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No. 63567-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

2009 DEC 22 PM 1:11
COURT OF APPEALS
STATE OF WASHINGTON

ELLIS, LI & MCKINSTRY PLLC,
a Washington professional company,

Respondent,

v.

EDWARD R. MacDONALD and the marital community of Edward R.
MacDonald and Susan MacDonald,

Petitioners.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. RESTATEMENT OF ISSUES	2
III. RESTATEMENT OF THE CASE.....	3
IV. ARGUMENT	7
A. MacDonald’s aspersions are inaccurate and irrelevant to this appeal	7
1. ELM never modified its fee agreement to include assets recovered by Dougal MacDonald.....	8
2. Dougal MacDonald was never truly adverse to MacDonald and MacDonald gave informed consent about any potential conflict of interest.	9
3. MacDonald agreed to the value of the settlement assets that he received; no appraisal was necessary.....	9
4. MacDonald received his portion of the Lewis & Clark Ranch.	10
5. The September 2008 MacDonald Settlement Agreement did not require court approval and MacDonald never paid William Taggart to seek court approval.	10
6. ELM plainly and regularly informed MacDonald of his litigation costs.	11

7.	MacDonald's evidence that he owes ELM at least \$1.155 million is not confidential or privileged.	12
B.	After MacDonald conceded that he owes \$307,440 of costs, the trial court had discretion to order him to use \$131,250 of settlement proceeds to reimburse ELM	12
C.	MacDonald received both sufficient notice of ELM's reimbursement motion and a meaningful opportunity to oppose it; thus, MacDonald received due process	15
D.	Washington's attorney's-lien statute applies here, where MacDonald hired Washington attorneys to file a Washington lawsuit and they recovered primarily Washington assets	19
E.	Washington's attorney's-lien statute applies to money that an adverse party paid MacDonald as part of the settlement that ELM obtained for MacDonald	21
F.	The trial court's June 3 contempt ruling was an appropriate response to MacDonald's refusal to pay the \$131,250 even though he conceded that he and his attorneys had the money	22
1.	Under the collateral bar rule, an error in the May 19 order does not invalidate the June 3 contempt ruling	23
2.	MacDonald did not overcome the presumption that he had the ability to obey the May 19 order	24
3.	In its contempt ruling, the trial court properly bound MacDonald's agents and attorneys	27

G.	The trial court’s June 3 future-payments ruling was proper and within the court’s discretion	28
H.	The Court should award ELM its attorney fees and costs on appeal.....	31
V.	CONCLUSION	31

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brown v. Safeway Stores, Inc.</u> , 94 Wn.2d 359, 617 P.2d 704 (1980)	18
<u>Fluor Enterprises, Inc. v. Walter Construction, Ltd.</u> , 141 Wn. App. 761, 172 P.3d 368 (2007)	16-17
<u>Forbes v. American Bldg. Maint. Co. W.</u> , 148 Wn. App. 273, 198 P.3d 1042 (2009)	29
<u>In re Lawrence</u> , 279 F.3d 1294, (11 th Cir. 2002)	24
<u>In re Vanderbeek</u> , 153 Wn.2d 64, 101 P.3d 88 (2004)	21-22
<u>King County v. Seawest Investment Assoc., LLC</u> , 141 Wn. App. 304, 170 P.3d 53 (2007)	13, 17
<u>Krien v. Nordstrom</u> , 80 Wn. App. 306, 908 P.2d 889 (1996)	17
<u>Moreman v. Butcher</u> , 126 Wn.2d 36, 891 P.2d 725 (1995)	22-24, 26
<u>Plummer v. Great Northern Ry. Co.</u> , 60 Wash. 214, 110 P. 989 (1910)	19-20
<u>Post v. City of Tacoma</u> , ___ Wn.2d ___, ¶24, 217 P.3d 1179 (2009)	17
<u>R.A. Hanson Co., Inc. v. Magnuson</u> , 79 Wn. App. 497, 903 P.2d 496 (1995), <u>review denied</u> , 129 Wn.2d 1010 (1996)	31
<u>Rainier National Bank v. McCracken</u> , 26 Wn. App. 498, 615 P.2d 469 (1980)	14-17

<u>Ross v. Scannell,</u> 97 Wn.2d 598, 647 P.2d 1004 (1982)	21-22
<u>Smith v. Moran, Windes & Wong, PLLC,</u> 145 Wn. App. 459, 187 P.3d 275 (2008) <u>review denied</u> , 165 Wn.2d 1032 (2009).....	28
<u>State v. Noah,</u> 103 Wn. App. 29, 9 P.3d 858 (2000)	22-23
<u>State v. Phipps,</u> 174 Wash. 443, 24 P.2d 1073 (1933)	24
<u>United States v. Asay,</u> 614 F.2d 655 (9 th Cir. 1980)	24
<u>Yamaha Motor Corp., U.S.A. v. Harris,</u> 29 Wn. App. 859, 631 P.2d 423, <u>review denied</u> , 96 Wn.2d 1013 (1981)	13, 14, 15, 16, 29

Statutes

RCW 4.44.480	1, 2, 13-14, 16, 29
RCW 4.56.110	29
RCW 7.21.030(3)	31
RCW 19.52.020.....	29
RCW 60.40.....	20
RCW 60.40.010.....	1, 2, 4, 13, 29

Rules

CR 2A.....	25
CR 54(b).....	16

CR 56	18
RAP 2.4(b)	7, 23
RAP 18.1	31

I. INTRODUCTION

In the trial court, Appellant Edward MacDonald never disputed that he owes at least \$307,440 of costs to his former attorneys, Respondent Ellis, Li & McKinstry PLLC (“ELM”). And when ELM asserted its statutory attorney’s lien over \$131,250 of settlement proceeds going to MacDonald—in order for ELM to pay down a MacDonald-costs credit line—MacDonald agreed to hold the money “in abeyance.” Thus, when MacDonald instead disbursed the money to his attorneys, it was a fairly easy decision for the trial court to order MacDonald to use the \$131,250 to reimburse ELM. The court had discretion to do so under both RCW 60.40.010 and RCW 4.44.480.

Likewise, it was straightforward for the trial court to hold MacDonald in contempt when he conceded that he and his attorneys held the money but refused to reimburse ELM as the court had ordered.

MacDonald respectfully asks this Court to affirm the trial court and award ELM its attorney fees and costs.

II. RESTATEMENT OF ISSUES

MacDonald's appeal raises five primary issues:

- Enforcing an attorney's lien is an equitable proceeding; a trial court will not be disturbed unless it abuses its discretion. As part of a larger settlement, ELM obtained \$131,250 for MacDonald. In response to ELM's attorney's lien, MacDonald agreed to hold the money "in abeyance." MacDonald also conceded that he owes ELM \$307,440 in costs. Did the trial court abuse its discretion in ordering MacDonald to pay the \$131,250 of settlement proceeds to reimburse ELM for costs?
- Under RCW 4.44.480, when before trial a party admits that a fund of money is due to another party, a court can order the party to deposit the money in court or pay the money to the other party. MacDonald admitted that he owes ELM \$307,440 in costs. Did the trial court err in ordering him to pay \$131,250 of settlement proceeds to reimburse ELM for costs?
- When a court deprives a person of property, the person receives "due process" if he has an opportunity to be heard at a meaningful time and in a meaningful manner. MacDonald received notice of ELM's motion for reimbursement, pursuant to its lien, eight days before the court considered the motion. MacDonald responded with a nine-page brief and 124 pages of declarations and exhibits and never asked for more response time. In regard to the trial court's reimbursement order, did MacDonald receive due process?
- RCW 60.40.010 grants attorneys a lien for compensation for services they provide. The statute states no geographic limitation. Here, MacDonald hired a Washington law firm, ELM, to recover assets located primarily in Washington. Under one fee agreement, ELM filed a Washington lawsuit, later represented MacDonald in related California lawsuits, and later recovered primarily Washington assets for MacDonald. Does ELM's representation in the California cases mean that the Washington lien statute no longer applies?
- "Contempt of court" includes disobedience of a court order. And when a trial court finds and remedies contempt, an appellate court will not reverse the trial court unless it abused its broad discretion. MacDonald refused to obey the trial court's order to repay \$131,250, even though he and his

attorneys conceded that they had the money. Did the trial court abuse its discretion in holding MacDonald in contempt?

ELM's argument below addresses these main five issues, as well as related sub-issues.

III. RESTATEMENT OF THE CASE

Beginning in 2005, ELM provided over 6,500 attorney hours of services to Edward MacDonald, a lawyer licensed to practice in California ("MacDonald").¹ ELM's services encompassed four lawsuits. After extensive work, and an offer from the opposing party of \$1.8 million, in September 2008 ELM settled the case for about \$16.8 million.² The settlement included an interest in a large, Benton County ranch and a \$650,000 promissory note payable to MacDonald. Payment on the promissory note was due at the earlier of December 2009 or upon the sale of certain property in Dixon, California.³

Under the parties' fee agreement, MacDonald owes ELM a contingency fee of almost \$1.7 million and \$487,440 in litigation costs—costs that ELM financed through a line of credit that ELM is still paying on today.⁴ Despite ELM's successful work on MacDonald's behalf, MacDonald refused to pay ELM.⁵ Therefore, ELM sued.

¹ Clerk's Papers ("CP") 24, 30.

² CP 26-29.

³ See CP 28, 505.

⁴ CP 29-30.

⁵ CP 30.

In January 2009, ELM moved for writs of attachment.⁶ In response, MacDonald conceded that he owes ELM over \$1 million.⁷ The trial court ordered attachment.

In addition, ELM learned that MacDonald was likely to receive settlement proceeds in January 2009 (a sizeable payment on the promissory note). ELM had, and has, an attorney's lien on these proceeds under RCW 60.40.010. ELM gave notice of its lien to MacDonald and to Douglas MacDonald, the promissory note payor.⁸

Although the lien does not require a written agreement, ELM's lien is consistent with a provision in MacDonald's fee agreement with ELM: "[Y]ou [MacDonald] agree to reimburse ELM for all unreimbursed costs when you receive sufficient distributions of the Interests to do so. You agree that, upon receiving a distribution, you shall immediately reimburse ELM for all unreimbursed costs incurred by ELM."⁹

In response to ELM's lien, MacDonald agreed in writing, through counsel, that he would hold the settlement proceeds in abeyance: "If my client [MacDonald] receives the funds from the closing of the Dixon property, those funds may be subject to the fee dispute [with ELM] and he

⁶ CP 403.

⁷ CP 46, 440 ¶ 18, 476.

⁸ CP 64, 45 (lien notice to counsel for Douglas MacDonald, with copy to counsel for MacDonald).

⁹ CP 35.

will hold them in abeyance until the dispute is resolved.”¹⁰ MacDonald himself told the trial court in a sworn declaration that “I realize, however, that given this fee dispute it is best to have the funds held in trust.”¹¹ And at the end of January, MacDonald told the court that “the money sits” in an escrow account because the “parties have not yet agreed on which trust account should hold the funds during the pendency of this action. . . .”¹²

When ELM later learned that MacDonald did, in fact, receive the settlement proceeds—\$131,250—ELM asked MacDonald to “pay the proceeds to Ellis, Li & McKinstry or to the Clerk of the King County Superior Court.”¹³ But MacDonald refused. And the money did not sit in an escrow account or a trust account. Instead, MacDonald took the money and paid various law firms working for him, including those opposing ELM.¹⁴

ELM filed a motion asking the trial court for an order that MacDonald pay “the \$131,250 to ELM for payment on the line of credit used to finance [MacDonald’s litigation] costs.”¹⁵ ELM showed the court that it had been forced to pay over \$72,000 on the \$487,440 line of credit, which was due in full at the end of June 2009.¹⁶

¹⁰ CP 66.

¹¹ CP 81 ¶ 21.

¹² CP 50.

¹³ CP 83.

¹⁴ CP 486-88.

¹⁵ CP 17.

¹⁶ CP 90.

Importantly, ELM also showed the trial court that although ELM had paid \$487,440 of costs on MacDonald's behalf, MacDonald disputed only \$180,000 of those costs.¹⁷ Thus, he did not dispute the remaining \$307,440.¹⁸

In his opposition to the motion, MacDonald did not contest this point. He made no assertion that he disputed more than \$180,000 of the cost bill of \$487,440.¹⁹

The trial court granted ELM's motion in an order dated May 15, 2009, and filed May 19.²⁰ The court ordered MacDonald to return the \$131,250 so that ELM could pay the money against the bank credit line that ELM incurred to finance McDonald's litigation costs.

MacDonald refused to obey the court's May 19 order. So on June 3, 2009, the court held MacDonald in contempt.²¹ In the June 3 order, the court also ordered MacDonald to pay all future promissory note payments—from the September 2008 settlement—to the trial court.²²

After the trial court held him in contempt, MacDonald paid \$51,077.50 to ELM. Commissioner William Ellis then granted a limited stay: “[It is] ORDERED that paragraphs 2, 3 and 4 of the trial court[’s

¹⁷ CP 15, 55-56.

¹⁸ See CP 229, 231.

¹⁹ CP 219-27.

²⁰ CP 238-39.

²¹ CP 392.

²² CP 393.

June 3] contempt order are stayed pending further order of the Court of Appeals provided that MacDonald deposits the disputed amount into the registry of the trial court within 7 days.”²³ At that point, the “disputed amount” was \$80,172.50, which MacDonald deposited in the trial court.

On July 13, 2009, Commissioner Mary Neel granted review of the June 3 order and based on RAP 2.4(b), also granted review of the May 19 order.²⁴

After the Court granted review, MacDonald refused to proceed with discovery in the trial court, forcing ELM to file a motion with the Court. On October 23, 2009, Commissioner Ellis rejected MacDonald’s arguments and ordered him to proceed.²⁵

IV. ARGUMENT

A. **MacDonald’s aspersions are inaccurate and irrelevant to this appeal.**

MacDonald makes several factual aspersions that are unnecessary to his appeal. Despite this irrelevance, however, they are meant to harm ELM and distract from the issues at hand. So ELM must respond.

²³ Notation Ruling (June 30, 2009) at 2.

²⁴ Notation Ruling (July 13, 2009) at 3.

²⁵ Notation Ruling (Oct. 23, 2009).

1. ELM never modified its fee agreement to include assets recovered by Dougal MacDonald.

MacDonald alleges that mid-litigation, ELM modified its fee agreement—specifically, its contingency fee—to include the value of assets recovered by MacDonald’s brother, Dougal MacDonald.²⁶ This is untrue.

From the beginning (February 2005), MacDonald’s fee agreement with ELM included interests recovered for Dougal.²⁷ This was because in his trust-and-estate documents, MacDonald’s and Dougal’s father left nothing to Dougal; Dougal’s only chance for an “inheritance” was through the portion their father left to MacDonald; MacDonald always planned to split his portion with Dougal; and MacDonald retained ELM to recover the full portion (regardless of whether MacDonald shared with Dougal).²⁸

Thus, the July 2005 fee letter did not increase ELM’s contingency fee. It merely clarified that the fee would include interests that MacDonald held for Dougal regardless of whether Dougal ultimately received the interests by outright distribution or “a formal recognition of a beneficial interest” in his parents’ trusts and estates.²⁹

²⁶ Brief of Petitioner/Appellant (“App. Br.”) at 5-6.

²⁷ CP 33 § 1.c.

²⁸ See CP 25 ¶ 5 and 28 ¶ 18.

²⁹ CP 40.

Indeed, the only change in the July 2005 letter was that ELM agreed to take on more litigation—defending MacDonald from Dougal³⁰—which was specifically excluded in the initial fee agreement.³¹

2. Dougal MacDonald was never truly adverse to MacDonald and MacDonald gave informed consent about any potential conflict of interest.

MacDonald alleges that Dougal was adverse to MacDonald. Substantively, this is untrue because MacDonald retained ELM to recover MacDonald’s full portion regardless of whether MacDonald shared with Dougal. Moreover, ELM and MacDonald discussed potential conflicts of interest with Dougal and after the opportunity for independent legal counsel, MacDonald agreed that he did “not believe there is any actual conflict or that such potential conflict will materially limit ELM’s ability to represent” him.³²

3. MacDonald agreed to the value of the settlement assets that he received; no appraisal was necessary.

MacDonald claims that he disputed the value of his interest in the Lewis & Clark Ranch.³³ Yes, after MacDonald received his settlement assets and ELM asked to be paid, MacDonald alleged a dispute. But at the time of the settlement, MacDonald and his family agreed to the value of

³⁰ CP 40.

³¹ CP 34.

³² CP 36.

³³ App. Br. at 9.

the settlement assets, including a value of \$5.6 million for MacDonald's portion of the Ranch.³⁴ Because MacDonald and ELM agreed to the assets' value, there was no need for—and no party sought to invoke—the appraisal provision of the fee agreement.³⁵

4. MacDonald received his portion of the Lewis & Clark Ranch.

MacDonald claims that he did not receive his portion of the Lewis & Clark Ranch and, thus, a partition action was necessary in Benton County.³⁶ This is untrue. Under the September 2008 settlement agreement, MacDonald received an undivided one-fourth interest in the Ranch.³⁷ MacDonald has already received this asset,³⁸ though he also has additional contract rights—against Douglas MacDonald—to have his interest divided.³⁹

5. The September 2008 MacDonald Settlement Agreement did not require court approval and MacDonald never paid William Taggart to seek court approval.

MacDonald alleges that ELM “abandoned” the California “estate litigation” and that MacDonald had to hire attorney William Taggart to get

³⁴ CP 28-29 ¶ 21.

³⁵ CP 35 § 2.b.

³⁶ App. Br. at 11.

³⁷ CP 501-02 § 4.1.

³⁸ CP 80 (MacDonald referring to himself as “ranch owner”); CP 478 (letter referring to MacDonald's ownership interest); CP 481 (MacDonald's motion referring to “Mr. MacDonald's undivided one-quarter interest in the L&C Ranch”)

³⁹ CP 503-04.

court approval of the September 2008 MacDonald Settlement Agreement.⁴⁰ This is untrue.

The settlement agreement did not require court approval.⁴¹ Instead, in the agreement, the parties agreed to voluntarily dismiss their lawsuits.⁴² Although unnecessary, Douglas MacDonald, the California executor, chose to seek California court approval.⁴³

In response, MacDonald's personal California attorney, Taggart, opposed Douglas's petition for approval.⁴⁴

6. ELM plainly and regularly informed MacDonald of his litigation costs.

MacDonald claims that ELM did not adequately inform him of litigation costs that he was incurring.⁴⁵ This is untrue. ELM sent MacDonald monthly cost reports.⁴⁶ Moreover, from the beginning, each party agreed that fees for California attorneys would be litigation "costs" that MacDonald had to reimburse ELM for.⁴⁷

⁴⁰ App. Br. at 11, 13.

⁴¹ CP 373, 380 ¶ 31.

⁴² CP 508 § 10.

⁴³ CP 373.

⁴⁴ CP 373, 383.

⁴⁵ App. Br. at 9, 25.

⁴⁶ CP 27 ¶ 16.

⁴⁷ CP 35-36.

7. MacDonald's evidence that he owes ELM at least \$1.155 million is not confidential or privileged.

When ELM moved for attachment, MacDonald responded that he "has offered over one million dollars to settle the remainder" of the case.⁴⁸ He then proceeded to file his November 2008 letter in which he offers ELM \$1.155 million.⁴⁹ MacDonald also filed a declaration saying, "I have not refused to pay ELM's reasonable fees and costs: ELM and I simply have a dispute about the value of the [underlying] settlement and my obligation to pay ELM. . . ."⁵⁰

MacDonald can try now to disclaim this evidence, but he filed the evidence. Therefore, it is not privileged, it is fully admissible, and the trial court was free to conclude that MacDonald believes that he owes ELM at least \$1.155 million.

B. After MacDonald conceded that he owes \$307,440 of costs, the trial court had discretion to order him to use \$131,250 of settlement proceeds to reimburse ELM.

MacDonald never asserted to the trial court that he owes ELM less than \$307,440 in litigation costs. And when MacDonald received \$131,250 in settlement proceeds, ELM simply asked that these proceeds be applied against the \$307,440 in undisputed, outstanding costs, which ELM was paying through an ongoing bank line of credit. When the trial

⁴⁸ CP 46.

⁴⁹ CP 476.

⁵⁰ CP 79.

court granted ELM's request, and ordered MacDonald to pay \$131,250 of costs, its ruling was consistent with RCW 60.40.010 and RCW 4.44.480. Either statute, independently, is sufficient authority for the trial court's order.

First, the trial court partially enforced ELM's attorney's lien under RCW 60.40.010. Enforcing an attorney's lien is an equitable proceeding that is reviewed for abuse of discretion.⁵¹ The trial court's order concerning the \$131,250 was not "manifestly unreasonable or based on untenable grounds."⁵² The trial court did not abuse its discretion in ordering MacDonald to use settlement proceeds to reimburse ELM for costs that he did not dispute.

Second, RCW 4.44.480 allows a court, before trial, to order one party to pay money to another party:

When it is admitted by the pleading or examination of a party, that the party possesses or has control of any money, or other thing capable of delivery, which being the subject of the litigation, is held by him or her as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.⁵³

⁵¹ King County v. Seawest Investment Assoc., LLC, 141 Wn. App. 304, 314, 170 P.3d 53 (2007).

⁵² See id.

⁵³ RCW 4.44.480 (emphasis added); see Yamaha Motor Corp., U. S. A. v. Harris, 29 Wn. App. 859, 864-65, 631 P.2d 423 (applying statute to pretrial payment order), review denied, 96 Wn.2d 1013 (1981).

In Yamaha Motor Corp., U.S.A. v. Harris, a snowmobile manufacturer sued one of its dealers for breach of contract.⁵⁴ Before trial, the dealer conceded that he had not paid the manufacturer for some snowmobiles that he had sold and that he had the sale proceeds in a bank account.⁵⁵ The trial court then ordered the dealer to pay into the court an amount equal to what the dealer would owe the manufacturer for the snowmobile sales.⁵⁶ The Court of Appeals held that the trial court's actions were authorized by RCW 4.44.480, as well as the manufacturer's written security agreement with the dealer and a Uniform Commercial Code lien statute.⁵⁷

In the present case, RCW 4.44.480 authorized the May 19 reimbursement order. And as in Yamaha, the trial court's order is further justified by the fact that ELM has a statutory lien. The security agreement in Yamaha is also similar to MacDonald's written agreement to "immediately reimburse ELM for all unreimbursed costs incurred by ELM."⁵⁸

Ignoring Yamaha, MacDonald relies on Rainier National Bank v. McCracken.⁵⁹ This reliance is misplaced for two reasons. First,

⁵⁴ Yamaha, 29 Wn. App. at 861-62.

⁵⁵ Id. at 863.

⁵⁶ Id. at 863-64.

⁵⁷ Id. at 864-65.

⁵⁸ CP 35.

⁵⁹ Rainier National Bank v. McCracken, 26 Wn. App. 498, 615 P.2d 469 (1980).

McCracken is different because it did not involve the broad discretion that a trial court has when enforcing a statutory lien, especially an attorney's lien.⁶⁰

Second, because Yamaha postdates McCracken and the present case involves a statutory lien (as in Yamaha), the trial court had the authority to order MacDonald to repay the \$131,250 even if he had disputed this amount. But MacDonald did not dispute this amount. And the McCracken court acknowledged that an order for a party to deliver funds is appropriate where "it is either clearly admitted in his pleading or shown in some proceeding in the cause that he has himself no right to retain it and that the other party to the action is entitled to it or at least has an absolute interest in it."⁶¹ This is the case here, where MacDonald did not dispute that he currently owes costs of \$307,440, over twice the amount that the trial court ordered him to return.

C. MacDonald received both sufficient notice of ELM's reimbursement motion and a meaningful opportunity to oppose it; thus, MacDonald received due process.

MacDonald chiefly relies on four cases for the assertion that he was denied property without due process. This is not accurate.

⁶⁰ Id.

⁶¹ Id. at 509 (quotation marks and citation omitted).

First, MacDonald relies on Fluor Enterprises, Inc. v. Walter Construction, Ltd.⁶² But the case says nothing about the deprivation of property without due process.⁶³ Likewise, MacDonald cites the case for the assertion that a “party cannot execute on a claim without first obtaining an enforceable judgment.”⁶⁴ But the Fluor court took this point from an Ohio case⁶⁵ as the Fluor court decided a completely different issue—“whether a partial judgment is immediately enforceable if it is not appealed.”⁶⁶ Thus, Fluor pertains to whether a party can execute on a partial judgment before getting a full final judgment, or at least a judgment that the trial court certifies under CR 54(b).⁶⁷ This issue is not at play in the present case. Fluor did not involve an attorney’s lien or an order to reimburse for undisputed litigation costs.

Despite its no-execution-before-final-judgment statement,⁶⁸ one cannot read Fluor broadly to mean that a pretrial order to pay is never allowed. This is because such a blanket statement fails to account for RCW 4.44.480, Yamaha, and even McCracken. Fluor does not mention

⁶² Fluor Enterprises, Inc. v. Walter Constr., Ltd., 141 Wn. App. 761, 172 P.3d 368 (2007).

⁶³ Id.

⁶⁴ App. Br. at 18.

⁶⁵ Fluor, 141 Wn. App. at 768 ¶ 15.

⁶⁶ Id. at 767.

⁶⁷ Id. at 767-79.

⁶⁸ Id. at 768 ¶ 15.

any of these authorities. Nor would one expect it to because a pretrial order to pay was not at issue in Fluor.

Second, MacDonald relies on McCracken for his due process argument. But McCracken says nothing about due process and is distinguishable as explained above.

MacDonald also relies on Krien v. Nordstrom and King County v. Seawest Investment Associates.⁶⁹ But these cases do not support MacDonald's argument. In Krien, the court approved an attorney's-lien adjudication where the trial court heard oral testimony from two witnesses and the "remainder of the evidence included declarations and affidavits from experts and those involved in the case."⁷⁰ In Seawest, the trial court apparently took evidence by live testimony. But neither case is prescriptive. Neither case holds that due process requires live testimony or notice of a certain number of days. And neither Krien nor Seawest had the same dynamic present here: a lack of dispute that the client owed the attorney at least \$307,440.

As the Due Process Clause requires, MacDonald had an "opportunity to be heard at a meaningful time and in a meaningful

⁶⁹ Krien v. Nordstrom, 80 Wn. App. 306, 908 P.2d 889 (1996); King County v. Seawest Investment Assoc., LLC, 141 Wn. App. 304, 170 P.3d 53 (2007), review denied, 163 Wash.2d 1054 (2008).

⁷⁰ Krien at 308-09.

manner.”⁷¹ He received eight days’ notice of ELM’s motion and in response, he filed a nine-page brief and 124 pages of sworn declarations and exhibits,⁷² which the trial court reviewed.⁷³ Even though ELM specified in its motion that MacDonald disputed only \$180,000 in costs (out of \$487,440), MacDonald never disputed this in his response. He never asked for more time before the trial court ruled. He never asked for more discovery on the issue of costs. He never asked for the chance to present live testimony.⁷⁴

MacDonald also complains that the May 19 order is invalid under CR 56. But MacDonald cites no authority for the proposition that CR 56 trumps a trial court’s broad discretion over attorney’s-*lien* proceedings. Even if CR 56 applied here, that fact would not affect the May 19 order for two reasons. First, MacDonald waived the time requirements under CR 56(c).⁷⁵ Second, there was no genuine issue of material fact that MacDonald owes at least \$307,440 of costs. MacDonald conceded this point. Even when MacDonald alleges that ELM did not fairly disclose that under the fee agreement, “costs” includes fees for outside, California attorneys, the amount of those costs totaled no more than \$180,000 of the

⁷¹ Post v. City of Tacoma, ___ Wn.2d ___, ¶ 24, 217 P.3d 1179, 1186 (2009).

⁷² CP 93-218.

⁷³ CP 238.

⁷⁴ CP 219-27.

⁷⁵ See Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 364, 617 P.2d 704 (1980) (no prejudice from violation of CR 6 time requirements where party presented argument and case authority and did not request continuance).

\$487,440 in costs.⁷⁶ Thus, there was no dispute that MacDonald owed costs well over \$131,250.

D. Washington’s attorney’s-lien statute applies here, where MacDonald hired Washington attorneys to file a Washington lawsuit and they recovered primarily Washington assets.

MacDonald came to Washington and hired a Washington law firm to file a Washington lawsuit to recover trust-and-estate assets that existed primarily in Washington. Even though ELM also represented MacDonald in related California litigation, ELM’s representation of MacDonald was primarily about Washington. MacDonald conceded this in his answer to ELM’s complaint when he admitted to jurisdiction and venue in Washington “because the transactions and events at issue in this dispute took place in King County, Washington.”⁷⁷ Thus, the Washington attorney’s-lien statute should apply.

MacDonald cites only one authority for the notion that Washington’s lien statute does not apply—Plummer v. Great Northern Railway.⁷⁸ But Plummer is different in at least two important ways. First, in Plummer, “[n]o suit or action was begun on behalf of [the client] in the state of Washington. . . .”⁷⁹ Here, ELM filed suit in Washington in March

⁷⁶ CP 55-56.

⁷⁷ CP 3-4 ¶¶ 2.1-2.2; CP 6-7 ¶¶ 2.1-2.2.

⁷⁸ Plummer v. Great Northern Ry. Co., 60 Wash. 214, 110 P. 989 (1910).

⁷⁹ Id. at 216.

2005 and represented MacDonald in that lawsuit until it ended in October 2008.⁸⁰

Second, in Plummer, before the attorneys sought to enforce an attorney's lien under the Washington statute, they first sought a fee under the British Columbia statute that barred an attorney's lien but which allowed an attorney to apply to an arbitrator for a fee award. Indeed, they had applied to an arbitrator and the arbitrator awarded a fee. This was an important fact to the Supreme Court: "[H]aving called upon the arbitrator to make an award, and having accepted the award so made, we think the respondents are estopped from claiming any other fee from [their] client."⁸¹ This did not happen in the present case. ELM did not first seek a fee, or lien, under a California statute and then turn around and seek one under the Washington statute as well.

Because MacDonald admits that the underlying transactions and events primarily occurred in Washington, ELM represented MacDonald for over three years in a Washington lawsuit, and ELM did not seek a lien under a California statute, Plummer is inapplicable. RCW 60.40 applies.

⁸⁰ CP 26-29.

⁸¹ Id. at 218.

E. Washington’s attorney’s-lien statute applies to money that an adverse party paid MacDonald as part of the settlement that ELM obtained for MacDonald.

MacDonald attempts to cast ELM’s attorney’s lien as a lien on real property. In truth, it is a lien on money owed to MacDonald. From the underlying settlement, MacDonald is owed money from the adverse party, Douglas MacDonald. And Douglas’s payment of this debt is secured by sale proceeds owed to Douglas.⁸²

Put another way, the Dixon, California parcels have been for sale; Douglas is owed money when they sell; and to secure the money that Douglas owes MacDonald, Douglas pledged the money owed to him (Douglas). Under the attorney’s lien statute, ELM has a lien on the money—the “Dixon proceeds.” Ross v. Scannell and In re Vanderbeek do not prohibit this.

In Ross, an attorney filed an attorney’s lien in the Superior Court and sent it to a title company for the admitted purpose of clouding title and blocking his client’s pending property sale.⁸³ In Vanderbeek, an attorney recorded liens on the proceeds of her clients’ real property sales.⁸⁴

The present case is different in two important ways. First, Ross and Vanderbeek pertain to an attorney’s lien on property owned by the

⁸² CP 505.

⁸³ Ross v. Scannell, 97 Wn.2d 598, 602-03, 647 P.2d 1004 (1982).

⁸⁴ In re Vanderbeek, 153 Wn.2d 64, 74, 101 P.3d 88 (2004).

attorney's client. Here, MacDonald did not and does not own the Dixon parcels. Douglas MacDonald and his co-owners do.⁸⁵

Second, in the very Vanderbeek passage that MacDonald emphasizes, the Supreme Court explains that its concern is with filed or recorded documents that cloud title to a client's property: "We see no difference between attorney liens filed on the title of real property and those filed on the proceeds of real property sales since both filings appear as liens on a title report and thus, have the effect of clouding clients' titles."⁸⁶ Here, there was no lien filed or recorded, ELM's lien never appeared on a title report, and there was no cloud on title to the Dixon parcels. ELM's lien is not a real property lien prohibited by Ross or Vanderbeek. ELM has a lien on money owed to MacDonald.

F. The trial court's June 3 contempt ruling was an appropriate response to MacDonald's refusal to pay the \$131,250 even though he conceded that he and his attorneys had the money.

When a trial court finds and remedies contempt, an appellate court will not reverse the trial court unless it abused its broad discretion.⁸⁷ "An abuse of discretion is present only if there is a clear showing that the

⁸⁵ CP 498 § B, 500-501.

⁸⁶ Vanderbeek, 153 Wn.2d at 88 (emphasis added).

⁸⁷ Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); State v. Noah, 103 Wn. App. 29, 45, 9 P.3d 858 (2000).

exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.”⁸⁸

1. Under the collateral bar rule, an error in the May 19 order does not invalidate the June 3 contempt ruling.

As shown above, the May 19 order was within the trial court’s discretion. Even if it was not, under the collateral bar rule, MacDonald was obligated to obey the order.⁸⁹ Thus, either way, the court appropriately found MacDonald in contempt.

The collateral bar rule prohibits a party from attacking an order in contempt proceedings that arise later from the party’s disobedience of the order.⁹⁰ This is true even if the order turns out to be erroneous, as long as it is not void—i.e., because the court lacks jurisdiction.⁹¹ Even if the May 19 order was unconstitutional—it was not—the trial court did not lack jurisdiction.⁹² Moreover, MacDonald has admitted that the trial court has jurisdiction.⁹³

MacDonald has presented—and ELM has found—no authority which holds that RAP 2.4(b) trumps the collateral bar rule. Thus, the Court should not even be reviewing the May 19 order. With due respect,

⁸⁸ Moreman, 126 Wn.2d at 40.

⁸⁹ Noah, 103 Wn. App. at 45-46.

⁹⁰ Id.

⁹¹ Id. at 46.

⁹² Id. at 45-46 (“law must be obeyed even if unconstitutional and disobedience results in contempt”).

⁹³ CP 3-4 ¶¶ 2.1; CP 6-7 ¶¶ 2.1.

Commissioner Mary Neel ruled incorrectly on this issue.⁹⁴ But at a minimum, the rule means that even if the May 19 order was in error, MacDonald was still obligated to fully and promptly obey it.

2. MacDonald did not overcome the presumption that he had the ability to obey the May 19 order.

To sanction a party for contempt, a court must find that the party has the ability to perform the act ordered. But the law provides a starting point: The law presumes that the party can perform what the court ordered.⁹⁵ This presumption changes only if the party carries “both the burden of production and the burden of persuasion” to prove that he cannot comply.⁹⁶ To carry these burdens, the party must “offer evidence . . . [that] the court finds credible.”⁹⁷ The party must “go beyond a mere assertion of inability and establish that he has made in good faith all reasonable efforts to meet the terms of the court order he is seeking to avoid.”⁹⁸ Moreover, where a party is responsible for his alleged inability to obey, that inability—due to the party’s fault—is not a defense to contempt.⁹⁹

⁹⁴ See Notation Ruling (July 13, 2009) at 3.

⁹⁵ Moreman, 126 Wn.2d at 40.

⁹⁶ Id.

⁹⁷ Id. at 40-41.

⁹⁸ In re Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002) (quotation marks and citation omitted).

⁹⁹ State v. Phipps, 174 Wash. 443, 446, 24 P.2d 1073 (1933) (inability to obey not a defense where condemner at fault for inability or “brought on himself disability to obey the order”); Lawrence, 279 F.3d at 1299 (same); United States v. Asay, 614 F.2d 655, 657-58 (9th Cir. 1980).

Incredibly, MacDonald claims that the trial court could not hold him in contempt because by the time the court ordered MacDonald to reimburse ELM, “MacDonald had already disbursed the majority of the proceeds except [for] \$13,125. . . .”¹⁰⁰ This assertion is both myopic and inaccurate.

First, the assertion ignores the facts that MacDonald had agreed that he would use first settlement proceeds to pay off costs,¹⁰¹ that he would hold the money “in abeyance,”¹⁰² and that the money should, at the least, be put in a trust account.¹⁰³ Contrary to his fee agreement and CR 2A, he did none of this.

Second, by the time of the May 19 order, MacDonald had not disbursed all but \$13,125. In fact, MacDonald admitted to the trial court that he retained \$37,952.50 of the \$131,250 in his “personal checking account” and another \$13,125 sat in the trust account of his personal attorney, William Taggart.¹⁰⁴ That’s a total of \$51,077.50 that MacDonald simply refused to pay as the trial court directed. Based on this fact alone, one cannot conclude that the trial court abused its discretion when it held MacDonald in contempt.

¹⁰⁰ App. Br. at 33.

¹⁰¹ CP 35.

¹⁰² CP 66.

¹⁰³ CP 81.

¹⁰⁴ CP 486-88 ¶ 10 (\$131,250 less \$80,172 equals \$51,077.50).

Third, as to the remaining \$80,172.50, MacDonald admitted that he had recently transferred the money as follows:

- \$30,000 to MacDonald's long-time attorney, William Taggart;
- \$10,000 to MacDonald's Spokane attorney, Dan O'Rourke;
- \$4,172.50 to attorney, and MacDonald expert witness, Mark Fucile; and
- \$36,000 to attorneys Johnson & Flora, who represent MacDonald in the trial court and, in part, in this appeal.¹⁰⁵

Even as to this \$80,172.50, the law presumes that MacDonald could repay the money. To overcome this presumption as a factual matter, MacDonald would have to, at the least, (1) produce evidence that he could not recover the money from these transferees, his attorneys, and (2) persuade the trial court based on that evidence.¹⁰⁶ He presented no evidence like this, such as declarations from his attorneys.

Moreover, based on the facts that MacDonald admits, he could not overcome the presumption as a legal matter. In asserting the transfers to his attorneys as a partial inability to obey, MacDonald ignored—and still ignores—the caselaw which establishes that a party cannot avoid contempt by putting himself in a position where he cannot obey.¹⁰⁷ MacDonald created the alleged inability and, thus, it is not a defense to contempt.

¹⁰⁵ Id.

¹⁰⁶ Moreman, 126 Wn.2d at 40.

¹⁰⁷ See supra note 99.

It is also noteworthy that the trial court's contempt ruling had precisely the coercive effect that the court intended. Once the court held MacDonald in contempt on June 3, he paid \$51,077.50 within a week. And he paid the remaining \$80,172.50 within three weeks. MacDonald had the ability to pay and the court's contempt ruling properly coerced him to do so.

3. In its contempt ruling, the trial court properly bound MacDonald's agents and attorneys.

MacDonald complains that the trial court's June 3 order could not bind his attorneys.¹⁰⁸ This is inaccurate.

First, the June 3 order was a continuation of the trial court's attorney's-lien determination. MacDonald did not dispute that he owes ELM well over \$131,250 in costs and ELM has a lien on the \$131,250 that MacDonald received. When he transferred the money to his attorneys, it did not escape the lien; it remained subject to the lien.

The result might be different if any of these transferees was a "good faith" transferee without knowledge of ELM's attorney's lien. But MacDonald never presented evidence of this. Johnson & Flora, who received \$36,000, clearly knew about the lien,¹⁰⁹ as did William Taggart,¹¹⁰ who received \$30,000. It would be surprising if MacDonald's

¹⁰⁸ App. Br. at 34.

¹⁰⁹ CP 45, 64.

¹¹⁰ CP 83.

other attorney-transferees did not also know about the lien, especially since the lien rises automatically as a matter of law¹¹¹ and they know that MacDonald is in a fees-and-costs dispute with ELM.

It is important to note that the trial court did not impose a daily fine on the attorneys themselves. The court merely assured that MacDonald's attorneys, as his agents and as transferees of the funds in question, did not inhibit the return of the money. This is not extraordinary. And it's within the trial court's broad discretion over both attorney's-lien proceedings and contempt proceedings.

G. The trial court's June 3 future-payments ruling was proper and within the court's discretion.

In addition to reimbursement of the \$131,250, MacDonald complains about the trial court's ruling that "[a]ll future payments of the September 15, 2008 Promissory Note shall be made to the Clerk of the King County Superior Court."¹¹² This ruling is reasonable and within the trial court's discretion.

MacDonald did not dispute that he owes at least \$307,440 of costs. And he does not dispute that all costs are to be paid first from any recovery.¹¹³ Subtracting \$307,440 from the \$650,000 owed to MacDonald

¹¹¹ Smith v. Moran, Windes & Wong, PLLC, 145 Wn. App. 459, 470, 187 P.3d 275 (2008), review denied, 165 Wn.2d 1032 (2009).

¹¹² CP 393 ¶ 5; see App. Br. at 17.

¹¹³ CP 35.

on the September 2008 promissory note leaves about \$343,000 plus interest. So the question becomes whether the trial court was within its discretion when it required this additional \$343,000 to be paid into the court. The answer is yes.

As explained above, under each of RCW 60.40.010 and RCW 4.44.480, the trial court had the discretion to enforce ELM's attorney's lien by ordering future settlement proceeds into the registry of the court. As with the funds in Yamaha, the \$343,000 is subject to a statutory lien and a written agreement.

Paying future payments of \$343,000 into the court also makes sense based on two views of the math in this case. First, based on valuation figures used during the September 2008 global settlement, ELM is entitled to fees and costs of about \$2.2 million.¹¹⁴ MacDonald submitted evidence that he owes ELM at least \$1.155 million.¹¹⁵ The sum of \$343,000 is less than 16 percent of \$2.2 million and just over 31 percent of MacDonald's \$1.1 million figure. And this is before adding 12 percent prejudgment interest under RCW 4.56.110 and RCW 19.52.020.¹¹⁶

Thus, even under MacDonald's version of the amount owed, the trial court ordered less than one-third of the amount in controversy into the

¹¹⁴ CP 29.

¹¹⁵ CP 476.

¹¹⁶ See Forbes v. American Bldg. Maint. Co. W., 148 Wn. App. 273, 297-98, 198 P.3d 1042 (2009).

court's registry. And the court did so only in regard to future settlement proceeds, which are subject to ELM's lien.

Second, MacDonald's own expert, attorney Mark Fucile, states that even if ELM's fee agreement was defective, ELM would still be entitled to "quantum meruit recovery"¹¹⁷—i.e., reasonable value for the work done. Dividing \$343,000 by 6,500 attorney hours yields less than \$53 an hour. Where the trial court merely ordered the money paid into the court, it is reasonable for the court to conclude that even under MacDonald's theory of the case, ELM will likely be entitled to recover at least an average of \$53 per attorney hour.

Finally, one must remember the context of the future-payments ruling. It came directly after MacDonald (1) showed the duplicity of promising to keep the \$131,250 in abeyance, and then doing just the opposite, and (2) plainly disobeyed the trial court's order to pay the \$131,250. Given the trial court's broad discretion over attorney's-lien proceedings, it is entirely reasonable to conclude that in order to protect ELM's attorney's lien—for it to have any teeth at all—the future settlement proceeds should be paid into the court pending trial.

¹¹⁷ CP 115:25.

H. The Court should award ELM its attorney fees and costs on appeal.

This entire appeal is the result of MacDonald's contempt. But for his contempt, there would be no review at this time of the May 19 and June 3 orders. ELM has spent considerable time and attorney fees in responding to MacDonald's multiple filings in this Court and in seek an order from this Court for MacDonald to proceed in the trial court. ELM is entitled to attorney fees and costs under RAP 18.1 and RCW 7.21.030(3).¹¹⁸

V. CONCLUSION

In the trial court, Edward MacDonald did not dispute that he owes Ellis, Li & McKinstry PLLC at least \$307,440 of costs. Thus, the court had the discretion, under RCW 60.40.010 and RCW 4.44.480, to order him to pay \$131,250 of settlement proceeds to reimburse ELM for costs that ELM incurred on MacDonald's behalf. The need for this was especially compelling since ELM was paying on the very bank line of credit used to finance MacDonald's costs.

The trial court also acted within its discretion when it found MacDonald in contempt for not reimbursing ELM as ordered. MacDonald

¹¹⁸ R.A. Hanson Co., Inc. v. Magnuson, 79 Wn. App. 497, 502-03, 903 P.2d 496 (1995), review denied, 129 Wn.2d 1010 (1996).

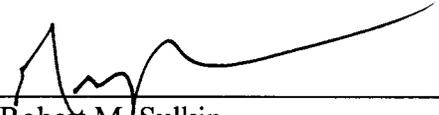
admitted that he and his attorneys held the \$131,250 but he refused to pay it over.

The Court should affirm the trial court's orders of May 19 and June 3, 2009, and should award ELM its attorney fees and costs.

DATED this ^{22nd}~~21~~st day of December, 2009.

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