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CLERK OF WISCONSIN
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

LEONARD POZNER,

Plaintiff-Respondent,

v.

JAMES FETZER,

Defendant-Appellant.

APPEAL NO. 2024AP1329
Dane County Case No. 18CV3122
Hon. Frank D. Remington, presiding

# RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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## Cases



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## Response to Statement of Issues

**Issue 1:** May Pozner garnish reimbursements of exempt funds, such as those exempt under Wisconsin Statutes 815.18(3)(j)?

**Response to Issue 1:** Pozner did not seek, nor did the circuit court allow, the garnishment of retirement benefits under Wis. Stat. § 815.18(3)(j) and the only other exemption Fetzer claimed was the $5,000 individual exemption, which Fetzer received.

**Issue 2:** May Pozner garnish funds, or may the Circuit Court Order them to be garnished, inconsistent with the Court of Appeals' Decision filed and dated February 8, 2024?

This Court already ruled in its Decision filed and dated February 8, 2024 (hereafter "Court of Appeals' Decision"), that Mrs. Fetzer's funds cannot be garnished; Pozner's subsequent attempt to garnish Mrs. Fetzer's funds thus ignores this Court's prior opinion. It must not be permitted to stand and ought to be appropriately sanctioned for the abuse of judicial resources and if [sic] the Defendant's time and expenses.

**Response to Issue 2:** On remand, the circuit court gave Fetzer the opportunity to submit evidence both in a response brief and at a hearing, to support his arguments that the funds at issue should not be

garnished. Fetzer failed to submit any additional evidence, agreed there were no disputes of fact, and, instead, argued that this Court had already decided the issue in his favor.

## Statement on Oral Argument

Respondent does not believe this case is appropriate for oral argument as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

## Statement on Publication

Respondent does not believe this case is appropriate for publication as the Court's decision is unlikely to have any significant value as precedent.

## Summary of the Facts

Fetzer appeals the circuit court's order disbursing funds garnished from a household bank account. On December 15, 2022, Pozner filed a non-earnings garnishment complaint against Fetzer and three garnishee defendants: State Bank of Cross Plains, Summit Credit Union, and UW Credit Union. (Record 542, hereafter all citations to documents in the record will be referenced as "R.") In total the

garnishee defendants held $13,789.38, $2,437.60 of which were from an account in which Fetzer deposited funds for his "legal defense fund." (R. 543; R. 546; R. 550; R. 562 at 7:24-8:11.) As Ms. Fetzer testified, most of the funds held by the garnishee defendants were in a checking account at the UW Credit Union in which the Fetzers made a number of deposits and out of which they paid a number of expenses. (R. 562 at 9:16-12:6, 15:21-16:7.) Among other things, Ms. Fetzer explained that they paid for items purchased at Costco from this account as well as things like a new garage door opener and a dishwasher.

This Court remanded this matter back to the circuit court after it found that the circuit court should have given Fetzer an opportunity to address the substance of Pozner's Motion for Disbursement of Funds. (R. 583.) Pozner filed the motion after a hearing at which the circuit court had indicated another hearing would be held. The circuit court granted Pozner's motion without another hearing and, on appeal, this Court remanded to allow Fetzer the chance to respond to the substance of the motion.

On remand, the circuit court vacated its order garnishing funds for the reasons stated in this Court's opinion. (R. 591 at 4:22-5:2.) The circuit court then proposed a procedure for moving forward:

> I think what is proposed and what I understand needs to be done is to turn back the hands of time. The plaintiff filed a motion for distribution of funds on April 25th of last year, document number 557. That's the one which I acted on without you having an opportunity to respond. I propose we just issue—set a briefing schedule on the pending motion with a new date to return.

(R. 591 at 9:4-11.)

In response, Fetzer told the circuit court that he, "in fact already responded," when he, "appealed to the Court of Appeals for the Fourth District pointing out that, with all respect to Attorneys Pflum and Feinstein, this was sloppy, slovenly work." (*Id.* at 9: 13-17.) Despite these claims, the circuit court asked Fetzer to file a response to the motion and, even though Fetzer said he could file sooner, the circuit court gave Fetzer a week to do so. (*Id.* at 11: 7-15.) The circuit court also set a hearing date. (*Id.* at 11:19-13:20.)

Fetzer proposed to, and actually did, file part of his appellate brief as his response. (R. 589; R. 590.) While he had the chance to submit evidence to support his arguments, he chose not to do so. He did not even provide his appendix from his appellate brief, provided to this Court, to the circuit court.

At the hearing on the motion, as he had at the scheduling hearing, Fetzer asserted that this Court would not have sent this case back, "had there been no reversible error here." (R. 597 at 7:3-7.) Fetzer continued, "[f]rankly, I think the Court of Appeals might hold Attorney Pflum or even this court in contempt if you were to go forward now in violation of their specific opinion, Your Honor." (*Id.* at 7:11-14.) Fetzer also argued that some funds were "related" to his wife who was not the debtor. (*Id.* at 7:16-19.)

The circuit court questioned Fetzer as to any evidence that some funds were those of his wife, and not him. (*Id.* at 11:11-13:8.) In response, Fetzer seemed to take the position that because some funds were reimbursements received from the Fetzers' daughter after Ms. Fetzer used a credit card to pay for items for her daughter at Costco, those reimbursements were Ms. Fetzer's property and not subject to garnishment. (*Id.*) Fetzer also explained, "its like the joint tax return, Your Honor. Everyone knows that's half hers and half mine and yet Pflum throws it in. And when I reimburse her for Fed-Ex expenses, he throws that in too." (*Id.* at 13:14-17.)

After giving Fetzer a chance to respond to Pozner's motion, both in writing and at a hearing, the circuit court granted Pozner's motion.

(R. 614.) In doing so, the circuit court accepted that a listing of deposits that were not from any retirement benefits were subject to garnishment, subtracted Fetzer's claimed exemption, and disbursed the remaining funds to Pozner. (R. 557; R. 614.) In total, the circuit court disbursed $2,004.46 to Pozner. (R. 614.) Fetzer appeals.

## Standard of Review

This Court will uphold the circuit court's exercise of discretion in setting the procedure used for deciding a motion, "unless there was no reasonable basis," for the procedure. *Schopper v. Gehring*, 210 Wis. 2d 208, 216, 565 N.W.2d 187 (Ct. App. 1997).

This Court reviews a circuit court's interpretation and application of Wisconsin's garnishment statutes under a de novo standard of review. *Prince Corp. v. Vandenberg,* 2016 WI 49, ¶ 15, 369 Wis. 2d 387, 882 N.W.2d 371. Under that standard, this Court independently interprets and applies questions of law, while benefiting from the analysis of the circuit court. *Id.*

## Argument

This Court should affirm the decision of the circuit court for three reasons. First, following this Court's instructions, the circuit court provided Fetzer with the chance to respond to Pozner's motion. Second,

Fetzer failed to provide evidence or legal support for his opposition to the disbursement motion. Third, the circuit court did not include any exempt funds in the disbursement order.

## I. On remand, the circuit court followed this Court's instructions, giving Fetzer the chance to address the substance of Pozner's motion.

In reversing and remanding the prior garnishment order, this Court concluded that the circuit court, "erroneously exercised its discretion in issuing an order without giving Fetzer an opportunity to address the substance of the motion." (R. 583, ¶ 20.) On remand, the circuit court gave Fetzer the opportunity to address the substance of the motion, both by allowing Fetzer to file a response to the motion and then by holding a hearing on the motion. (R. 591, at 11:5-22.) Because the circuit court had a reasonable basis for setting this procedure, this Court should reject any argument that the circuit court erroneously exercised its discretion in setting this procedure.

Fetzer argues that this Court told the circuit court how the motion should be decided but fails to cite to any language in this Court's decision to support his argument. Fetzer is wrong. In remanding this matter, this Court explained, "[w]e decide only that Pozner fails to show, given the current state of the record, that Fetzer

could not demonstrate legitimate reasons to reduce the amount of the garnishment order if given the opportunity." (R. 583 at 12.)

Accordingly, the circuit court did not erroneously exercise its discretion when, on remand, it: vacated the order at issue, allowed Fetzer the chance to submit a brief in opposition to the motion, and held a hearing on the motion before deciding the motion.

## II. Fetzer did not even try to show legitimate reasons to reduce the amount of garnishment ordered.

On remand, despite given the chance, Fetzer made no effort to provide a factual or legal challenge to Pozner's Motion for Distribution of Funds. Rather, Fetzer chose to submit part of his appellant brief as his response to the motion, without the support of any evidence. At the hearing on the motion, Fetzer chose to spend more time discussing what he thought were bases for contempt against the circuit court and Pozner's counsel, rather than the legal or evidentiary reasons he opposed the motion.

Fetzer has no support for his argument that he did not need to provide additional evidence or legal arguments because this Court had already decided the issue. Just the opposite, in its decision, this Court stated, "[w]e express no conclusions regarding the merits of Fetzer's

arguments." (R. 583 at ¶ 27.) The Court explained it could not do so, "because the current record is insufficiently developed." (R. 583 at ¶ 27.) Earlier in its decision, this Court characterized some of Fetzer's arguments as appearing to be "unsupported by legal authority." (R. 583, at ¶11.)

Relying on his unsupported arguments, Fetzer did not provide the circuit court with any admissible evidence to support the legal arguments he made. Through his prior appellate brief, he provided unsupported statements about the intent and knowledge of others to support his argument that none of the funds should have been disbursed. (*See, e.g.,* R. 590 at 8 of 12 of 15.) Fetzer provided no evidence to support his argument that some of the funds garnished, held in a joint account used for household expenses, were the individual property of his wife. (Brief of Appellant at 8-9.)

Nor did Fetzer make a coherent argument. Fetzer argued that a number of the deposits were reimbursements from his daughter to his wife for purchases made at Costco, and that these expenditures (and their reimbursements) are "not attributable to Dr. Fetzer but to his wife." (R. 590 at 20-21.) In addition, Fetzer made repeated arguments about his legal defense fund but never provided any evidence to support

his claim that, "the public who have donated funds [thought] their money would be used in the legal defense of Dr. Fetzer against Mr. Pozner, rather than paying Mr. Pozner." (R. 590 at 20.)

At the hearing on the motion, the circuit court tried to sort through these arguments. For example, the circuit court asked Fetzer, "you think that your implicit characterization that some portion of a joint account is being your wife's property, you believe is grounds to deny the plaintiff's access. Is there anything more—is that accurate and is there anything more you want to tell me?" (R. 597 at 9:3-9.) Rather than provide evidence to support his "implicit characterization," Fetzer said:

> Surely every party present understands that joint tax returns are equally divisible between a husband and spouse. It is common knowledge, Your Honor. I don't think it requires specific judicial notice to recognize attorney Pflum's argument is ridiculous on its face. And given that the Court of Appeals had directed that the – the rehearing must be conducted and a new opinion found in accordance with its opinion, where they have specifically cited *Prince Corporation* to state that only debtor property may be subject to garnish, frankly I think that this court will be found in contempt by the Court of Appeals.

(R. 597 at 10:10-21.) The circuit court tried again to ask Fetzer about his claims that some of the garnished funds were the individual property Ms. Fetzer, asking him, "is there any factual basis for me to say that [Ms. Fetzer] didn't comingle the funds with a joint credit card, the ones you do share with her as opposed to a Costco membership card?" (R. 597 at 12:23-6.) Fetzer responded telling the circuit court he had no involvement with the transaction, that "everyone knows" the joint tax return "that's half hers and half mine." (R. 597 at 13:9-19.) Fetzer also lumped in deposits from his legal defense fund account for Fed-Ex expenses paid out of the joint account as funds he believes were the individual property of this wife and not subject to garnishment. (R. 597 at 13:9-19.)

Likely, the circuit court asked these questions because Pozner argued that any individual property of Ms. Fetzer had been so co-mingled with other funds that there was no way to identify Ms. Fetzer's individual property amongst the rest of the property at issue. (R. 594 at 8-9.) With only unsupported arguments, the circuit court was tasked with looking at funds from three different bank accounts, totaling $13,789.38, to determine if any of the funds at issue could be said to be Ms. Fetzer's individual property. Fetzer argued that dozens of deposits

made on eight, separate dates over the course of months, represented Ms. Fetzer's individual property. But, he offered no legal support for his position that any of these deposits, having been co-mingled with funds from Fetzer's legal defense account in an account used for household expenses, could still be identified as Ms. Fetzer's individual property months later. The circuit court did not error in rejecting Fetzer's arguments which were unsupported by evidence or law.

Perhaps realizing his failure to sufficiently develop the record on remand, Fetzer raises facts and arguments to this Court that he failed to present to the circuit court. (Fetzer Brief at 8-12.) For the first time, he looks for support for his position that funds he characterizes as his wife's portion of a "joint tax return," deposited into a checking account used for household expenses, like paying Costco bills, and paying costs associated with Fetzer's legal cases months prior to the garnishment, was the individual property of Ms. Fetzer and not subject to disbursement. And, for the first time, he seeks to introduce evidence about how he requested donations to his "legal defense fund." (Fetzer Brief at 11.)

This Court should reject these arguments. Fetzer was unable to show that any of the disbursed funds were the individual property of Ms. Fetzer at the time of the garnishment. He does not do so here.

## III. Fetzer fails to explain how any disbursed funds are exempted retirement benefits.

Despite arguing that some of the disbursed funds were exempt as retirement funds in Issue 1 of his Statement of Issues Presented for Review (Fetzer Brief at 4-5), Fetzer failed to show that any of the disbursed funds were retirement benefits. In fact, Pozner was careful to make sure that the funds he sought were not retirement benefits. (R. 557.) He started by looking at all non-retirement benefit deposits to the account in which the Fetzers had their retirement benefits deposited. He then deducted the claimed $5,000 exemption under Wis. Stat. § 815.15(3)(k), and asked that the remaining funds be disbursed. In the end, the circuit court disbursed to Pozner less funds than were in the account in which Fetzer deposited donations to his "legal defense fund." Fetzer raises arguments about many of these deposits but does not argue that any of them are retirement benefits. Thus, there is no basis for this Court to conclude that the disbursed funds contained exempt retirement benefits.

## Conclusion

This Court should affirm the circuit court's order for the disbursement of funds. The circuit court provided Fetzer with the opportunity to respond to the motion as well as a hearing on the motion. Despite this opportunity Fetzer chose to rely on a record this Court concluded was, "insufficiently developed," and repeat legal arguments that this Court stated, appear[] to have no merit." (R. 583 at ¶ 25.) Accordingly, this Court should affirm the circuit court's order allowing the disbursement of funds.

September 19, 2024 Respectfully submitted,

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## CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief produced with a proportional serif font. The length of this brief, including footnotes, is 2501 words.

September 19, 2024 Quarles & Brady LLP

*Electronically signed by Emily M. Feinstein*
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## Certificate of Compliance With Rule 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 809.18(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief.

September 19, 2024 *Quarles & Brady LLP*

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