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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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LEONARD POZNER,  
Plaintiff-Respondent,

v.

JAMES FETZER,  
Defendant-Appellant.

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APPEAL NO. 2023AP1002  
Dane County Case No. 18CV3122  
Hon. Frank D. Remington, presiding

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**RESPONSE BRIEF OF PLAINTIFF-RESPONDENT**

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MESHBESHER & SPENCE LTD.  
Genevieve M. Zimmerman (WI  
#1100693)  
1616 Park Avenue South  
Minneapolis, MN 55404  
Phone: (612) 339-9121  
Email: [gzimmerman@meshbesh.com](mailto:gzimmerman@meshbesh.com)

THE ZIMMERMAN FIRM LLC  
Jake Zimmerman (*Pro Hac Vice*)  
15 Crocus Hill  
Saint Paul, MN 55102  
Phone: (651) 983-1896  
Email: [jake@zimmerman-firm.com](mailto:jake@zimmerman-firm.com)

QUARLES & BRADY LLP  
Emily M. Feinstein (WI SBN: 1037924)  
33 East Main Street, Suite 900  
Madison, WI 53703-3095  
Phone: (608) 251-5000 phone  
E:mail: [emily.feinstein@quarles.com](mailto:emily.feinstein@quarles.com)

*Attorneys for Plaintiff-Respondent  
Leonard Pozner*

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## RESPONSE TO STATEMENT OF ISSUES

**Issue 1:** The Judge Erred [sic] by granting Pozner's written Plaintiff's Motion for Distribution of Funds without a hearing.

**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.

**Issue 2:** Pozner cannot garnish reimbursements of exempt funds.

**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.

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

**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).

## **STATEMENT ON ORAL ARGUMENT**

Appellee 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**

Appellee 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**

On December 15, 2022, Leonard Pozner ("Pozner") filed a Non-Earnings Garnishment Summons and Complaint against James Fetzner, Ph. D ("Dr. Fetzner") and 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.”) Appendix Ex. A<sup>1</sup> at 3. On December 21, 2022, Summit Credit Union filed an Answer stating that it held \$46.06 in a personal checking account for Dr. Fetzer (the “Summit Account”). (R. 543, Ex. I at 17.) On December 27, 2022, State Bank of Cross Plains filed an Answer stating that it held \$2,437.60 of Dr. Fetzer’s assets (the “SBCP Account”). (R. 546, Ex. J at 18.) On December 30, 2022, UW Credit Union filed an Answer stating it had control or possession of assets belonging to Dr. Fetzer of \$11,305.72 (the “UWCU Account”). (R. 550, Ex. K at 19.) Lastly, on January 3, 2023, Dr. Fetzer filed an Answer claiming a personal \$5,000 deposit account exemption and claimed the UWCU Account was exempt due to Social Security and Retirement Account payouts. (R. 549, Ex. L at 20.) On January 18, 2023, Pozner objected to Dr. Fetzer’s Answer and UWCU’s Answer asserting the UWCU Account contained non-exempt commingled funds. (R. 551, Ex. M at 22.)

On March 17, 2023, the circuit court held a hearing on Dr. Fetzer’s claim of exemptions (the “Hearing”). (R. 552, Ex. N at 23.) As stated by the circuit court, the purpose of the Hearing was to decide

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<sup>1</sup> To avoid confusion, when citing to document in Dr. Fetzer’s Appendix, Pozner will cite to both the Record number of the document and the Appendix Exhibit letter and page.

“what to do, if anything, with the debtor’s answer with regard to the funds in the UW Credit Union”—an issue the circuit court understood to be “fairly clear and I believe undisputed.” (R.562, Ex. O, 28<sup>2</sup>:11–15; *id.*, 30:17–20.) The circuit court was clear on this point: “It appears that the UW Credit Union is a depository for more than Social Security funds. It appears. We don’t know for sure. That’s the purpose of today’s hearing.” (*Id.*, 31:5–8.) The circuit court went onto say, “[t]he ultimate question on this hearing is whether I should allow or overrule the objection and allow this creditor to take monies out of the UW Credit Union account.” (*Id.*)

At the Hearing, Dr. Fetzer opted to have his wife, Janice Fetzer, testify regarding the UWCU Account because she was “most knowledgeable about the monies.” (*Id.*, 29:25–30:6.) Ms. Fetzer testified that the UWCU Account contained funds not associated with the couple’s Social Security or other retirement income in the amount of \$3,239.25, associated with Dr. Fetzer’s legal defense of the present lawsuit, the couple’s tax returns, and various reimbursements from their daughter. (R. 562, Ex. O at 33 – 35.) After this testimony, the

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<sup>2</sup> Page numbers reference the Appendix pagination rather than the transcript pagination.



circuit court concluded that Dr. Fetzter had comingled funds in the UWCU Account, stating “well, I think you’ve established, it’s undisputed, these funds are all comingled.” (*Id.*, 42:5–6.)

At the end the Hearing, the circuit court ordered the Fetzters to provide Pozner’s counsel with 12 months of bank statements from the UWCU Account. In particular, the circuit court ordered:

THE COURT: I’m gonna continue this hearing. Mr. Pflum, then after you receive these statements, I’m gonna ask you within the next 30 days thereafter to apprise the Court what, if anything, you want me to do, either reconvene and then continue the examination to determine whether the funds are fairly traceable out of the specific account or not, or whether the plaintiff wants to sort of start over, regroup and come back with a new garnishment with a little better information.

(R. 562, Ex. O at 47.)

After receiving 12 months of bank statements from the Fetzters’ UWCU Account together with an itemization of non-exempt deposits into the UWCU Account, Pozner asked the circuit court to disburse the funds in that account that were not exempt. (Appendix Exs. Q and R at 50-51; R. 557 and 559, Exs., B and D at 5 and 10.) Pozner applied Dr. Fetzter’s \$5,000 exemption and the applicable exemptions for Social Security and other retirement account exemptions and asked the circuit court to have the garnishee defendants to disburse \$2,004 from

Dr. Fetzer's deposit accounts. (R. 557 and 559, Exs., B and D at 5 and 10.) Pozner made this request April 25, 2023, through a Motion for Distribution of Funds (the "Motion to Disburse") which he filed with a proposed Non-Earning Garnishment Order to release the Garnishee Defendants (the "Order") upon payment of the \$2,004. (R. 557 and 559, Exs., B and D at 5 and 10.) On May 1, 2023, the circuit court signed the Order. (R. 561, Ex. F at 13.) On June 5, 2023, Dr. Fetzer appealed the Order.

### **STANDARD OF REVIEW**

This dispute requires the Court to interpret and apply Wisconsin's garnishment statutes. Statutory interpretation and application are questions of law that the Court reviews independently, while benefitting from the analysis of the circuit court. *See Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 15, 369 Wis. 2d 387, 398, 882 N.W.2d 371, 377.

### **ARGUMENT**

The circuit court granted Pozner's Motion to Disburse funds because even after accounting for Dr. Fetzer's claimed exemptions, the UWCU Account contained additional non-exempt, funds.

In deciding whether any funds could be garnished, the circuit court followed the process Dr. Fetzer argues should be followed. Dr. Fetzer argues that the circuit court should have: 1) determined how much money Dr. Fetzer received in 2022 from non-exempt sources; 2) deduct the \$5,000 aggregate exemption under Wis. Stat. § 815.18(3)(k), and 3) garnish any positive balance. However, Dr. Fetzer now argues this Court should find new exemptions apply to funds in his accounts. He failed to raise these new exemptions in his answer or at the Hearing. And, he has no legal authority supporting his argument for these new exemptions. Wisconsin law allows any property, not subject to an affirmatively claimed exemption, to be used to satisfy a judgment. Dr. Fetzer failed to meet his burden that the amounts in the UWCU Account, the SBCP Account, and the Summit Account were entirely exempt.

Second, Dr. Fetzer received a hearing on his exemptions and was not entitled to another hearing. Even if this Court agrees that the circuit court should have given Dr. Fetzer a second hearing, any such error was harmless. Dr. Fetzer cannot hope to succeed at a second hearing by raising new exemptions not supported by law.

**I. The Circuit Court Granted Both of the Exemptions Dr. Fetzner Claimed And Allowed Garnishment of the Remaining Non-Exempt Funds.**

Dr. Fetzner claimed, and the circuit court granted, an individual \$5,000 exemption and an exemption for his Social Security and other retirement deposits. Dr. Fetzner now argues that the circuit court should have granted him exemptions he did not affirmatively claim and that are not available under Wisconsin law. This Court should reject his arguments and uphold the circuit court for three reasons: 1) Dr. Fetzner is not entitled to exemptions he did not affirmatively claim; 2) the circuit court correctly applied the only exemptions Dr. Fetzner claimed; and 3) Dr. Fetzner now seeks exemptions that are not provided for in law.

Pozner sought partial satisfaction of his judgment against Dr. Fetzner through garnishment, a remedy available to a creditor seeking satisfaction of its debtor's debts through property of the debtor that is in the hands of a third-party. *Prince Corp.*, 2016 WI 49, ¶ 19. In doing so, Pozner was not entitled to garnish property subject to an exemption allowed under Wis. Stat. § 815.18(3) and claimed by Dr. Fetzner. Wis. Stat. § 815.18(6)(a). As the debtor, Dr. Fetzner must affirmatively and timely claim an exemption and waives exemption rights by failing to do

so. *Id.* Exemptions are limited however, a debtor is not generally entitled to exempt cash that is traceable to property that would be exempt. Wis. Stat. § 815.18(4).

**A. Dr. Fetzer is not entitled to exemptions he did not affirmatively claim.**

In his answer, Dr. Fetzer claimed only two exemptions: 1) a \$5,000 deposit account exemption under Wis. Stat. § 815.18(3)(k) and 2) an exemption for Social Security and Retirement Account payouts. (R. 549, Ex. L.) He did not claim any additional exemptions at the Hearing. He now claims that some of the deposits at issue are, “reimbursements of exempt funds” but does not tie this argument to either of the exemptions he raised in his answer.

Because he failed to affirmatively raise these new, unidentified exemptions, either in his answer or at the Hearing, Dr. Fetzer is not entitled to claim them. Under Wisconsin law, Dr. Fetzer is required to “affirmatively claim an exemption.” Wis. Stat. § 815.18(6)(a). The law requires a debtor, like Dr. Fetzer, to affirmatively claim an exemption at the time of the seizure of the property or “within a reasonable time” after the seizure. *Id.* Dr. Fetzer has the additional problem that he failed to raise that issue before the circuit court. By failing to do so, Dr.

Fetzer lost the right to bring that issue before this Court. *See Cashin v. Cashin*, 2004 WI App 92, ¶ 26, 273 Wis. 2d 754, 681 N.W.2d 255.

**B. The circuit court gave Dr. Fetzer the only exemptions he claimed.**

The circuit court gave Dr. Fetzer the two exemptions Dr. Fetzer affirmatively claimed and distributed the remaining funds to Pozner. Dr. Fetzer had a total of \$13,789.38 in three bank accounts. (R. 543, Ex. I, R. 546, Ex. J; R. 550, Ex. k.) Pozner presented evidence that the funds at issue contained deposits that exceeded his \$5,000 individual exemption and contained commingled deposits that were not from Social Security or other retirement funds. As Ms. Fetzer testified, while one of the accounts at issue contained deposits of Social Security and other retirement benefits, it also contained deposits from gifts, a “legal defense fund,” and reimbursements from shopping trips among other things. Dr. Fetzer now explains that the non-retirement funds deposits also included tax returns and an insurance discount. None of these other deposits fall into either of Dr. Fetzer’s claimed exemptions.

**C. Dr. Fetzer is not entitled to exemptions not found in the law.**

Dr. Fetzer contends these deposits which are not Social Security or other retirement funds or his \$5,000 individual exemption, are also exempt but has not identified the statutory exemption he believes

applies. In Wisconsin, exemptions from garnishment are governed by statute. Wis. Stat. § 815.18(3). Dr. Fetzner spends pages arguing that deposits from his “legal defense fund” or reimbursements from shopping trips or other deposits are exempt but never identifies the source of any supposed exemption for these funds. None exists.

Sometimes, Dr. Fetzner refers to these deposits as “reimbursements of exempt funds,” perhaps assuming that he can try to trace exempt funds to these deposits to make these deposits exempt. He does not even suggest evidence exists to show that these deposits are traceable to exempt funds. Even if he had such evidence, however, “[p]roperty traceable to property that would be exempt under this section in the form of cash proceeds or otherwise is not exempt.” Wis. Stat. § 815.18(4).

The circuit court “determine[d] how much money [Dr.] Fetzner received in 2022 from non-exempt sources” it then, “deduct[ed] the \$5,000 aggregate exemption (under 815.18(3)(k)) and garnish[ed] the positive balance.” (App. Br. at 13.) In doing so, the circuit court followed the exact procedure Dr. Fetzner described as “the reasonable procedure,” in his opening brief. Dr. Fetzner would have this Court reverse the circuit court because he now argues that deposits—for which he failed

to claim an exemption and for which he cannot identify an applicable exemption on appeal—are also exempt. Because Dr. Fetzer failed to claim these funds were exempt and the funds are not exempt, this Court should uphold the circuit court’s decision to distribute funds.

## **II. The Circuit Court Did Not Need to Set a Hearing on Pozner’s Motion to Disburse Funds.**

Dr. Fetzer is not entitled to reversal merely because the circuit court did not hold a second hearing on his claimed exemptions. Dr. Fetzer has no real support for his argument that he was entitled to a second hearing. Dr. Fetzer had the chance to be heard on his exemptions at the Hearing. He does not claim otherwise. Instead, Dr. Fetzer seeks to raise new exemptions, not supported by law. Even if the circuit court erred by not giving him a second bite at the apple, that error was harmless.

Dr. Fetzer provides this Court with no precedential authority for his argument that it should reverse the circuit court’s distribution order and remand this case for a hearing on the order. Instead, he cites to an unpublished opinion, discussing the procedure for hearings on summary judgment. *State v. Hanson*, 2013 WI App 55, 347 Wis. 2d 549, 830 N.W.2d 722 (unpublished). Unpublished opinions, issued after July 1, 2009 may only be cited for their persuasive value. Wis. Stat. §



809.23(3)(b). Dr. Fetzner does not explain how *Hanson*, which addressed the response procedure on summary judgment, applies here, especially when Dr. Fetzner received an evidentiary hearing at which the Court ruled on the exemptions he raised in his answer.

Dr. Fetzner had a fair opportunity to prepare and to be heard on his exemptions at the Hearing. *Schopper v. Gehring*, 210 Wis. 2d 208, 215, 565 N.W.2d 187 (Ct. App. 1997); *see also* Wis. Stat. § 801.15(4). He was not entitled to an additional hearing so that he could raise new exemptions he failed to raise in his answer, based on evidence he had and could have presented at the Hearing. “The trial court has the inherent power to control its calendar and scheduling.” *Id.* Here, the circuit court held a Hearing at which Dr. Fetzner and his witness had the advantage of evidence not available to Pozner.

At the Hearing, the circuit court ruled on Dr. Fetzner’s exemptions, granting both but finding that funds still remained to be distributed. Pozner met his burden at the Hearing of showing the funds available exceeded the amount of available exceptions. *Maxcy v. Peavey*, 178 Wis. 401, 405, 190 N.W. 84 (1922). All that remained was calculating the exact amount of funds that were not exempt, which

Pozner did after receiving the requested account statements. (R.557, Ex. B, ¶¶ 8–10; R. 558, Ex. C, ¶¶ 4–6.)

Even if this Court finds that the circuit court should have given Dr. Fetzner another hearing to argue about exemptions he failed to raise, and that do not exist in the statute, any such error was harmless. In Wisconsin, “[n]o judgment shall be reversed . . . for error as to any matter of . . . procedure, unless in the opinion of the court . . ., after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment . . . .” Wis. Stat. § 805.18(2). A trial court’s failure to follow statutory procedures is subject to harmless error review. *In re Termination of Parental Rts. of Brittany Ann H.*, 2000 WI 28, ¶ 60, 233 Wis. 2d 344, 369, 607 N.W.2d 607, 619, *holding modified on other grounds by In re Matthew D.*, 2016 WI 35, ¶ 60, 368 Wis. 2d 170, 880 N.W.2d 107 (finding harmless error despite circuit court’s failure to follow the procedures set forth in a statute); *c.f. State v. Anthony*, 2015 WI 20, ¶ 96, 361 Wis. 2d 116, 860 N.W.2d 10 (“[V]iolation of a criminal defendant’s right to testify to relevant evidence is subject to harmless error analysis.”).

Any purported error that resulted by the circuit court granting Pozner's motion without a further hearing was harmless. As discussed earlier, *see* Section I.A *supra*, Dr. Fetzer only claimed two exemptions in his answer—both of which the circuit court gave to Dr. Fetzer. (R. 557, Ex. B (Pozner's Motion to Disburse accounting for claimed exemption under Wis. Stat. § 815.18(3)(k) and not seeking social security or retirement account funds).) And as further discussed earlier, *see* Section I.C *supra*, Dr. Fetzer's newly asserted exemptions have no statutory support. So even if the circuit court had scheduled another hearing, the outcome would remain the same because there is no legal basis for Dr. Fetzer's newly asserted exemptions. Thus, any error by the circuit court was harmless.

## CONCLUSION

This Court should uphold the circuit court's Non-Earnings Garnishment Order allowing the disbursement of \$2,004 to Pozner.

August 23, 2023

Respectfully submitted,

MESHBESHER & SPENCE LTD.  
Genevieve M. Zimmerman (WI #1100693)  
1616 Park Avenue South  
Minneapolis, MN 55404  
Phone: (612) 339-9121  
Fax: (612) 339-9188  
Email: gzimmerman@meshbesh.com

THE ZIMMERMAN FIRM LLC  
Jake Zimmerman (*Pro Hac Vice*)  
15 Crocus Hill  
Saint Paul, MN 55102  
Phone: (651) 983-1896  
Email: jake@zimmerman-firm.com

*Electronically signed by Emily M. Feinstein*

QUARLES & BRADY LLP  
Emily M. Feinstein (WI SBN: 1037924)  
emily.feinstein@quarles.com  
33 East Main Street, Suite 900  
Madison, WI 53703-3095  
(608) 251-5000 phone  
(608) 251-9166 facsimile

*Attorneys for Plaintiff-Respondent  
Leonard Pozner*

**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 2798 words.

August 23, 2023

Quarles & Brady LLP

*Electronically signed by Emily M. Feinstein*  
*Attorney for Appellee Leonard Pozner*

**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.

August 23, 2023

Quarles & Brady LLP

*Electronically signed by Emily M. Feinstein*  
*Attorney for Appellee Leonard Pozner*