEALS DECISION	1
III. ISSUE PRESENTED FOR REVIEW	2
IV. STATEMENT OF THE CASE	2
V. ARGUMENT	6
A. Summary of Argument	6
B. This Court Should Accept Review to Confirm Restitution Under RAP 12.8 Is An Equitable Remedy and to Apply Relevant Principles of the Law of Restitution.....	10
1. This Court's prior decisions confirm restitution under RAP 12.8 is an equitable remedy and §74 of the Restatement of Restitution is the applicable common law	10
2. The Court of Appeals ignored Restatement of Restitution §74, comment h, which is on all fours with this case.....	11
3. The trial court did not abuse its discretion in denying Ehsani's motion for restitution from Mr. Cullen under Restatement of Restitution §74 and comment h.....	13
C. This Court Should Accept Review Because Knowledge of the Possibility of Reversal of a	

Judgment Does Not Require An Attorney to
Restore the Funds Awarded to His Clients 16

D. This Court Should Accept Review Because the
Decision Has Significant Implications for All
Attorneys Practicing in Washington 19

VI. CONCLUSION..... 20

APPENDIX A DECISION OF THE COURT OF APPEALS

TABLE OF AUTHORITIES

Cases

<i>Breda v. B.P.O. Elks Lake City 1800 SO-620</i> , 120 Wn. App. 351, 90 P.3d 1079 (2004).....	1
<i>Ehsani v. McCullough Family P'ship</i> , 113 Wn. App. 1046, 2002 WL 31106405 at *3 (Wash. Ct. App. Sept. 23, 2002).....	4
<i>Ehsani v. McCullough Family P'ship</i> , Case No. 53645-1-I, 2005 WL 3462780 (2005).....	1, 6, 7, 19
<i>Niemann v. Vaughn Cmty. Church</i> , 154 Wn.2d 365, 113 P.3d 463 (2005).....	14
<i>In re Marriage of Mason</i> , 48 Wn. App. 688, 740 P.2d 356 (1987).....	9, 16, 17, 18, 19
<i>In re Marriage of Stern</i> , 68 Wn. App. 922, 846 P.2d 1397 (1993).....	8, 9, 10, 13, 16
<i>In re McKean</i> , 148 Wn.2d 849, 64 P.2d 1226 (2003).....	6, 14, 19
<i>SAC Downtown Ltd. P'ship. v. Kahn</i> , 123 Wn.2d 197, 867 P.2d 605 (1994).....	8, 9, 10
<i>Spahi v. Hughes-Northwest, Inc.</i> , 107 Wn. App. 763, 27 P.3d 1233 (2001).....	9, 13, 17
<i>State v. A.N.W. Seed Corp.</i> , 116 Wn.2d 39, 802 P.2d 1353 (1991).....	8, 9, 10, 11, 13, 17, 19
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003)	1

Statutes

11 U.S.C. 362(a)	5
RCW 26.09.140	18

Rules

RAP 12.8.....	4, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19
RAP 13.4.....	9, 10, 11, 13, 16, 19, 20

RAP 3.1.....	1
RAP 7.2.....	4, 8, 17
RAP 8.1.....	4, 10, 15, 17
RAP 8.3.....	16, 17
RPC 1.14.....	6, 7, 14, 19

Other Authorities

Restatement of Restitution §74.....	10, 11, 12, 13, 18
Restatement of Restitution §74, comment h (1937)	11, 12, 13, 18
Restatement of Restitution §74, Illustration 20	12, 13, 18

I. IDENTITY OF PETITIONER

Petitioner is David D. Cullen, counsel for the McCullough Family Partnership, David E. McCullough and Chong R. McCullough, Edward F. McCullough, and the McCullough Group (collectively “the McCulloughs”), Defendants in the Superior Court proceedings below. While not a party to those proceedings, Mr. Cullen is an “aggrieved party” under RAP 3.1 and thus may seek review by this Court, as his pecuniary interests have been affected by the Court of Appeals’ decision requiring him to restore funds disbursed to his trust account pursuant to an order of the Superior Court. *See State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003) (“aggrieved party” under RAP 3.1 is “one whose personal right or pecuniary interests have been affected”); *accord, Breda v. B.P.O. Elks Lake City 1800 SO-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (“A lawyer who is sanctioned by a court becomes a party to an action and thus may appeal as an aggrieved party”).

II. CITATION TO COURT OF APPEALS DECISION

Mr. Cullen seeks review of the decision in *Ehsani v. McCullough Family P’ship*, Case No. 53645-1-I, 2005 WL 3462780 (2005), an unpublished opinion filed December 19, 2005, by Division One of the Court of Appeals (“the Decision”). A copy of the Decision is presented in the Appendix.

III. ISSUE PRESENTED FOR REVIEW

Whether an attorney should be compelled to restore funds paid to the attorney's clients in satisfaction of a judgment if that judgment is later reversed on appeal.

IV. STATEMENT OF THE CASE

This petition for review follows nearly a decade of litigation and two unpublished decisions by the Court of Appeals. The details of the underlying litigation between Plaintiff Sayed Zia Ehsani and Defendants, the McCulloughs, do not bear on the issue presented for review, which is limited to equitable principles of restitution after appeal.¹ On June 27, 2000, the dispute culminated in a judgment in favor of the McCulloughs against Mr. Ehsani for \$106,410.50. CP 339. A portion of this judgment, \$97,459, represented the McCulloughs' attorney fees. CP 339. Mr. Cullen, however, was not the judgment creditor. CP 339.

When the judgment was entered, a small portion of the sales proceeds from the property underlying Plaintiff Ehsani's foreclosure action were being held in an escrow account on Mr. Ehsani's behalf, the remainder having been paid directly to Mr. Ehsani and Ms. Zamani. CP 342. The trial court directed that these proceeds, amounting to \$77,900, should be issued to the McCulloughs by check made payable to their

¹ More details about the factual background of this litigation, including the lawsuit giving rise to the judgment at issue here, are set forth in Respondent's briefing in the Court of Appeals proceeding. See Brief of Respondent David Cullen at 2 – 5.

attorney's trust account. CP 342. Mr. Cullen was not bound by any escrow agreement, terms, conditions or restrictions imposed on him or the McCulloughs in conjunction with this disbursement to him. CP 342. The trial court imposed no restrictions on the use of these funds except that they were to be "applied in partial satisfaction of the judgments awarded to the McCulloughs." CP 342.

Mr. Ehsani satisfied this partial judgment in two payments, first on July 3, 2000, in the amount of \$50,000, and the remaining \$27,900 paid on October 10, 2000. CP 353 – 54. The funds were deposited directly in Mr. Cullen's client trust account. CP 274.

As noted above, the trial court awarded a judgment in favor of the McCulloughs against Mr. Ehsani totaling \$106,410.50, including a sum for attorney fees. CP 339. The \$77,900 deposited in Mr. Cullen's trust account only satisfied this judgment **in part**. CP 353 – 354.

The trial court's order did not specify how the \$77,900 partial judgment was to be divided among the McCulloughs' creditors. CP 342. Mr. Cullen did not have a contingent fee agreement with the McCulloughs, so there was no agreement as to Mr. Cullen's entitlement to a specific percentage of any funds the McCulloughs might be awarded in the litigation. CP 270; 275.

The McCulloughs subsequently authorized Mr. Cullen to make disbursements from the trust account to several creditors, including a legal

messenger service, the Court of Appeals, and the McCulloughs' accountant. CP 270; CP 274. The McCulloughs disbursed funds to David McCullough and to "David D. Cullen, Attorneys & Counselors," Mr. Cullen's legal practice. CP 274.

On July 24, 2000, Plaintiff Ehsani filed a Notice of Appeal contesting the judgment entered by the Superior Court. Nothing in the record indicates that Mr. Ehsani made any effort to obtain or post a supersedeas bond under RAP 8.1 to stay enforcement of the trial court's money judgment. RAP 7.2 provides that "[a]ny person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed" by either the supersedeas procedure or by other order of the appellate court. Thus, the McCulloughs appropriately disbursed the funds awarded to them.

On September 23, 2002, in an unpublished per curiam decision, Division One of the Court of Appeals reversed the judgment of the trial court, including the award of attorney fees and costs to the McCulloughs. *See Ehsani v. McCullough Family P'ship*, 113 Wn. App. 1046, 2002 WL 31106405 at *3 (Wash. Ct. App. Sept. 23, 2002). The case was remanded to the trial court. *Ehsani*, 2002 WL at *4.

On remand, Mr. Ehsani moved the trial court for a restitution order pursuant to RAP 12.8, requesting that the court award restitution of the \$77,900 Mr. Ehsani had paid the McCulloughs. CP 158 – 160. Mr.

Ehsani characterized the \$77,900 paid in partial satisfaction of the Amended Judgment as being received by “Defendants’ [the McCulloughs] attorneys, David D. Cullen, Attorneys & Counselors.” CP 159. In fact, as noted above, the funds were deposited in Mr. Cullen’s client trust account, and no funds were disbursed to any party, including Mr. Cullen’s law practice, until the McCulloughs expressly authorized the disbursement. And, Mr. Ehsani’s motion for a restitution order did not include a proposed form of order, so it was unclear whether Ehsani sought restitution from the McCulloughs or from Mr. Cullen. CP 181. Indeed, Mr. Ehsani was precluded from seeking restitution from David and Chong McCullough, as well as Edward McCullough, because they had filed petitions for Chapter 7 bankruptcy. CP 254-255. The automatic stay in bankruptcy² prevented Ehsani from pursuing a request for restitution against them, the judgment creditors in the judgment at issue.³ CP 254 255.

The trial court denied Mr. Ehsani’s motion for restitution against Mr. Cullen as part of its Order on Remand from Appeal on Attorney Fees, and Apportionment of Holdback Funds (“Order on Remand”). CP 291

² See 11 U.S.C. 362(a).

³ As the McCulloughs’ counsel noted in briefing submitted to the trial court, the bankruptcies of the individual McCulloughs did not prevent Ehsani from seeking restitution from The McCullough Group, Inc., but that entity “was administratively dissolved several years ago and has no assets,” thus rendering a request for restitution from that entity futile. CP 256.

293. Mr. Ehsani appealed the Order on Remand. CP 294 – 297. The Court of Appeals reversed the Order on Remand, including the order denying Mr. Ehsani’s motion for restitution, and ordered Mr. Cullen to restore the \$77,900 issued to the McCulloughs. *Ehsani*, 2005 WL 3462780 at *2-3.

Mr. Cullen only petitions this Court for review of one issue decided in the Order on Remand and subsequently reversed by the Court of Appeals: whether Mr. Cullen should be compelled to restore funds paid to the McCulloughs in satisfaction of the trial court’s June 27, 2000, judgment because that judgment was later reversed on appeal.

V. ARGUMENT

A. Summary of Argument

Monies deposited in an attorney’s trust account are the property of the client. RPC 1.14 not only requires an attorney to keep a client’s funds separate from the attorney’s own funds, by depositing such funds in a trust account, but also imposes requirements governing attorneys’ fiduciary responsibilities regarding client funds. *See In re McKean*, 148 Wn.2d 849, 863-64, 64 P.2d 1226 (2003).

The Decision erases the boundary between attorney and client funds mandated by RPC 1.14. Requiring Mr. Cullen to restore funds paid to his clients in partial satisfaction of a judgment, when that judgment was later reversed on appeal, **merely because the funds were first deposited**

in Mr. Cullen's client trust account by the judgment debtor, dilutes the unambiguous directive of RPC 1.14. Citing RPC 1.14(a)(2), the Decision concludes that "Cullen had authority to control the funds in the trust account," because the Rule requires funds "potentially" belonging to an attorney to be deposited in a trust account and withdrawn when due unless the client disputes the attorney's right to receive such funds. *Ehsani*, 2005 WL 3462780 at *3. What the Court of Appeals ignored, however, is that there was no agreement as to what percentage of the **partial** judgment Mr. Cullen should receive for his professional services. Lacking a contingent fee agreement with the McCulloughs, there was no agreement as to what funds, if any, in the trust account "potentially" belonged to Mr. Cullen. Moreover, since Mr. Cullen was not a judgment creditor or obtaining a direct award of fees, he had no direct obligation as is imposed on the McCulloughs.

Furthermore, the Decision effectively imposes a new standard of practice for Washington attorneys. The Court of Appeals held Mr. Cullen's awareness, as an attorney, of the possibility of the judgment's reversal on appeal, meant that Mr. Cullen's disbursement of his clients' funds in accordance with his clients' authorization and instructions "was at his peril." *Ehsani*, 2005 WL 3462780 at *3. The Decision's reasoning provides no guidance for attorneys who act in good faith to disburse the funds of an un superseded judgment pursuant to their clients' authorization

pending appeal, only a warning that attorneys who do so, act “at [their] peril.” *Ehsani*, 2005 WL 3462780 at *3.

The Decision conflicts with this Court’s decision in *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 802 P.2d 1353 (1991). In *A.N.W. Seed*, the Court held that when a party seeks restitution under RAP 12.8, Washington courts should look to the common law of restitution, as reflected in the Restatement of Restitution. *See A.N.W. Seed*, 116 Wn.2d at 45. Decisions of this Court and the Court of Appeals post-*A.N.W. Seed* confirm that restitution under RAP 12.8 is an equitable remedy. *See SAC Downtown Ltd. P’ship. v. Kahn*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994); *In re Marriage of Stern*, 68 Wn. App. 922, 931, 846 P.2d 1397 (1993). Here, however, the Court of Appeals concluded that Mr. Ehsani was entitled to restitution from Mr. Cullen as a matter of right, without considering whether the relevant equitable principles supported such a remedy.

Moreover, the Decision’s conclusion that Mr. Cullen’s awareness of a pending appeal denies him the protections RAP 12.8 provides a “purchaser in good faith” is contrary to this Court’s decisions and those of the Court of Appeals. RAP 7.2(c) unambiguously states that “[a]ny person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed” pursuant to the supersedeas procedure or an order of the appellate court.

This Court concluded in *A.N.W. Seed* that a notice of appeal is not a substitute for the supersedeas procedure. *See A.N.W. Seed*, 116 Wn.2d at 48. Previous Division One decisions followed this controlling principle, holding that “knowledge of the pendency of an appeal” is not fatal to standing as a “purchaser in good faith” for purposes of RAP 12.8. *See Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 772-73, 27 P.3d 1233 (2001).

Rather than applying the equitable principles interpreting RAP 12.8 articulated by this Court in *A.N.W. Seed* and *SAC Downtown Ltd. P’ship*, which it had previously followed in *Stern* and *Spahi*, the Court of Appeals here relied on a 1987 decision, *In re Marriage of Mason*, 48 Wn. App. 688, 740 P.2d 356 (1987), that both predates those opinions and is factually distinguishable. The Court of Appeals fundamentally misconstrued *Mason*’s limited holding and mistakenly concluded it was on all fours with Mr. Cullen’s case, even though Mr. Cullen was not a judgment creditor, as was the attorney in *Mason*.

In sum, the Decision conflicts with controlling authority. Review is warranted on those grounds alone under RAP 13.4(b)(1) and (2). And, as noted above, the public policy implications of the Court of Appeals’ decision are serious, not only for Mr. Cullen but for all attorneys practicing in Washington. For that reason, review is also warranted under

RAP 13.4(b)(4): this case “involves an issue of substantial public interest that should be determined by the Supreme Court.”

B. This Court Should Accept Review to Confirm Restitution Under RAP 12.8 Is An Equitable Remedy and to Apply Relevant Principles of the Law of Restitution

1. This Court’s prior decisions confirm restitution under RAP 12.8 is an equitable remedy and §74 of the Restatement of Restitution is the applicable common law

Restitution under RAP 12.8, the relief requested by Mr. Ehsani and properly denied by the Superior Court, is an equitable remedy. *See SAC Downtown Ltd. P’Ship*, 123 Wn.2d at 205 (affirming denial of restitution and noting “restitution is an equitable remedy”); *Stern*, 68 Wn. App. at 932 (noting “the equitable nature of...RAP 12.8”). As an equitable remedy, restitution is not a matter of right but requires the trial court to assess the relative equities of the facts before it and consider the availability of legal remedies. *See SAC Downtown Ltd. P’Ship*, 123 Wn.2d at 205 (refusing to weigh equities when trial court had decided restitution would be inequitable); *Stern*, 68 Wn. App. at 932-33 (noting implicit limitation to equitable remedy under RAP 12.8 when legal remedy under RAP 8.1 is available).

In *A.N.W. Seed*, this Court not only confirmed that RAP 12.8 “provides a form of restitution” but also held the Restatement of Restitution, specifically §74, expresses the “common law principle of restitution” necessary to determine whether restitution under RAP 12.8 is warranted. *A.N.W. Seed*, 116 Wn.2d at 45. Indeed, as the leading treatise

on Washington law notes, RAP 12.8 was amended in 1994 in response to *A.N.W. Seed* to add the words “provide restitution.” See 3 Karl B. Tegland, *Washington Practice: Rules Practice*, RAP 12.8 (6th ed. 2004). This amendment “was intended to alert the reader to the fact that the court looks to the general law of restitution to determine the appropriate remedy under RAP 12.8.” *Id.*

As a prelude to a detailed discussion of the comments to §74 of the Restatement, the *A.N.W. Seed* court cautioned “generalized statements extracted from opinions do not reflect the particularized standard which governs specific facts.” *A.N.W. Seed*, 116 Wn.2d at 46. The Court established the legal standard Washington courts should follow when determining whether restitution under RAP 12.8 is warranted: look to the Restatement of Restitution, §74, and the “15 comments with 32 illustrations” that follow that section. *A.N.W. Seed*, 116 Wn.2d at 46. Here, as detailed below, the Court of Appeals ignored that standard and this Court should grant review under RAP 13.4(b)(1) and (2).

2. The Court of Appeals ignored Restatement of Restitution §74, comment h, which is on all fours with this case

Restatement of Restitution §74, entitled “Judgments Subsequently Reversed,” provides:

A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract

that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

Restatement of Restitution §74 (1937). While §74 articulates the general principles governing restitution in the context of a reversed judgment, comment h to §74 specifically addresses the circumstances here: whether a judgment creditor's attorney is liable to a judgment debtor when the judgment is reversed. Comment h provides in pertinent part:

An attorney or other agent of the judgment creditor who receives payment from the judgment debtor or who receives the proceeds of sale of the debtor's things and who pays it to the judgment creditor before reversal is not liable if the judgment was valid before reversal and if he had no knowledge of any fraud used in securing it. Under the same conditions he is under no duty to repay money which he received on account of the judgment creditor and which he retains as payment for services or for a debt owed by the judgment creditor to him (see Illustration 20) since he received the money as a bona fide purchaser.

Restatement of Restitution §74, comment h (1937). The related illustration, Illustration No. 20, provides further guidance on this issue:

A [the McCulloughs] obtains a valid judgment against B [Ehsani] for \$3000. B [Ehsani] pays the amount of the judgment to C [Cullen], A's [the McCulloughs'] attorney. At A's [the McCulloughs'] direction C [Cullen] expends \$1000 to satisfy A's [the McCulloughs'] creditors and retains \$2000 as compensation for his services in this suit and in previous ones. **Upon reversal of the judgment, B [Ehsani] is not entitled to restitution from C [Cullen].**

Restatement of Restitution §74, Illustration 20 (emphasis added).

The Decision fails to consider §74 of the Restatement, despite this Court's directive in *A.N.W. Seed* that §74 should guide Washington courts faced with a request for restitution under RAP 12.8. *A.N.W. Seed*, 116 Wn.2d at 45; *See also Stern*, 68 Wn. App. at 931 (applying §74 and comment to determine whether restitution warranted under RAP 12.8); *Spahi*, 107 Wn. App. at 771-73 (same). As with the Decision's disregard of restitution principles more generally, its failure to apply Restatement of Restitution §74 and the relevant comments and illustrations (here, comment h and Illustration No. 20) support this Court's granting review under RAP 13.4(b)(1) and (2).

3. The trial court did not abuse its discretion in denying Ehsani's motion for restitution from Mr. Cullen under Restatement of Restitution §74 and comment h

The Decision fails to reference the appropriate standard of review. Indeed, the Decision fails to mention any standard of review guiding its review of the trial court's order denying Mr. Ehsani's request for restitution from Mr. Cullen for the funds paid to the McCulloughs.

To determine the proper standard of review of a trial court's order on an equitable issue, Washington courts distinguish between whether a trial court may grant equitable relief (reviewed as a question of law) and the "fashioning" of an equitable remedy (reviewed for abuse of discretion). *See Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374,

113 P.3d 463 (2005). Here, the issue before the Superior Court was not whether the court **could** grant equitable relief, as RAP 12.8 provides the court with that authority, but how an equitable remedy might be “fashioned,” based on the equities of the case and guided by the principles of restitution discussed above. The Superior Court determined that an equitable remedy for Mr. Ehsani could not be fashioned by requiring Mr. Cullen, the McCulloughs’ attorney, to restore funds to Mr. Ehsani.

As the trial court properly concluded, it would be inequitable to require Mr. Cullen to restore the \$77,900 to Mr. Ehsani on the McCulloughs’ behalf. The key fact weighing against Mr. Ehsani’s demand for restitution from Mr. Cullen was that the monies disbursed to Mr. Cullen’s client trust account **did not belong to Mr. Cullen**. CP 301; CP 261. The trial court reviewed Mr. Cullen’s accounting records, which showed that Mr. Cullen had not received the \$77,900. CP 301; CP 261. The monies were paid into his trust account, thus rendering them the property of his clients. *See* RPC 1.14; *In re McKean*, 148 Wn.2d at 863-64. And, as discussed above, the Decision’s conclusion that Mr. Cullen had authority to control the funds in the trust account, because the funds “potentially” belonged to him, is incorrect. Prior to his clients’ disbursement instructions, there was no agreement as to what amount of the partial judgment Mr. Cullen was entitled to, “potentially” or otherwise.

That amount was in dispute until the McCulloughs provided Mr. Cullen with specific instructions and authorized disbursement of the funds.

Per the McCulloughs' authorization and instructions, the funds deposited in the trust account were tendered to several parties, including a legal messenger service, the Court of Appeals, the McCulloughs' accountant, and the McCulloughs themselves. CP 261; CP 301. Mr. Cullen only retained a portion of the funds, as authorized by his clients. CP 261. He was not bound by any conditions or restrictions in conjunction with the disbursement, nor were the McCulloughs. Without any such restrictions, Mr. Cullen had no duty to retain these funds pending appeal; indeed, his duty was to his clients, as the funds belonged to them as judgment creditors. CP 172. The trial court did not abuse its discretion when it determined that Mr. Ehsani would be unjustly enriched at Mr. Cullen's expense if Mr. Ehsani were allowed to recover the McCulloughs' award from Mr. Cullen, who was not the judgment creditor here.

In addition, the record reveals that Mr. Ehsani took no steps to avail himself of the legal remedies available to protect his financial interests pending appeal. David McCullough told Mr. Ehsani several times – and even testified at trial – that he could not pay a substantial judgment and that he would be forced to declare bankruptcy if one was awarded. CP 266. Even with this knowledge, Mr. Ehsani failed to utilize RAP 8.1's supersedeas procedure. Nor did he move the appellate court for

injunctive relief under RAP 8.3. Mr. McCullough filed a bankruptcy petition, but there is no evidence in the record that Mr. Ehsani filed a claim in the bankruptcy proceeding to recover the amount for which he claims restitution. Nor is there any evidence in the record that Mr. Ehsani's efforts to recover in bankruptcy would have been futile. The availability of legal remedies is one factor the trial court considers when fashioning an equitable remedy under RAP 12.8. *See Stern*, 68 Wn. App. at 932-33. Based on these facts, the trial court did not abuse its discretion when it determined that requiring Mr. Cullen to reimburse the funds paid to the McCulloughs would be an inequitable and unfair way to "fashion" a remedy for Mr. Ehsani.

Failure to reference the applicable standard of review – here, abuse of discretion – and failure to demonstrate how that standard supports the Court of Appeals' reversal of the trial court is contrary to decisions of this Court and supports granting review under RAP 13.4(b)(1) and (2).

C. This Court Should Accept Review Because Knowledge of the Possibility of Reversal of a Judgment Does Not Require An Attorney to Restore the Funds Awarded to His Clients

Relying on *Mason*, the Court of Appeals held that Mr. Cullen could not be a "purchaser in good faith" under RAP 12.8 and therefore could not claim the protection of that status because "he would naturally be aware of the possibility of appeal and reversal." *Ehsani*, 2005 WL 3462780 at *2 (quoting *Mason*, 48 Wn. App. at 692).

The Decision's reliance on *Mason* ignores this Court's controlling *A.N.W. Seed* decision, which rejects the Decision's reasoning that an attorney may not rely upon a court judgment when there is any possibility of an appeal. As this Court explained in *A.N.W. Seed*, a notice of appeal is not a substitute for RAP 8.1's supersedeas procedure. *A.N.W. Seed*, 116 Wn.2d at 48. Indeed, were the Decision a correct statement of Washington law, there would be no need for, or purpose to, RAP 8.1. And – as *A.N.W. Seed* also emphasized – RAP 7.2(c), which provides the judgment creditor with authority to execute on a trial court judgment unless that judgment is stayed under RAP 8.1 or 8.3, would be “render[ed] meaningless” were the Decision's legal conclusions correct. *See A.N.W. Seed*, 116 Wn.2d at 47-48. In *Spahi*, decided by Division One fourteen years after *Mason*, the court was even more explicit: “we hold that a purchaser of property is a “purchaser in good faith” for purposes of RAP 12.8 notwithstanding knowledge of the pendency of appeal.” *Spahi*, 107 Wn. App. at 772-773.

Rather than reference *A.N.W. Seed* or *Spahi*, the Decision claims that *Mason* “required an attorney for an initially prevailing party to restore fees awarded during a dissolution proceeding when the award was reversed.” *Ehsani*, 2005 WL 3462780 at *2. The Decision also notes that *Mason*'s conclusion that the attorney in that case “would naturally be aware of the possibility of appeal and reversal,” and for that reason, could

not be a “purchaser in good faith” under RAP 12.8, governs the resolution of this case. *Ehsani*, 2005 WL 3462780 at *2.

The issue presented in *Mason*, however, was narrow and confined to the facts of that case: “whether the superior court may properly order restitution of **sums paid to an attorney under a judgment pursuant to RCW 26.09.140**, when that judgment and the award of attorney’s fees is subsequently reversed on appeal.” *Mason*, 48 Wn. App. at 690 (emphasis added). The attorney in *Mason* was himself the judgment creditor, pursuant to a statute providing that attorney’s fees in a dissolution proceeding may “be paid directly to the attorney who may enforce the order in his name.” *Mason*, 48 Wn. App. at 690. The *Mason* court itself recognized the limitations of its holding when it cited, and distinguished, §74 of the Restatement of Restitution, and comment h and Illustration No. 20:

Neither comment h nor the cited cases are factually the same as this case. In each of those cases and in the illustration [No. 20] to comment h, the attorney receiving the fees retained a portion of the proceeds of a sale in compensation for his fees and passed the remaining proceeds on to his client.

Mason, 48 Wn. App. at 692. Here, like the attorney in the Restatement Illustration (and unlike the attorney in *Mason*), Mr. Cullen was not paid directly. He was not the judgment creditor. He was a third party to the monies awarded to the McCulloughs. He had no discretion to direct payment of his clients’ funds without their authorization.

This Court should accept review to clarify the limited holding of *Mason*, and to affirm its previous decision in *A.N.W. Seed*: knowledge of a pending appeal does not bar a non-judgment creditor like Mr. Cullen from the protections afforded “purchasers in good faith” under RAP 12.8. For this reason, review is warranted under RAP 13.4(b)(1) and (2).

D. This Court Should Accept Review Because the Decision Has Significant Implications for All Attorneys Practicing in Washington

This case presents issues that have significant implications for all attorneys practicing in the State of Washington. First, the Decision renders RPC 1.14 meaningless. Attorneys have a mandatory duty under that Rule to keep their clients’ funds separate from the attorneys’ own funds. This duty is not to be taken lightly; the failure to observe RPC 1.14 strictly warrants disciplinary action by the Washington State Bar Association. *In re McKean*, decided by this Court in 2003, is but one example of such cases. *See McKean*, 148 Wn.2d at 863-64. The Court of Appeals’ determination that Mr. Cullen must restore funds paid to his clients in satisfaction of a judgment, simply because the funds were first disbursed to Mr. Cullen’s client trust account, contradicts the principles underlying RPC 1.14. And, as discussed above, the Court of Appeals’ conclusion that “[Mr.] Cullen had authority to control the funds in the trust account” is incorrect. *Ehsani*, 2005 WL 3462780 at *3. Without the McCulloughs’ clear authorization, Mr. Cullen had no authority or property

interest in the funds in his client trust account. The Court should accept review to affirm the importance of RPC 1.14.

The Decision also imposes a new requirement on attorneys: under its logic, attorneys are no longer entitled to disburse funds from client trust accounts while the possibility of appellate reversal exists. Under *Ehsani*, attorneys who do so, act at their own peril. There is no protection for attorneys who disburse funds of an un superseded judgment pursuant to their clients' instructions pending appeal.

This Court's review is warranted when a case presents an issue of "substantial public interest." RAP 13.4(b)(4). It cannot be contested that the Court of Appeals' decision, with its far-reaching implications for all who practice law in Washington, satisfies this standard.

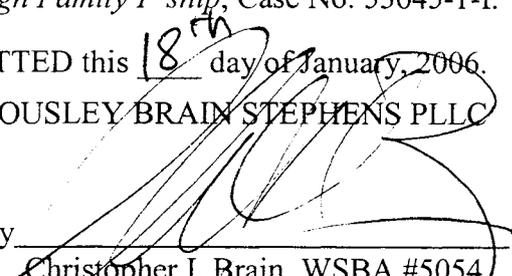
VI. CONCLUSION

For the reasons stated herein, this Court should accept review of the decision in *Ehsani v. McCullough Family P'ship*, Case No. 53645-1-I.

RESPECTFULLY SUBMITTED this 18th day of January, 2006.

TOUSLEY BRAIN STEPHENS PLLC

By


Christopher I. Brain, WSBA #5054
A. Janay Ferguson, WSBA # 31246
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
(206) 682-5600
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of January, 2006,
caused to be served a true and correct copy of the following upon
the persons indicated below:

Petition for Review

Helmut Kah
Attorney at Law
16818 140th Ave. NE
Woodinville WA 98072

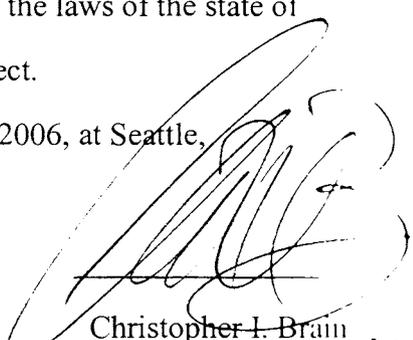
- U.S. Mail, postage prepaid
- Hand Delivered via
Messenger Service
- Overnight Courier
- Facsimile

Sayed Zia Ehsani
23400 Maestro Pl
West Hills, CA 91304

- U.S. Mail, postage prepaid
- Hand Delivered via
Messenger Service
- Overnight Courier
- Facsimile

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

EXECUTED this 18th day of January, 2006, at Seattle,
Washington.


Christopher I. Brain



APPENDIX A

H

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

SLIP COPY

Court of Appeals of Washington,
Division 1.

Sayed Zia EHSANI, a single man, and Guitty
Zamani, a single woman, Appellants,

v.

The McCULLOUGH FAMILY PARTNERSHIP, a
Washington partnership; David E.
McCullough and Chong R. McCullough, husband
and wife, and the marital community
comprised thereof; Edward F. McCullough; and the
McCullough Group, Inc., a
Washington corporation, Respondents.

No. 53645-1-I.

Dec. 19, 2005.

Appeal from Superior Court of King County; Hon.
James A. Doerty, J.

Sayed Zia Ehsani (Appearing Pro Se), Seattle, WA,
Helmut Kah, Attorney at Law, Woodinville, WA, for
Appellants.

Christopher Ian Brain, Allyson Janay Ferguson,
Tousley Brain & Stephens PLLC, Coreen Rebecca
Ferencz, Attorney at Law, Seattle, WA, for
Respondents.

BAKER, GROSSE and AGID, JJ.

UNPUBLISHED OPINION

PER CURIAM.

*1 We again reverse the trial court in this matter. The court improperly declined to follow this court's instructions concerning how to disburse funds from an escrow holdback fund. The court also erred by denying the appellants' RAP 12.8 motion for a refund of fees paid pursuant to an earlier erroneous award.

In the previous appeal, we reversed the trial court's use of a novel theory of equity to deny Sayed Zia

Ehsani's suit for judicial foreclosure of a note and deed of trust for the sale of a hotel. [FN1] We accordingly reversed the award of \$97,489.00 in attorney fees and \$8,951.50 in expert accountant fees to be paid by Ehsani to the McCulloughs, who defaulted on the note. We also reversed the trial court's denial of a request by Ehsani's former wife, Guitty Zamani, for reimbursement of expenses paid while managing the hotel, directing that Zamani should receive \$32,377.20 from a holdback fund, and the remainder of the fund to be divided according to Ehsani and Zamani's percentage interests in the note.

[FN1] The underlying facts are well known to the parties and the trial court and need not be repeated here. See *Ehsani and Zamani v. the McCullough Family Partnership*, noted at 113 Wn.App. 1046 (2005).

No party petitioned for review. On remand, Ehsani filed a motion in the trial court under RAP 12.8 for restitution of \$77,900.00 paid from the holdback fund into the trust fund of David Cullen, the McCullough's attorney. Zamani, for her part, argued the trial court should not follow this court's opinion regarding the reimbursement, asking the court to divide the holdback fund by the percentage shares first and then reimburse her from Ehsani's share. The trial court denied Ehsani's RAP 12.8 motion and granted Zamani's request regarding her reimbursement. Ehsani again appeals and Zamani again cross-appeals. [FN2]

[FN2] The McCullough's attorney, David Cullen, has filed briefs in opposition to Ehsani and Zamani. The McCulloughs, who have filed for bankruptcy, have not participated in this appeal in their own right.

Ehsani again represents himself and again raises numerous claims; most are arguments we previously rejected that we need not discuss again. Ehsani is, however, entitled to relief regarding the method of reimbursement to Zamani. Under the law of the case doctrine, a mandated appellate decision "governs all subsequent proceedings in the action in any court." [FN3] An appellate court's directive that leaves no discretion to the superior court must be strictly complied with. [FN4] Our opinion resolving the first appeal unambiguously directed the trial court to disburse to Zamani "\$32,377.20 off the top of the

\$200,000 holdback before dividing the remainder" [FN5] pursuant to Ehsani's and Zamani's percentage interests. We accordingly reverse, and emphasize that Zamani's reimbursement of \$32,377.20 must come from the \$200,000 holdback *before* the remainder of the fund is divided pursuant to the appropriate percentages. [FN6] Zamani therefore shall restore what was previously distributed to her from the holdback to the fund so that final distribution will be made in strict compliance with our prior opinion. [FN7]

FN3. RAP 12.2; *State v. Strauss*, 93 Wn.App. 691, 697, 969 P.2d 529 (1999).

FN4. *Harp v. Am. Sur. Co. of N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

FN5. *Ehsani*, slip. op. at 9.

FN6. Zamani's counsel's brief, referenced by the trial court as the basis of its decision, argued our opinion was "erroneous", that it resulted in an unfair "windfall" to Ehsani, and should be "corrected." Zamani did not claim our opinion was ambiguous, and in any event, did not petition for review. It is a classic application of the law of the case doctrine that the trial court cannot simply choose to reject an appellate court's final decision. *Harp*, 50 Wn.2d at 368.

FN7. RAP 12.8. We reject Zamani's request that we order funds directly disbursed to her from Ehsani's share of the restored holdback fund, which is simply a transparent attempt to circumvent our ruling in the first appeal.

The only other issue requiring discussion is Ehsani and Zamani's request that Cullen restore the \$77,900.00 disbursed from the holdback pursuant to the trial court's erroneous award of Ehsani's share to the McCulloughs for fees.

*2 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. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or

modification of that decision. [FN8]

FN8. RAP 12.8.

Cullen contends he is not subject to RAP 12.8 because he was not a party. But under RAP 12.8, "[t]he only person required to be a party ... is the person in whose favor the restitution order is issued." [FN9] In *In re Marriage of Mason*, [FN10] this court held that RAP 12.8 [FN11] required an attorney for an initially prevailing party to restore fees awarded during a dissolution proceeding when the award was reversed. Cullen mischaracterizes *Mason* to contend it applies only when an attorney is a judgment creditor under RCW 26.09.140. But in *Mason*, this court, while discussing RCW 26.09.140 as an alternative basis for its decision, expressly held that there was no requirement that the person required to restore property be a party, and concluded that "restitution of the attorney's fees ordered in this case is a matter of right under RAP 12.8." [FN12]

FN9. *In re Marriage of Mason*, 48 Wn.App. 688, 691, 740 P.2d 356 (1987).

FN10. 48 Wn.App. 688, 740 P.2d 356 (1987).

FN11. Though *Mason* applied an earlier version of the rule, no party has argued the changed language is material.

FN12. *Mason*, 48 Wn.App. at 693. Given this holding, Cullen's contention that RAP 12.8 is an equitable remedy, to which no party is entitled as a matter of right" is untenable. Though Cullen cites *SAC Downtown Ltd. P'ship v. Kahn (In re Foreclosure of Liens)*, 123 Wn.2d 197, 867 P.2d 605 (1994) and *Marriage of Stern*, 68 Wn.App. 922, 846 P.2d 1387 (1993), neither case supports his claim and each is properly distinguished. In *SAC Downtown*, the Supreme Court considered whether purchasers at a tax sale were entitled to damages in addition to restoration of the property, thus addressing the measure of relief under RAP 12.8, not whether relief was appropriate. *SAC Downtown*, 123 Wn.2d at 204. In *Stern*, the issue was a requested refund of erroneously overpaid child support. Agreeing with authority from other jurisdictions that "child support judgments are inherently different from ordinary judgments", the *Stern* court

concluded the trial court had discretion to decide whether to grant relief. 68 Wn.App. at 932. Minor children for whom support has been paid are not comparable to an attorney like Cullen who directed the course of litigation.

Cullen alternatively claims he is a purchaser in good faith under RAP 12.8 and general principles of restitution. In *Mason*, however, we rejected virtually the same argument:

Schmitt as her trial attorney had notice of the appeal. In addition, as an attorney, he would naturally be aware of the possibility of appeal and reversal. One who has notice and is not a stranger to a transaction cannot be a purchaser in good faith. [FN13]

FN13. *Mason*, 48 Wn.App. at 692.

Cullen ignores *Mason's* resolution of the question, and instead relies on out of state authority, particularly the Massachusetts decision of *Cox v. Cox*, [FN14] to contend he was a purchaser in good faith because he was not employed on a contingent fee basis. But Cullen fails to consider that the *Cox* court distinguished *Mason* because Massachusetts had no court rule corresponding to RAP 12.8. [FN15]

FN14. 780 N.E.2d 951 (2002).

FN15. *Cox*, 780 N.E.2d at 961 ("We do not think *Mason* apposite, however, because there is no such analog in our rules.").

Contrary to Cullen's contention, following *Mason* does not result in Ehsani's unjust enrichment. Cullen acknowledges Ehsani's judgment against the McCulloughs will not be satisfied. [FN16] Even applying RAP 12.8, Ehsani recovers only a portion of his loss. Cullen's reliance on the trial court's finding that Ehsani had "unclean hands" in the original action fails because we reversed that holding. And Ehsani's failure to post a supersedeas bond does not preclude applying RAP 12.8: while the measure of restitution is affected by that consideration, [FN17] to agree with Cullen would be to rewrite "shall" in RAP 12.8 as "may."

FN16. Indeed, that all parties were aware the McCulloughs could not pay their obligations suggests Cullen was effectively in the same position as an attorney compensated with a contingent fee: able to recover his fee only if he prevailed.

FN17. See *State v. B. D. ...*, 116 Wash.2d 39, 474, 807 P.2d 1001 (1991) (measure of restitution for improperly sold property under RAP 12.8 is the amount the property sold for at the sheriff's sale rather than market value)

*3 Finally, Cullen asserts he did not control the funds because they were paid into his trust account and some were eventually distributed to the accountant, this court, and a messenger service. [FN18] But Cullen received the benefit of the trial court's order for \$97,459.00 of reasonable attorney fees, greatly exceeding the \$77,900.00 disbursed to Cullen's trust account. Under RPC 1.14(a)(2), Cullen had authority to control the funds in the trust account. [FN19] Cullen's disbursement of those funds during the appeal was at his peril.

FN18. See *In re Discipline of ...*, 118 Wn.2d 849, 64 P.3d 1226 (2000) (RPC 1.14).

FN19. Funds "potentially" belonging to a lawyer "may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." RPC 1.14(a)(2). There is no suggestion the McCulloughs disputed the amount Cullen persuaded the trial court was a reasonable attorney fee.

Cullen, as the attorney for the McCulloughs at trial and during the prior appeal, was aware of the possibility of reversal, and should have been aware of RAP 12.8 and *Mason*. We follow *Mason* and accordingly reverse.

The trial court is reversed. Cullen shall restore the \$77,900 that was disbursed from the holdback fund to his trust account. Zamani shall likewise restore what she received from the holdback fund and the fund then shall be redistributed in strict compliance with this court's opinion in the prior appeal. We deny all requests for attorney fees.

Reversed and remanded, with instructions.

Not Reported in P.3d, 2005 WL 3462780
(Wash.App. Div. 1)

END OF DOCUMENT