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STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT
PROBATE DIVISION
FIRST JUDICIAL DISTRICT

In Re the Estate of:

Prince Rogers Nelson,

Decedent.

Court File No.: 10-PR-16-46
Judge Kevin W. Eide

AFFIDAVIT OF LEE A. HUTTON, III IN SUPPORT OF BARNES & THORNBURG LLP'S APPLICATION OF ATTORNEY'S LIEN AS FIRST PRIORITY

STATE OF MINNESOTA)
) *ss.*
COUNTY OF HENNEPIN)

1. My name is Lee A. Hutton, III and that I am a licensed attorney to practice law in the State of Minnesota.
2. That I am the partner of Barnes & Thornburg, LLP and I had substantial involvement with the billing and legal representation in this matter.
3. That in late 2017, Tyka retained BT to represent her in connection with the administration of the Estate of Prince Rogers Nelson ("Estate").
4. That BT served as Tyka's counsel of record from January 19, 2018 until August 13, 2018 because of non-payment of fees.
5. Unlike other firms, BT has been paid nothing to date despite the many appearances, mediations, contract corrections, fixing past problems, and has provided a lot of work that was not billed to the benefit of the client.
6. BT requests that this court determine and establish as the amount of its lien against Tyka's interest in these proceedings, and to enter judgment accordingly pursuant to

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the lien amount filed on August 13, 2018. BT attorney's lien was filed prior to the attorney liens of all other counsel for Tyka.

7. That pursuant to Minn. Stat. Section 480A.08, subd. 3 (2010), I am attaching the case as Exhibit A, Roers v. Hare et. al.

I declare, under penalty of perjury, that everything stated in this document is true and correct.

FURTHER YOUR AFFIANT SAYETH NOT.

s/Lee A. Hutton, III
Lee A. Hutton, III

Sworn to and subscribed before me
this 26th day of December, 2018.

/s/ Sofia P. Shaw
Notary Public
My Commission Expires January 31, 2021

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EXHIBIT A

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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-237

Alan J. Roers, et al.,
Appellants,

vs.

Michael B. Pierce, et al.,
Defendants,
Gilmore, L.L.C., et al.,
Respondents,
Lindquist & Vennum, P.L.L.P.,
Respondent.

Filed November 14, 2011
Reversed and remanded
Stoneburner, Judge
Johnson, Chief Judge, dissenting

Hennepin County District Court
File No. 27CV078792

Kay Nord Hunt, Lee A. Hutton, III, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellants)

Karen K. Kurth, Thomas P. Malone, Barna, Guzy & Steffen, Ltd., Coon Rapids, Minnesota (for respondents Gilmore, et al.)

Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellants challenge the district court's order on priority of distribution of settlement proceeds in this action, arguing that the district court erred in holding that the garnishment action of one appellant's judgment creditor has priority over appellant law firm's attorney lien and applies to non-marital assets of the judgment debtor's spouse. We reverse and remand.

FACTS

In April 2007, appellants Alan and Cynthia Roers, represented by respondent Lindquist & Vennum, P.L.L.P., sued defendants Michael B. Pierce and Robert P. Hare, The Real Estate Nexus, Ltd., and Robert P. Hare V, L.L.C. d/b/a White Oak Real Estate Advisors (the Hare defendants), asserting misrepresentation and fraud in connection with Roerses' purchase of a ranch (Ranch Lawsuit). The Ranch Lawsuit was dismissed by summary judgment in January 2008 but, in January 2009, was reinstated, in part, by this court's decision in *Roers v. Pierce*, 2009 WL 67061 at *7, *review denied* (Mar. 31, 2009). While the case was on appeal, appellant Lommen, Abdo, Cole, King & Stageberg, P.A. (Lommen firm) replaced Lindquist & Vennum as Roerses' attorneys.

In unrelated litigation, respondents Gilmore, L.L.C. and Monarch Homes, Inc. (Gilmore and Monarch) sued Alan Roers and a corporation solely owned by Alan Roers (The Cornerstone Litigation). That lawsuit resulted in entry of a December 2008 judgment against Alan Roers for $840,000. In March 2009, Gilmore and Monarch obtained a district court order in the Cornerstone Litigation enjoining Alan Roers, in

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relevant part, from "transferring, encumbering or otherwise disposing of" any real estate in which he holds an ownership interest and/or any assets which could be used to satisfy the judgment against him, except for reasonable living and business expenses with prior approval of the district court. In April 2009, Lindquist & Vennum filed an attorney lien for $138,871.22 in the Ranch Lawsuit.

The Roerses' marriage was dissolved by judgment entered in June 2009. The dissolution judgment divided their property in accord with a stipulation based on the Roerses' 2005 antenuptial agreement. The judgment acknowledges the pending Cornerstone Litigation and judgments against Alan Roers and the pending Ranch Lawsuit and provides, in relevant part, that any damages awarded to the Roerses in the Ranch Lawsuit will be divided in accord with Cynthia Roers's 71% and Alan Roers's 29% interest in the ranch.

In July 2009, Alan Roers appealed the judgment in the Cornerstone Litigation. This court affirmed the Cornerstone Litigation judgment in April 2010. *Cornerstone Home Builders Inc. v. Guyers Development LLC*, 2010 WL 1541344 (Minn. App. 2010).

In March 2010, the Ranch Lawsuit went to trial and resulted in judgment for the Roerses on May 28, 2010, awarding them $347,500 or an unencumbered deed to 20 acres of the ranch, against the Hare defendants for negligent misrepresentation; $135,000 against the Hare defendants for fraudulent misrepresentation and $40,000, against Pierce or an unencumbered deed (in concert with Hare) for negligent misrepresentation. Judgment was entered on June 28, 2010 in the amount of $522,500.

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After entry of judgment, the Hare defendants moved for amended findings of fact and conclusions of law or a new trial. On August 23, 2010, the district court granted the Hare defendants a new trial on the issue of fraud, and reserved all motions for costs and disbursements until the case was fully tried or resolved.

Gilmore and Monarch, as judgment creditors of Alan Roers, served garnishment summonses on the Hare defendants and Pierce on August 30 and 31, 2010, respectively. On September 9, 2010, the Lommen firm filed notice of its attorney lien in the Ranch Lawsuit pursuant to Minn. Stat. § 481.13 (2010), followed by a UCC Financing Statement.

On October 4, 2010, the district court in the Ranch Lawsuit granted a motion brought by the Hare defendants to enforce a settlement agreement with the Roerses, and reserved the right to determine the priority of all liens and claims to the settlement proceeds. On October 7, the Lommen firm noticed its motion for lien priority. On October 13, the district court issued an amended order enforcing the settlement agreement, and, on the same day, Gilmore and Monarch served a garnishment summons on the Real Estate Nexus and served all parties in the Ranch Lawsuit with a notice of motion and motion to establish the priority of its garnishment over other lien holders. The motions were heard on October 20, 2010. On January 4, 2011, the district court issued its order on priority of distribution of settlement proceeds, holding that Lindquist & Vennum's attorney lien, in the amount of $138,871.22, is first; Gilmore and Monarch's garnishment summons on the Hare defendants, in the amount of $300,131.14 plus interest, is second; Gilmore and Monarch's garnishment summons on Pierce, in the

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amount of $300,131.14 plus interest, is third; the Lommen firm's attorney lien in the amount of $442,223.59, is fourth; Gilmore and Monarch's garnishment summons on the Real Estate Nexus, in the amount of $300,131.14 plus interest, is fifth; and Alan and Cynthia Roers are sixth "in whatever manner they agreed to under the settlement agreement." The district court rejected the Lommen firm's argument that Gilmore and Monarch's garnishment summons served on the Hare defendants and Pierce were ineffective because the June 28, 2010 judgment was vacated as a matter of law by the grant of a new trial, and the district court rejected the alternative argument that, if garnishment was effective, Gilmore and Monarch are only entitled to a lien against 29% of the settlement proceeds because Cynthia Roers is not a judgment debtor in the Cornerstone Litigation. The district court concluded that the June 28, 2010 judgment was not vacated by the grant of a new trial and that the record was insufficient to differentiate the proceeds of the confidential settlement "as 71% belonging to Cynthia Roers and 29% belonging to Alan Roers."

This appeal followed in which appellants challenge the ruling that Gilmore and Monarch's garnishments of the Hare defendants and Pierce attached to any proceeds of the Ranch Lawsuit litigation and, alternatively, that only Alan Roers's share of the proceeds could be attached by his judgment creditors.

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D E C I S I O N

I. The district court erred in determining that Gilmore and Monarch's garnishments summonses on the Hare defendants and Pierce were effective and had priority over the Lommen firm's attorney lien.

A. Standard of review

The determination of lien and garnishment priorities is a question of law reviewed de novo. *See Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995) (stating that, in the context of mechanic's liens, because determining lien priority depends on statutory interpretation, review is de novo), *review denied* (May 31, 1995).

B. Attorney liens

An attorney has a lien on "the interest of the attorney's client in any money or property involved in or affected by any action or proceeding in which the attorney may have been employed . . . as against third parties, from the time filing of the notice of the lien claim, as provided in this section." Minn. Stat. § 481. 13, subd. 1 (a)(2) (2010).

Lindquist & Vennum filed notice of an attorney lien on April 21, 2009. The Lommen firm filed notice of an attorney lien on September 9, 2010. It is undisputed that the Lommen firm's lien is subordinate to the Lindquist & Vennum lien and that the Lindquist & Vennum lien is superior to all other claims.

C. Garnishment

Garnishment proceedings are governed by Minn. Stat. § 571: "[A] perfected lien by garnishment is subordinate to a preexisting voluntary or involuntary transfer, setoff, security interest, lien, or other encumbrance that is perfected, but a lien perfected by

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garnishment is superior to such interest subsequently perfected." Minn. Stat. § 571.81, subd. 2 (2010).

Service of the garnishee with a garnishment summons attaches all nonexempt indebtedness, money or other property that, when the summons is served, is either "due or belonging to the debtor and owing by the garnishee" or is "in the possession or under the control of the garnishee." Minn. Stat. § 571.73, subd. 3(2) (2010). Any indebtedness, money, or other property due to the debtor that is not due absolutely or depends on any contingency is not subject to attachment by garnishment. Minn. Stat. § 571.73, subd. 4 (1) (2010).

The garnishor has the burden to show facts that establish that the garnishee is either indebted to or had property of the debtor in his possession at the time of service of the garnishment summons. *See Stub v. Hein*, 129 Minn. 188, 189–90, 152 N.W. 136, 137 (1915). It is a "well-settled principle that a garnishment impounds only those assets in possession of the garnishee at the time of the service of the garnishment summons. It does not reach assets subsequently acquired by the garnishee." *Johnson v. Dutch Mill Dairy, Inc.*, 237 Minn. 117, 121, 54 N.W.2d 1, 3 (1952).

Gilmore and Monarch served garnishment summonses on the Hare defendants on August 30, 2010 and on Pierce on August 31, 2010. The district court held that, despite the grant of a new trial in the Ranch Lawsuit on one issue after the June 28, 2010 entry of judgment, the judgment was not vacated, and "the money due the Roerses at the time of the garnishment summonses was not dependent upon any legally material contingency." The district court concluded that, because the Lommen firm's notice of attorney lien was

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filed after the garnishment attached to the judgment against the Hare defendants and Pierce, the Lommen firm's lien was subordinate to Gilmore and Monarch's garnishments.

D. Grant of new trial vacates previously entered judgment

The Lommen firm correctly argues that the legal effect of the grant of a new trial to the Hare defendants in the Ranch Lawsuit after entry of judgment was to vacate the entire judgment, making the Hare defendants' and Pierce's indebtedness to Alan Roers contingent and not subject to attachment by garnishment summons. "It is well settled [in Minnesota] that an order granting a new trial may, in a proper case, be made after the entry of judgment, without a formal motion to set aside the judgment, and that the granting of a motion for a new trial after entry of judgment will, in effect, vacate the judgment without any special motion or order to that effect." *Noonan v. Spear*, 125 Minn. 475, 479, 147 N.W. 654, 655 (1914). Plainly, the grant of a new trial vacated the June 28, 2010 judgment.

Gilmore and Monarch argue that, because a new trial was ordered only on a limited issue involving $135,000 of a $522,500 judgment, only that portion of the judgment for which the new trial was granted was vacated. We disagree.

> When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any

> time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Minn. R. Civ. P. 54.02. Because the district court did not make the determination that there was no just reason for delay and did not direct entry of judgment on claims not involved in the grant of a new trial, all of those claims remained subject to revision and therefore contingent until entry of final judgment on all claims. Because there was no final judgment in the Ranch Lawsuit when Gilmore and Monarch served garnishment summonses on the Hare defendants and Pierce, the garnishments did not attach because any indebtedness of the Hare defendants and Pierce to Alan Roers remained contingent. We reverse the district court's decision that Gilmore and Monarch's August 30 and 31, 2010 garnishment summonses attached to any property or debt that the Hare defendants and Pierce were claimed to owe Alan Roers in the Ranch Lawsuit. We remand for entry of an order that reflects that Gilmore and Monarch's August 30 and 31, 2010 garnishment summones were ineffective and that the Lommen firm's attorney lien is prior to all claims other than the Lindquist &Vennum firm's attorney lien.

II. Percentage of Ranch Lawsuit settlement proceeds subject to garnishment moot

Because Gilmore and Monarch's garnishment summonses did not attach to any portion of the Hare defendants' and Pierces' contingent liability in the Ranch Lawsuit, the issue of whether the Roerses' dissolution decree limited the percentage of liability that could be attached is moot, and we decline to address this issue.

Reversed and remanded.

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JOHNSON, Chief Judge (dissenting)

I respectfully dissent from the opinion of the court. In my view, the district court properly determined the order of priority of the parties' respective liens on the proceeds of the Ranch lawsuit.

Appellant argues that, at the time of service of a garnishment summons, there must be "absolute liability" and "an unconditional existing indebtedness" by a garnishee toward a debtor. Appellant argues further that the indebtedness of the Hare defendants and Pierce toward the Roerses was not absolute and not unconditional because "there was no judgment" after the district court ruled on the motion for new trial. There is no statutory basis for these arguments. The relevant provision of the garnishment statute defines the type of property that may be attached: "all . . . nonexempt *indebtedness, money, or other property due or belonging to the debtor* and owing by the garnishee or in the possession or under the control of the garnishee at the time of service of the garnishment summons, whether or not the same has become payable." Minn. Stat. § 571.73, subd. 3(2) (2010) (emphasis added). The statute imposes the condition that the "indebtedness" or "money" that is owed to the debtor "not depend upon any contingency." Minn. Stat. § 571.73, subd. 4(1) (2010). But nothing in the garnishment statute requires that the indebtedness described in section 571.73, subdivision 3(2), be embodied in a judgment, let alone a judgment that is final, "absolute," "unconditional," and not subsequently vacated by operation of law. Accordingly, appellant's arguments concerning whether the partial grant of the post-trial motion operated to vacate the judgment, or whether the district court entered a partial judgment, are immaterial.

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The Hare defendants and Pierce were indebted to the Roerses, without any contingencies, in the amount of $387,500, at the time Gilmore and Monarch served the garnishment summonses. The district court had granted a new trial with respect to the Roerses' fraud claim against the Hare defendants, for which the jury had awarded $135,000 in damages. But only that one claim was to be retried. The district court had denied post-trial relief with respect to the Roerses' negligent misrepresentation claim against the Hare defendants, for which the jury had awarded $347,500 in damages, and the Roerses' negligent misrepresentation claim against Pierce, for which the jury had awarded $40,000 in damages. In *Northwestern National Bank v. Hilton & Associates*, 271 Minn. 564, 136 N.W.2d 646 (1965), the supreme court held that a pending tort claim could not be garnished because the "indebtedness is contingent on proof of liability and damage." *Id.* at 565, 136 N.W.2d at 647. In this case, in contrast, the Roerses have proved liability on two tort claims and have proved that they are entitled to damages of $387,500 on those two claims.

Appellants contend that the partial grant of a new trial on one of the Roerses' three claims caused the judgment to be wholly contingent because the district court conceivably could have revisited the Roerses' recovery on the negligent misrepresentation claims, even though the district court did not express any such intention. But the mere possibility of a future event that would, if it occurred, make indebtedness contingent should not make the indebtedness contingent before the event occurs. For example, it is established that indebtedness arising from a jury verdict is contingent while an appeal is pending. *Lind v. Hurd*, 148 Minn. 190, 191, 181 N.W. 326,

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326 (1921). But there is no Minnesota caselaw stating that the mere possibility of an appeal from a judgment on a jury verdict causes the judgment debt to be contingent before an appeal actually is pending. The garnishment statute suggests otherwise because it asks whether there is indebtedness "at the time of service of the garnishment summons, whether or not the same has become payable." Minn. Stat. § 571.73, subd. 3(2). The caselaw likewise is focused on the status of the indebtedness on the day of service of a garnishment summons, without any inquiry into future potentialities. *See, e.g., S.T. McKnight Co. v. Tomkinson*, 209 Minn. 399, 401, 296 N.W. 569, 570 (1941) ("the day upon which the garnishment summons is served fixes the respective rights and disabilities"). If the mere possibility of a future contingency were sufficient to defeat a garnishment summons, it would be too easy for counsel to identify speculative future events that would diminish the availability and efficacy of the garnishment procedure. *See, e.g.*, Minn. R. Civ. P. 60.02 (permitting motion to vacate judgment to be filed "within a reasonable time"); *Bode v. Minnesota Dep't of Natural Resources*, 612 N.W.2d 862, 870 (Minn. 2000) (holding that "reasonable time" in rule 60.02 is to be determined on case-by-case basis).

For these reasons, I would affirm the district court's determination of the order of priority of the parties' respective liens.