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No. 53645-1-I

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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SAYED ZIA EHSANI, a single man, Appellant,
GUITTY ZAMANI, a single woman, Respondent/Cross Appellant,

v.

THE MCCULLOUGH FAMILY PARTNERSHIP, et al, Respondents.

BRIEF OF RESPONDENT DAVID CULLEN TO APPELLANT SAYED ESHANI

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ORIGINAL

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I. RESPONSE LIMITED TO COMPLY WITH THE COURT'S ORDER ON SUPPLEMENTAL BRIEFING

In compliance with the Court's Order of August 5, 2005, Respondent David Cullen does not repeat portions of his previous response to cross-appellant Guitty Zamani, but incorporates by reference the Statement of Issues and Statement of the Case presented in his original response.

II. ARGUMENT

- 1. The trial court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed to the McCulloughs through his trust account, because neither RAP 12.8 nor the equitable principles of restitution call for this remedy, the funds were paid to others, and Mr. Ehsani has unclean hands.**

Restitution under Rule of Appellate Procedure (RAP) 12.8 is an equitable remedy, to which no party is entitled as a matter of right. *See* RAP 12.8 (2005); *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994)(refusing to weigh equities when trial court had decided restitution would be inequitable); *In re Marriage of Stern*, 68 Wn. App. 922, 932-33, 846 P.2d 1387 (1993)(noting implicit limitation to equitable remedy when legal remedy under RAP 8.1 available). Although trial courts may rely on their discretion to fashion an equitable award, whether a trial court may grant equitable relief is a question of law. *See Niemann v. Vaughn Community Church* 154 Wn.2d 365, 374-75, 113 P.3d 463 (2005)(analyzing doctrine of *cy pres*); *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, ___, 114 P.3d 1182, 1193 (2005)(evaluating availability

of post-judgment interest).¹ Mr. Ehsani argues broadly that Mr. Cullen should be required to make restitution of \$77,900 on the McCulloughs' behalf, but articulates no cogent theory under which such restitution would be equitable; accordingly, the trial court's order denying Mr. Ehsani's motion should be affirmed.

A trial court judgment is presumed valid and, unless superseded under RAP 8.1, the judgment creditor has specific authority to execute on that judgment. RAP 7.2(c) (2005). However, a trial court decision, including a money judgment, may be stayed pending appeal or review by filing a supersedeas bond, cash, or an approved alternate security in the trial court. RAP 8.1(b) (2005). The primary purpose of a supersedeas bond is to delay execution of the judgment pending appeal. *Lampson Universal Rigging, Inc. v. Washington Public Power Supply System*, 105 Wn.2d 376, 378-379, 715 P.2d 1131 (1986)(summarizing general purpose of supersedeas bond pending appeal); *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769-770, 27 P.3d 1233 (2001)(analyzing effect of failure to post supersedeas bond in federal foreclosure action reversed on appeal).

RAP 12.8 provides an equitable alternative for appellants who fail to protect against a judgment's execution by using the legal remedy provided under RAP 8.1. "The rule is based upon common law principles of restitution that allow a person who has conferred a benefit on another to

¹ The *Niemann* and *Rufer* decisions issued during June 2005, after Respondent Cullen's original response.

recoup that benefit to avoid unjust enrichment.” *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 47, 802 P.2d 1353 (1991). These principles are articulated in the Restatement (First) of Restitution’s general codification of the common law. *See id.* at 46.

Under the Restatement, it is immediately clear that restitution from third parties is treated quite differently than restitution from parties to the reversed judgment. Restitution from third parties is generally not required, absent knowledge of fraud in the award, even when the third party subsequently receives some portion of the award in payment. The third party is treated as a bona fide purchaser.

Restatement of Restitution § 74, comment h (1937) specifically concerns restitution from an attorney or agent of a judgment creditor under these circumstances. The comment provides in relevant 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 20, mirrors the issue and the equitable result in this appeal. The illustration provides:

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.

There is a narrow exception to this general rule, which turns on the attorney's diminished status as a third party. An attorney may become a direct creditor, either by joint payment, or a contingent fee, or by statutory provision. *See In re Marriage of Mason*, 48 Wn. App. 688, 691, 740 P.2d 356 (1987)(requiring restitution of sums paid to an attorney because attorney was a judgment creditor in his own right under RCW 26.09.140); *accord Transamerica Ins. Group v. Adams*, 62 Or. App. 419, 422, 661 P.2d 937 (Or. Ct. App. 1983)(check to attorney made to both attorney and client). Under this exception, the attorney is no longer treated as a bona fide purchaser because she has a direct interest in the award. It is therefore equitable to enforce restitution of that portion directly awarded her. The converse is also true. When an attorney remains a third party to a transaction, that is, she is not a judgment creditor in her own right because she does not receive a contingent fee or any direct award, she is a bona fide purchaser and not liable to the judgment debtor for restitution.

Mr. Cullen remained a third party in this instance. He did not receive a contingent fee. CP 275:1-11. He was not paid directly under Washington statute, such as that at issue in *Mason*. *See Mason*, 48 Wn. App. at 691. Mr. Cullen was a third party to the fees awarded the

McCulloughs. It would be inequitable to treat Mr. Cullen as anything other than a bona fide purchaser.

Further, RAP 12.8, like all equitable relief, depends upon a balancing of the equities. *See Sac Downtown Ltd. Partnership*, 123 Wn.2d at 205. The failure to seek legal protection under RAP 8.1 is one consideration limiting the equitable relief, if any, available under RAP 12.8. *See Stern*, 68 Wn. App. at 932-933. Other factors weighed to determine whether equitable relief should be granted under RAP 12.8 include, whether it would unjustly enrich one party over the other, whether the party pursuing the benefit seeks equitable relief with clean hands, and whether the negligence or other fault of one or both of the parties created the situation giving rise to the right to restitution. *See A.N.W. Seed Corp.*, 116 Wn.2d at 47 (discussing principles of restitution generally).

It would be inequitable to require Mr. Cullen to restore \$77,900 to Mr. Ehsani on the McCulloughs' behalf. Perhaps the most critical fact weighing against Mr. Ehsani's demand for restitution from Mr. Cullen is the fact that the monies disbursed from the holdback fund to Mr. Cullen's trust account did not belong to Mr. Cullen. CP 301; CP 261. Mr. Ehsani argues this amount was paid directly to Mr. Cullen, but that argument is simply incorrect.

The trial court reviewed Mr. Cullen's accounting records, which reflected that Mr. Cullen had not received the \$77,900 disbursed from the holdback fund. CP 301; CP 261. In fact, the monies were paid into his trust account, thus rendering them the property of his clients, the

McCulloughs. See RPC 1.14 (2005); *In re McKean*, 148 Wn.2d 849, 863-64, 64 P.2d 1226 (2003). These funds were then tendered from Mr. Cullen's trust account at the direction of the McCulloughs to a number of individuals, including the McCulloughs, the McCulloughs' accountant, a legal messenger service, and the Court of Appeals. CP 261; CP 301. Only a portion of these funds was retained by Mr. Cullen. CP 261. Notably, Mr. Cullen was not bound by any escrow agreement, terms, conditions or restrictions imposed on him or the McCulloughs in conjunction with the disbursement. Without such condition or restriction, Mr. Cullen was under no duty to retain these funds pending appeal, especially in light of the fact that the funds were disbursed according to the McCulloughs' instructions. CP 172: 2-7. Mr. Ehsani would be unjustly enriched at Mr. Cullen's expense if allowed to recover the McCulloughs' award from Mr. Cullen.

A second factor weighs against allowing Mr. Ehsani to recover in equity; the trial court was familiar with and considered the conduct of the parties throughout the course of litigation, and found that neither Mr. Ehsani nor Ms. Zamani had "clean hands" with regard to the foreclosure action against the McCulloughs. CP 6. The court specifically determined that Mr. Ehsani's request for reimbursement of his attorney fees was not well founded and restricted its award to him on that basis. CP 301.

Finally, Mr. Ehsani took no steps to avail himself of the legal remedies available for his protection on appeal. David McCullough told

Mr. Ehsani several times—and in fact rendered testimony at trial—that he could not pay a substantial deficiency judgment, and that he would be forced to declare bankruptcy if one was awarded. CP 266. Despite this knowledge, Mr. Ehsani failed to employ the supersedeas procedures authorized by RAP 8.1 and Mr. McCullough filed bankruptcy. 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 or that an effort to recover in bankruptcy would have been futile. Based on these facts, the trial court properly decided that requiring Mr. Cullen to reimburse the funds dispensed from the holdback account to the McCulloughs, an unidentified portion of which was disbursed to Mr. Cullen, would be inequitable and unfair, and thus properly denied Mr. Ehsani’s motion under RAP 12.8.

2. **The trial court properly denied Mr. Ehsani’s motion to require Mr. Cullen to restore the monies awarded the McCulloughs, because the possibility of appeal does not eviscerate RAP 7.2 and Mr. Cullen was not awarded the funds jointly and subject to approval, rendering *Transamerica* inapplicable.**

Mr. Ehsani’s contention that there is a general duty not to rely upon a court judgment when there is any possibility of appeal is contrary to RAP 7.2. Moreover, it has been expressly rejected in Washington. Mr. Ehsani’s argument would substitute notice of appeal for supersedeas. “That is not the purpose or intent of RAP 7.2(c) and RAP 8.1.” *A.N.W. Seed Corp.*, 116 Wn.2d at 48 (rejecting market value of the property sold by execution of the un-superseded judgment as the measure of restitution);

see also Spahi, 107 Wn. App. at 772-73 (holding that a purchaser of property is a “purchaser in good faith” for purposes of RAP 12.8 notwithstanding knowledge of the pendency of an appeal). An attorney receiving funds at his client’s instruction is a bona fide purchaser in good faith, and just as mere notice that an appeal may flow would vitiate the supercedeas procedure and undermine RAP 7.2 if allowed to substitute for RAP 8.1, so such awareness should not apply to Mr. Cullen.

Mr. Ehsani’s argument that mere knowledge of a potential appeal necessitates restitution seems to form the basis of his reliance upon *Transamerica Ins. Group v. Adams*, 62 Or. App. 419, 425-26, 661 P.2d 937 (Or. Ct. App. 1983). However, this non-binding Oregon appellate decision should not persuade the Court, as it is neither legally nor factually similar to the present case. First, and most critically, unlike the award in *Transamerica*, the award made to the McCulloughs was not made jointly payable to Mr. Cullen. *Transamerica*, 62 Or. App. at 422.

In *Transamerica*, the plaintiff, a workers’ compensation insurer sought restitution of attorney fees paid by order of an Oregon Workers’ Compensation Board referee. *Transamerica*, 62 Or. App. at 421. Adams represented the injured worker, Whitt, in the administrative hearing. *Id.* The referee approved settlement of Whitt’s claim, including attorney fees, in December 1977. *Id.* Payment of the claim was made to Whitt and Adams jointly, requiring joint endorsement for negotiation. *Transamerica*, 62 Or. App. at 422. No such joint award was made here.

Transamerica diverges significantly from this case in another regard. In addition to the attorney, Adams's, status as a joint creditor, the Oregon workers' compensation statute at issue, Or. Rev. Statute 656.388(1), expressly prevented finalization of an attorney fee award in workers' compensation cases until the award was approved by the Board.² The Oregon Workers' Compensation Board set aside the settlement made jointly to Adams and Whitt. *Transamerica*, 62 Or. App. at 422. Relying on the reversed settlement and the workers' compensation statute, the Oregon Court of Appeals held Adams knew he might be required to restore his fee once the Board reversed the compensation award. Therefore, the attorney could not claim to be a transferee without knowledge. *Transamerica*, 62 Or. App. at 423. When the settlement was set aside, the attorney's fee was set aside as well. *Id.*

Transamerica is critically different from the circumstances at issue here and should not persuade the Court. Mr. Cullen was not paid jointly and had no discretion to direct the payment of the funds awarded the McCulloughs. Further, the McCulloughs, and therefore Mr. Cullen, could rely upon the finality of the judgment as articulated under RAP 7.2.

² Or. Rev. Statute 656.388(1) provides in relevant part:

No claim or payment for legal services by an attorney representing the worker or for any other services rendered before an Administrative Law Judge or the Workers' Compensation Board, as the case may be, in respect to any claim or award for compensation to or on account of any person, **shall be valid unless approved by the Administrative Law Judge or board, or if proceedings on appeal from the order of the board with respect to such claim or award are had before any court, unless approved by such court.**

Or. Rev. Statute 656.388(1) (1983) (emphasis added).

A.N.W. Seed Corp., 116 Wn.2d at 48. The trial court properly decided that requiring Mr. Cullen to reimburse the funds dispensed from the holdback account to the McCulloughs, an unidentified portion of which was disbursed to Mr. Cullen for hourly work, would be inequitable and unfair, and thus properly denied Mr. Ehsani's motion under RAP 12.8.

3. Attorney fees and costs should be awarded to Mr. Cullen as the prevailing party on appeal.

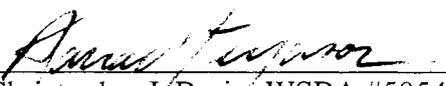
Costs to the prevailing party are permitted on appeal. RAP 14.2 (2005). Mr. Cullen previously requested the attorney fees and costs occasioned by Ms. Zamani's cross-appeal. As Mr. Ehsani's appeal necessitated further costs and attorney fees, Mr. Cullen should be entitled to recover these costs and fees from Mr. Ehsani, as well.

III. CONCLUSION

Therefore, for the reasons set forth above, the court should affirm the trial court's order denying Mr. Ehsani's motion for restitution.

RESPECTFULLY SUBMITTED this 12th day of September 2005.

TOUSLEY BRAIN STEPHENS PLLC

By: 

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of September, 2005,
caused to be served a true and correct copy of the following upon
the persons indicated below:

Brief of Respondent David Cullen to Sayed Ehsani

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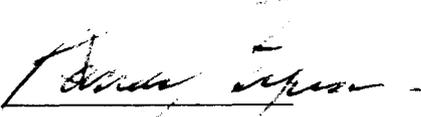
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

EXECUTED this 12th day of September, 2005, at Seattle,
Washington.


A. Janay Ferguson

