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CLERK OF WISCONSIN
COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Leonard Pozner,
Plaintiff-Respondent

v.

Appeal No. 2023AP001002

James Fetzer,
Defendant-Appellant

Appeal From the Circuit Court of Dane County
Case No. 2018CV003122
Judge Frank D. Remington, Presiding

REPLY BRIEF OF APPELLANT

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REPLY TO RESPONSE TO STATEMENT OF THE ISSUES

Issue 1: The Judge Erred by granting Pozner's written Plaintiff's Motion For Distribution Of Funds without a hearing.

General Area of the law: Violation of Wisconsin Statute §801.15(4).

Necessary facts: Pozner filed his Plaintiff's Motion For Distribution Of Funds, Affidavit of Randy Pflum in Support of Plaintiff's Motion For Distribution Of Funds, and a Proposed Order on April 25, 2023. Judge Remington signed the Final Order on May 1, 2023, and no notice of hearing was sent and no hearing was held on said written Motion.

Policies that should be followed: Wisconsin Statute §801.15(4) says:

"A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by statute or by order of the court. Such an order may for cause shown be made on ex parte motion. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be

served at some other time. All written motions shall be heard on notice unless a statute or rule permits the motion to be heard ex parte."

The judicial system in Wisconsin should follow the Wisconsin statutes and "all written motions shall be heard on notice unless a statute or rule permits the motion to be heard ex parte." There was no cause shown or court order allowing an ex parte hearing of Pozner's written Plaintiff's Motion For Distribution Of Funds. Dr. Fetzer had just begun working on his Response to Pozner's Motion For Distribution of Funds when he learned the Final Order granting same had been signed only four effective days from the filing of the subject motion.

Response to Issue 1: The circuit court properly granted Pozner's Motion for Distribution of Funds because the circuit court held an evidentiary hearing on Dr. Fetzer's exemptions on March 17, 2023 and even if the circuit court should have given Dr. Fetzer a second hearing the error was harmless.

Reply to Response to Issue 1: An "evidentiary hearing" is not the same as a hearing on a written motion. And the evidentiary hearing was still in progress and the circuit court at the evidentiary hearing gave two options to the Plaintiff Creditor, Mr. Pozner: 1) the same evidentiary hearing was to be reconvened or 2) the whole garnishment process started over again after Ms. Fetzer had submitted more evidence to Pozner. The evidentiary hearing was not reconvened nor did Pozner start the garnishment process over again. Rather, Pozner filed a written Motion, Affidavit in Support, and Proposed Order which the Judge signed without notice or holding a hearing in violation of Wisconsin statute. There was no first

hearing of Pozner's written Motion For Distribution Of Funds. Therefore, the assertion that a "second hearing" was unnecessary is designed to mislead the court for obvious pernicious purposes. And, as the record shows, this erroneous garnishment procedure cannot be considered harmless error as Dr. Fetzer's wife was harmed and deprived of the ability to rebut the taking of her portion of two tax returns.

Issue 2: Pozner cannot garnish reimbursements of exempt funds:

General area of the law: Pozner has once again entered an area where the law is silent and for good reason. Creditors have not garnished the payback of petty no-interest loans originating from the exempt funds in the same account. This involves the deprivation of the right of debtors and their family members to conveniently use and protect exempt funds in a bank account.

Necessary facts: On March 17, 2023, a hearing was held to determine the contents of Fetzer's UW Credit Union bank account where Janice Fetzer, Dr. Fetzer's wife, testified that a number of deposits shown in her check book for the subject WVCU account were paybacks of exempt funds originating from that same account. Janice then provided a list of nine deposits, six of which were paybacks from family members who used the credit card associated with that account. The amounts paid back were to the penny except for one which was underpaid, not overpaid.

Policies that should be followed: The lawful way to garnish funds from an account is to determine the source of that money to be non-exempt. The source of

funds from family members were originally from the same exempt funds from the same account. Pozner should have determined from Janice Fetzer's testimony which funds in the account were paybacks of exempt funds in the same account and then omitted them from non-exempt funds deposited and in other accounts and then deducted the \$5,000 exemption from that and garnished any positive balance.

Response to Issue 2: The circuit court did not distribute exempt funds to Pozner, rather the circuit court determined that Dr. Fetzer's accounts had funds that exceeded the exemptions Dr. Fetzer claimed and allowed a distribution of non-exempt funds.

Reply to Response to Issue 2: The circuit court did in fact sign an order to distribute exempt funds to Pozner and did it without holding a hearing on Pozner's written motion in violation of Wisconsin statute §801.15(4). Pozner filed the written Motion For Distribution of Funds listing amounts of money that were known to him to be exempt as the exemptions were made known to him in both the evidentiary hearing and the itemized exemptions submitted by Ms. Janice Fetzer after the hearing as she was so ordered. Dr. Fetzer was denied the opportunity to correct Pozner's Motion For Distribution of Funds by the court's violation of Wisconsin statute §801.15(4).

Issue 3: Pozner cannot garnish funds that are exempt under Wisconsin statutes §815.18(3)(j).

General area of the law: Exemption of retirement and insurance benefits under Wisconsin statute §815.18(3)(j).

Necessary facts: Pozner garnished the USAA Senior Bonus deposited into the subject UWCU account on 3/3/2022 which contained \$253.59 as a "senior bonus" from USAA and a \$116 refund for overpayment of a dental surgery charge. Dr. Fetzer was in the process of putting this information listed in Janice Fetzer's account checkbook into his response to Pozner's Motion for Distribution of Funds when he learned the motion was granted and the order signed. Therefore this could not be entered into evidence for this appeal because of the violation of the 801.15(4) requiring hearings on all written motions.

Policies that should be followed: Funds that a person receives due to old age are exempt, therefore, those who prosecute a garnishment proceeding must not garnish funds that are received on the reason of old age.

Response to Issue 3: Pozner did not seek to garnish and the circuit court did not allow garnishment of funds exempt under Wis. Stat. §815.18(3)(j).

Reply to Response to Issue 3: No argument other than a general denial was made in the Respondent's Brief concerning this issue; therefore, Pozner waives any claim he may have to such funds made exempt by §815.18(3)(j).

STANDARD OF REVIEW

This Court should apply the "question of law" standard which is reviewed de novo. There is no fact dispute that the circuit court granted Pozner's written Motion For Distribution of Funds without holding a hearing which is required by Wisconsin statute §801.15(4).

Pozner is asking this Court to apply the “harmless error” standard and try to find “no harm” where half of joint tax returns of third parties are garnished as well as decide issues under the “first impression” standard of review without case law precedent and where the Wisconsin courts have never ruled on three issues before it in this case related to garnishment:

1) The court’s authority to garnish the judgment debtor’s legal defense funds derived from public donations for the benefit of the judgment creditor against the will and intent of the public donors.

2) The court’s authority to garnish birthday gifts to third parties by third parties.

3) The court’s authority to garnish reimbursements of the debtor’s exempt funds used by third parties for the benefit of the same third parties and without benefit to the judgment debtor.

And Pozner asks this Court to use that “harmless error” and “first impression” standard of review in face of the fact Fetzner was denied a state required hearing to assert and justify his exemptions.

ARGUMENT

In essence, Pozner has two arguments, both of which are false. First, the circuit court garnished only non-exempt funds under Wisconsin statutes, and second, the circuit court did not need to set a hearing on Pozner’s Motion to Distribute Funds. Pozner approaches the most important issue last by trying to first establish the lawfulness of the Non-Earnings Garnishment Order and then claim the denial of a

required hearing on Pozner's written Motion For Distribution of Funds is excusable because the court decided at the evidentiary hearing what to garnish and/or the result would be the same had the court held a hearing on Pozner's written motion as required by law.

Pozner's first assertion is false as both Fetzer in his Opening Brief and Pozner in his Response Brief have quoted from the record the proof that the court did not determine what funds were non-exempt or the amounts thereof during the evidentiary hearing. Instead, the record shows the court gave Pozner only two options, namely, 1) reconvene and continue the ongoing examination hearing, or 2) start over with a new garnishment procedure (App., p 47 L 5-14). There was no third option for Pozner to immediately file a written Motion For Distribution of Funds based upon what had been heard and decided in the evidentiary hearing and received from Ms. Janice Fetzer after the evidentiary hearing.

Pozner's second assertion is also false because the result of a hearing, had it been held, on Pozner's written Motion For Distribution would most certainly be different. At the evidentiary hearing Ms. Fetzer was asked the source of funds that go into their joint UWCU account. She described the source of recent deposits (App., p 35, L 4-22) and later submitted a list of them (App., p 51). Ms. Fetzer made it clear that the tax returns were joint returns by use of the pronoun "we" (App., p 37, L 7-12). Pozner garnished all of both joint tax returns, and gifts to Ms. Janice Fetzer from her daughter and other deposits that should be ruled exempt without a Wisconsin statute based on law regarding misappropriation of donations.

This instant case reveals why it is necessary to require a hearing for all written motions. Any movant could knowingly, or otherwise, file a written motion, with affidavits and proposed orders that contain falsehoods, errors, or misunderstandings after an examination hearing and the judge could sign it denying the non-movant any means to assert exemptions or correct the motion and order.

Dr. Fetzer and his wife complied with the examination and court order to provide Pozner with documentation of deposits but the court discouraged the Fetzer's from describing anything about them (App., p 46, L 7) (emphasis added):

THE COURT: Fine. Ms. Fetzer, this is -- **I'm not gonna make any decision today.** If you are willing, Ms. Fetzer, would you please make a photocopy of your UW Credit Union bank statements. Now, those statements should have all your accounts, maybe two accounts or three accounts.

MS. FETZER: It has two. It has both.

THE COURT: Could you then please make a copy of the last, let's say, 12 months starting with the most recent account, so not all of 2022, but just give me -- if they come monthly, give me the last 12 that you have, not give me, but send those to Mr. Pflum.

MS. FETZER: I will. But now, on my bank statement, when the bank sends 'em, it just gives a deposit of so much money. It doesn't say where it's from.

THE COURT: **Don't worry about it. That's Mr. Pflum's problem to interpret that.** Then Mr. Pflum -- Ms. Fetzer, please provide those to Mr. Pflum in the next two weeks. Today is the 17th. I'm gonna ask that you send those to him no later than the end of the month, March 31st.

MS. FETZER: Okay.

Two things are evident from the record: First, contrary to Pozner's assertion, the circuit court did not determine anything at the evidentiary hearing that would

justify denying a hearing in violation of §801.15(4). And second, any assertion of the source of funds or claims of exemption were discouraged by Judge Remington and the determination or interpretation or assertion of exemptions were taken out of the hands of Fetzer and placed in the hands of Pozner.

Pozner asserts the long and well established doctrine of “harmless error” to get around the Wisconsin statute requiring a hearing for all written motions. Pozner also asserts that Fetzer must have a Wisconsin statute to support every declared exemption. But when the circuit court grants unprecedented garnishment motions there is no recourse but to look for principles of law outside Wisconsin garnishment statutes and garnishment case law. The Wisconsin garnishment statutes could not anticipate every reckless motion possible, this case in point, and therefore merely establishes certain minimum exemptions that must be protected if claimed.

The only defense Pozner has to the court’s violation of state statute §801.15(4) is to show that the result would be the same if the court had not violated the statute. This is immediately shown otherwise by the list of deposits (App., p 51) submitted to Pozner by Ms. Janice Fetzer after the evidentiary hearing but before the filing of Pozner’s Motion For Distribution. This list clearly shows a Wisconsin joint state tax return of \$1,486.00 and a joint federal tax return of \$521.00. Half of that amount of each return must be considered to be exempt as it belongs to Ms. Janice Fetzer not Dr. Fetzer. If that was not clear somehow, the required hearing on Pozner’s written motion would have clarified it to the satisfaction of the court.

Remember, the circuit court instructed Ms. Fetzer to leave the interpretation of her submissions to Pozner during the evidentiary hearing and later submission of bank statements.

Another item shown on the list and mentioned in the evidentiary hearing is a deposit of \$100.00 as a birthday gift to Ms. Janice Fetzer from their daughter. That is certainly exempt and if that was not clear, it would have been clarified at the required hearing on Pozner's Motion For Distribution of Funds. This is sufficient evidence to show that the error of both Pozner and the circuit court is not harmless and must be remanded. Those three items in the list total \$1,103.50 without going any further into what could be exempt by other means and other law and that is over half of the \$2004.00 sought in Pozner's Motion.

Mr. Pozner then claims that donations made by the public to Dr. Fetzer's legal defense fund to defend himself from Mr. Pozner is not exempt from garnishment by Pozner. He implies that there is no law that exempts the garnishment of such funds to be used in direct opposition to the will of the public who lawfully gave that money to Dr. Fetzer to be used against Mr. Pozner. But garnishment of Fetzer's defense fund to pay Pozner would constitute a court ordered fraud by misappropriating donations in a manner completely opposite the will of the donor. The intended purpose of the donor must be preserved *Crow v. Clay County*, 196 Mo. 234, 95 S.W. 369 (Mo. 1906):

as was ruled in *Lackland v. Walker*, *supra*, to preserve and make useful what may be called the spirit of the charity and give effect to the expressed charitable purpose of the

donor as near as may be, to the end that the controlling purpose and intent of John Aull, as disclosed by the instrument presented for construction, may be effectuated.

The platform¹ that collects Dr. Fetzer's legal defense funds tries to protect against the kind of charity fraud being instituted by Pozner's Motion For Distribution and the circuit court in this case:

Reasons for reporting a campaign may include suspicion of false information, fraudulent activity, scam, or any other concerns that you may have. Our team will review your report and conduct a thorough investigation into the campaign. Please note that due to privacy and security considerations, we may not be able to provide updates on the status of our investigation. However, we assure you that we take all reports seriously and will take the necessary action if we find any violation.²

If allowed to stand, GiveSendGo will find a court ordered charity fraud.

CONCLUSION

Based upon conclusions of the foregoing issues and arguments, Judge Remington's Order (R563) Granting Pozner's Motion for Distribution of Funds (R557) should be reversed and remanded for further proceedings.

September 20, 2023



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¹ <https://www.givesendgo.com/fundingfetzer>

² <https://help.givesendgo.com/support/solutions/articles/70000420205-reporting-a-campaign>