

No. SC89666

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IN THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI, ex. rel., JEREMIAH W. NIXON,  
Attorney General, State of Missouri, Respondent,

v.

LORNE BASS, Register No. 1143300, Defendant,

and

HANRAHAN TRAPP, P.C., Appellant.

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APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, NINETEENTH  
JUDICIAL DISTRICT, DIVISION II, THE HONORABLE RICHARD G. CALLAHAN

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RESPONDENT'S SUBSTITUTE BRIEF

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## Statement of Facts

On June 16, 2006, the State of Missouri, at the relation of Jeremiah W. Nixon, Missouri Attorney General, filed its petition for incarceration reimbursement under the Missouri Incarceration Reimbursement Act, §§ 217.825 to 217.841, RSMo, against Lorne Bass. (L.F. 2, 7-28). The Circuit Court of Cole County then entered a show cause order and ex parte order appointing receiver ordering Bass to show cause why a judgment should not be entered against him and setting a show cause date of August 21, 2006. (L.F. 2, 29-31).

On July 3, 2006, Hanrahan Trapp, P.C., filed a motion to intervene alleging that funds held by the Cole County Sheriff in the name of Bass belonged to it. (L.F. 2, 32-47). The State responded to the intervention motion on July 12, 2007. After a hearing on August 2, 2006, the trial court sustained the motion to intervene on August 9, 2006. (L.F. 3)

On September 12, 2006, Hanrahan Trapp filed an answer to the petition. (L.F. 5, 48-51). The answer did not include any counterclaims denominated as such, but did include affirmative defenses based on allegations that the funds held by the Cole County Sheriff belong to it and not Bass. (L.F. 48-51).

On November 14, 2006, the State filed its summary judgment motion with suggestions in support of summary judgment. (L.F. 5, 52-80). Hanrahan Trapp filed its response to the summary judgment motion on December 5, 2006. (L.F. 5, 81-103). Bass did not respond to the summary judgment motion. (*See* L.F. 2-6). On December 19, 2006, the State filed its summary judgment reply. (L.F. 6, 104-14).

On April 24, 2007, the trial court held a hearing on the summary judgment motion. (L.F. 6). On June 29, 2007, the trial court entered judgment against Bass, and ordered that 90% of the funds held by the Cole County Sheriff be used to reimburse the State for the cost of care of Bass. (L.F. 6, 122-24).

On July 24, 2007, Hanrahan Trapp filed its notice of appeal. (L.F. 6, 125-31).

## Argument

### **I. The trial court properly granted summary judgment to the State because Bass is an offender with assets.**

In the summary judgment motion, the State demonstrated that it is entitled to judgment as a matter of law because Bass is an offender with an asset consisting of funds held by the Cole County Sheriff. The only challenge to this motion was whether the “Authorization for Release of Funds” signed by Bass divested him of all property rights to this asset.

#### **A. Standard of Review**

On appeal, the propriety of summary judgment is purely a question of law, making review essentially de novo. *I.T.T. Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom judgment was entered. *Id.* For a moving party to prevail at summary judgment, the moving party must show that: “(1) there was no genuine dispute as to the material facts on which he relies for summary judgment; and (2) based on those facts, he was entitled to judgment as a matter of law.” *Parshall v. Buetzer*, 121 S.W.3d 548, 553 (Mo. App. W.D. 2003) (citing *I.T.T.*, 854 S.W.2d at 380). Here, there is no dispute as to a material fact, and the State is entitled to judgment.

#### **B. The State is legally entitled to summary judgment because Bass has an asset that is subject to MIRA.**

MIRA authorizes the State, through Attorney General, to seek to secure reimbursement from a current or former offender for the expense of the State for the costs

of care incurred while the offender is or was maintained in a state correctional facility. §§ 217.825 – 217.841, RSMo. The cost of care incurred by the State includes the cost to the Department of Corrections for providing an offender’s transportation, room, board, clothing, security, medical, and other normal living expenses. § 217.827.2, RSMo.

Under MIRA, an offender’s cost of care is reimbursed to the State from the offender’s “assets.” MIRA specifically states that property, real or personal, belonging to or due an offender, from any source whatsoever, constitutes “assets” obtainable by the State for the purposes of securing costs and reimbursement. § 217.827.1, RSMo.

Specifically, the “assets” of an offender include:

property, tangible or intangible, real or personal, belonging to or due an offender or a former offender, including income or payments to such offender from social security, workers’ compensation, veterans’ compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever.

§ 217.827.1(a), RSMo. The only exclusions to assets are a homestead of up to \$50,000.00 and up to \$2,500.00 of savings from wages and salary earned while the offender is in the state correctional center. § 217.827(1)(b), RSMo. The State may collect up to 90% of the value of an offender’s assets for the purposes of securing costs and reimbursement under MIRA. § 217.833.1, RSMo.

The State proved its claims. Bass has been sentenced to a Missouri correctional facility and is currently in a Missouri Correctional Facility. (L.F. 53, 56-68). And Bass

has assets available to pay for his incarceration consisting of \$4,421.00 in funds held by the Cole County Sheriff. (L.F. 53, 69). Bass failed to respond to the State's summary judgment motion. (L.F. 2-6). As such, he has admitted each of these statements under Rule 74.04(c)(2).

**C. The uncontroverted facts show that Bass did not assign his funds to Hanrahan Trapp such that it divested him of all interests in the funds.**

The only defense presented by any party to this action was the affirmative defense presented by Hanrahan Trapp claiming that the funds belonged to it through an assignment, allegedly from his "Authorization for the Release of Funds." (L.F. 71).

An assignment "divests the assignor of all interest in the thing assigned, and vests the same in the assignee." *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 426 (Mo. App. W.D. 1990). The release of funds signed by Bass is not a valid assignment. Specifically, the release of funds states:

I, Lorne Bass, hereby authorize the release of any and all of my funds currently in the possession of Cole County, Missouri (believed to be approximately \$4421.00) to the firm of Hanrahan Trapp, PC as the initial retainer for legal representation fees.

(L.F. 53-54, 71). This statement is not an assignment because it merely authorizes the release of funds for a specific purpose. By its terms, the release does not assign all rights to Hanrahan Trapp, but merely authorizes the Cole County Sheriff to release the funds to Hanrahan Trapp. Furthermore, this release is not dated, calling into question when Bass actually signed this document. (L.F. 71).

As stated on its face, this document is a release, not an assignment. By the very terms of the document, it permits Hanrahan Trapp to transfer the funds from the Sheriff to the law firm “as the initial retainer.” “Attorney's fees ‘. . . are not owned, they are earned . . .’”. If an attorney wants a share of the fee, he must perform an appropriate share of the legal services in the case.” *Neilson v. McCloskey*, 186 S.W.3d 285, 287 (Mo. App. E.D. 2005). At the time Hanrahan Trapp alleges Bass signed the release, Hanrahan Trapp had not undertaken their representation of Bass. (L.F. 37). As such, this assignment could only be considered contingent and Bass maintained an interest in the funds. *See C & M Developers, Inc. v. Berbiglia, Inc.*, 585 S.W.2d 176, 181 (Mo. App. W.D. 1979) (“[C]onditional assignment made as collateral security for a debt does not work a divestiture of all right or interest of the assignor therein but, to the contrary, he retains a sufficient right or interest therein to qualify as a real party in interest for the purpose of maintaining a civil action”). Therefore, this document on its face cannot be an assignment to the law firm.

And if it were an assignment, it would cover only the rights Bass had at the time of the alleged signing. At the time Hanrahan Trapp claims Bass signed the release, the funds were subject to a forfeiture action and Hanrahan Trapp had not earned any fees. (L.F. 54, 69). “A mere agreement to assign a debt or chose in action at some future time will not operate as an assignment thereof so as to vest any present interest in the assignee.” *City of Kansas City v. Milrey Development Co.*, 600 S.W.2d 660, 664 (Mo. App. W.D. 1980) (quoting 6A C.J.S. Assignments § 45, p. 658). But the court need not

address the forfeiture issue; the mere release allowing the sheriff to disburse the funds did not vest any interest in the funds to Hanrahan Trapp.<sup>1</sup>

The trial court properly resolved the question of whether the State had priority over these funds. Although Hanrahan Trapp did nothing to perfect any secured interest it may have had in the funds, it essentially is claiming that it has a secured interest in the funds held by the Cole County Sheriff, and that this secured interest is superior to the interests of the State. But the legislature has answered the question of who has priority to an offender's assets in an action for incarceration reimbursement. Section § 217.837.4, RSMo, states,

The state's right to recover the cost of incarceration pursuant to an order issued pursuant to the provisions of section 217.835 shall have priority over all other liens, debts, or other incumbrances against real property or any other assets which are part of a prisoner's estate

As such, the debt owed by Bass for his incarceration has priority over his debt to his attorney for services to be rendered.

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<sup>1</sup> The Testimonial Agreement entered into by Bass in his criminal case does not include any statements involving the civil forfeiture. (L.F. 72-73). A guilty plea must be voluntary and without coercion. *Drew v. State*, 436 S.W.2d 727, 729 (Mo. 1969). Given that the Testimonial Agreement is silent regarding the release of funds, Hanrahan Trapp's allegations regarding an agreement not disclosed to the court call into question the nature of the guilty plea.

Hanrahan Trapp cites to *Greater Kansas City Baptist and Community Hospital Ass'n, Inc. v. Businessmen's Assurance Co.*, 585 S.W.2d 118 (Mo. App. W.D. 1979) to support the proposition that it has an absolute assignment. But *Kansas City Baptist* involves an assignment to a hospital of insurance benefits in a case between the hospital and the insurer. *Id.* at 117-18. The case does not stand for the proposition that an authorization divests the person who signed the document of all interest. The issue in *Kansas City Baptist* was whether the hospital had an interest in funds under the assignment and whether this interest gave the hospital standing to maintain the action against the insurer. *Id.* at 119. Under this case, an assignment, no matter how poorly worded, gives the assignee the authority to maintain an action for the retrieval of those funds. *Id.* Here, there is no dispute that Hanrahan Trapp has some interest in the funds. But this interest is only an authorization to take control of the funds owned by Bass so that Hanrahan Trapp can be paid after they have performed their services. This document does not invest Hanrahan Trapp with priority over the State's interests in the funds.

Hanrahan Trapp also cites to *State ex. rel. Nixon v. Karpierz*, 105 S.W.3d 487 (Mo. App. W.D. 2003), in support of its argument. *Karpierz* does not, however, prevent incarceration reimbursement in this case. *Karpierz* only applies to attorney liens under contingency fee arrangements. *Id.* at 490-91. The reasoning in *Karpierz* does not apply here. In *Karpierz*, the Court of Appeals, Western District, held that the reason funds obtained from a lawsuit are not the funds of an offender is that the attorney worked to obtain those funds and that without this work the State would obtain nothing for incarceration reimbursement. *Id.* at 491. Here, the funds were not the result of an

attorney's work and were in existence before any attorney did any work. No party disputes that these funds belonged to Bass before Hanrahan Trapp agreed to undertake his representation. As such, *Karpierz* provides no support for Hanrahan Trapp's argument.

Because the funds held by the Cole County Sheriff belonged to Bass, the trial court properly entered judgment for the State and this judgment should be affirmed.

**II. Hanrahan Trapp has altered its basis for its claim of relief in Point II in arguing that they had earned their fee. Nonetheless, this new basis does alter that the release was not an assignment of funds.**

Hanrahan Trapp now argues that it has earned its full fee in this case. This analysis is irrelevant as to whether the “Authorization for the Release of Funds” transferred ownership of the funds.

Hanrahan Trapp did not raise any issue as to whether it earned, and was not paid, its full fee for Bass’s underlying criminal action in its response to the summary judgment motion. (L.F. 81-103). Rather, it based its arguments on the face of the authorization itself, as well as facts that occurred after the release was signed by Bass. (L.F. 81-103). As addressed in the response to Point I, on the date that Bass signed the release, Hanrahan Trapp had not begun its representation—the funds were to be transferred to Hanrahan Trapp for their “initial retainer.” (L.F. 71). The release did not divest Bass of his right to the funds on the day that the document was signed. And, in its arguments, the State has consistently argued that this release did not grant a present interest in the funds. (L.F. 77-79, 107-08). This document was not an assignment of funds, and Hanrahan Trapp has failed to show why the funds are not available to the State under MIRA.

The State proved its prima facie case under MIRA. Hanrahan Trapp presented no issue as to any material fact related to the ownership of the funds of Bass. Therefore, the trial court did not err and the judgment should be affirmed.

**Conclusion**

The judgment of the trial court should be affirmed.

Respectfully submitted,

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**Certificate of Service**

The undersigned counsel hereby certifies that the foregoing brief was mailed, postage prepaid, this 21st day of January, 2009, to

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**Certificate of Compliance**

This brief includes the information required by Missouri Supreme Court Rule 55.03, and pursuant to Rule 84.06(b), the undersigned counsel hereby certifies that Respondent's brief complies with the type-volume limitation, in that, it was prepared with Microsoft Word (Times New Roman, 13-point font), and contains 2,749 words. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses and found virus free.

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