
IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, <i>ex rel. Jay Nixon, Attorney General,</i> <i>Plaintiff-Appellee,</i>	}	Nº SC89666
vs.		
LORNE BASS, <i>Defendant,</i>		
and HANRAHAN TRAPP, P.C., <i>Intervenor-Appellant.</i>		

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE RICHARD G. CALLAHAN, CIRCUIT JUDGE

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, Nº WD68662

APPELLANT'S SUBSTITUTE OPENING BRIEF

Respectfully submitted,

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Appellant

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JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the Circuit Court of Cole County, granting Plaintiff's motion for summary judgment. The issue presented on appeal is whether the circuit court erred in granting summary judgment in favor of Plaintiff where there was uncontroverted evidence on which Plaintiff affirmatively relied that Defendant Lorne Bass had assigned the funds at issue to Appellant prior to Plaintiff filing his petition, and where there was no evidence that Appellant had not earned the entirety thereof prior to Plaintiff filing his petition.

The Court of Appeals, Western District, ruled in favor of Plaintiff by way of a majority panel opinion, with one judge dissenting, and held that, because the money was expressly denominated a "retainer," Defendant Bass was entitled to it in the context of Plaintiff's action and because Plaintiff's right to the money was purportedly superior to Appellant's. Appellant thereafter timely moved the court for rehearing/transfer pursuant to Mo. Ct. R. 83.02 and 84.17, which motion was denied. Respondent timely moved this Court to grant transfer, and the Court granted transfer on December 16, 2008. Accordingly, this Court has jurisdiction of this case as though on original appeal pursuant to MISSOURI CONST., art. V, §§ 5 and 10, and Mo. Ct. R. 83.04.

STATEMENT OF FACTS

On March 29, 2006, Defendant Lorne Bass ("Bass") was arrested by deputies of the Cole County Sheriff's office on suspicion of violating Mo. Rev. Stat. §§ 195.202 and 195.211. (L.F. 39, ¶ 1). During Bass' arrest, the Cole County Sheriff seized \$4,421.00 from him. (L.F. 39, ¶ 2). On March 31, 2006, Bass was formally charged in Cole County Circuit Court with violating said §§ 195.202 and 195.211 in Case No. 06AC-CR00810. (L.F. 39, ¶ 3).

On April 3, 2006, the State of Missouri ("the State"), by the Cole County Prosecuting Attorney, filed a petition pursuant to Mo. Rev. Stat. § 513.600, *et seq.*, seeking forfeiture of the said \$4,421.00. (L.F. 39, ¶ 4). Said case was assigned Case No. 06AC-CC00252 in Division II of the Cole County Circuit Court. *Id.* On April 7, 2006, Bass retained Appellant Hanrahan Trapp, P.C. ("Appellant"), to represent him in Case No. 06AC-CR00810. (L.F. 39-40, ¶ 5). Bass agreed to pay a fee of \$10,000.00 therefor. (L.F. 40, ¶ 5). On April 7, 2006, Bass paid Appellant the sum of \$5,600.00, and advised that \$4,421.00 was being held by the Cole County Sheriff, but that Bass would assign the held funds to Appellant for the balance of Appellant's legal fees. (L.F. 40, ¶ 6). On April 13, 2006, Bass signed a document authorizing the release of the said \$4,421.00 to Appellant as the remainder of the outstanding legal fees. (Appx.

A4; Appx. A6, ¶ 9; L.F. 40, ¶ 8; L.F. 45; L.F. 87, ¶ 8). Although the document is not dated, Bass swore by affidavit that he in fact executed the document on April 13, 2006. (Appx. A6, ¶ 9; L.F. 38, ¶ 9; L.F. 47, ¶ 9; L.F. 70, ¶ 9).

On May 22, 2006, Bass was bound over to Division II of the Cole County Circuit Court in Case No. 06AC-CR00810-01. (L.F. 40, ¶ 9). On June 12, 2006, upon Bass' plea of guilty, the circuit court sentenced Bass to 3 years' imprisonment pursuant, in part, to a testimonial agreement negotiated between the State and Appellant, on behalf of Bass, whereby, *inter alia*, the State would allow Bass to plead guilty and would dismiss the said forfeiture action knowing that Bass would use the funds to pay Appellant. (Appx. A8-A9, ¶¶ 5 and 8 (Affidavit of Asst. P.A. Randall M. England); L.F. 87, ¶ 9; L.F. 98-99, ¶¶ 5 and 8). At Bass' plea hearing, Appellant filed a motion for the release of the said \$4,421.00 to it. (L.F. 87, ¶ 10). The circuit court advised that it would approve the release as requested upon the State dismissing the forfeiture action in Case No. 06AC-CC00252. *Id.* The issue of Appellant's fee was never raised at any time, and no evidence thereof was ever heard.

On June 16, 2006, the State dismissed its forfeiture action per its agreement with Appellant; however, the circuit court did not act to approve the release of the funds to Appellant as it had stated it would. (L.F. 88, ¶ 11). Instead, later

that same day, Plaintiff filed his petition pursuant to Mo. Rev. Stat. § 217.825, *et seq.*, seeking reimbursement from the said \$4,421.00 for Bass' incarceration.¹ (L.F. 7-28). Plaintiff alleges that he is entitled to such reimbursement from April 26, 2006, forward. (L.F. 10, ¶ E; L.F. 18). Division I of the circuit court appointed the inmate treasurer for the State of Missouri as receiver of the said \$4,421.00. (L.F. 29-30, ¶ 3). The matter was thereafter transferred to Division II, the same division which took Bass' guilty plea and which committed the error assigned herein. (L.F. 5).

On July 3, 2006, Appellant moved to intervene herein. (L.F. 32-38). Appellant also filed its counterclaim along with its motion to intervene. (L.F. 39-47). The motion was granted on August 9, 2006. (L.F. 3). Appellant's counterclaim alleged, *inter alia*, that Bass had assigned the funds to Appellant prior to Plaintiff filing his petition and that, accordingly, the funds were not an asset belonging to Bass but belonged to and were due to Appellant. (L.F. 41, ¶

¹ The timing of Plaintiff's filing to coincide with the State's dismissal was most interesting; however, it was never developed below how Plaintiff became aware of the existence of the money. Appellant, Bass, and Asst. P.A. England had not advised Plaintiff of the existence of the money. (Appx. A11-A12, ¶ 7 (Affidavit of Asst. P.A. Randall M. England)).

16). Appellant filed an answer to Plaintiff's petition, asserting as an affirmative defense its right to the funds because of the assignment. (L.F. 48-51).

Plaintiff thereafter sought summary judgment. (L.F. 52-73). Plaintiff denied that Bass assigned the funds to Appellant by arguing that the document Bass executed on April 13, 2006, "merely authorizes the release of funds for a specific purpose." (L.F. 77). He also noted that the document was not dated; however, he affirmatively relied on Bass' affidavit in support of his motion for summary judgment, which affidavit states that Bass signed the document on April 13, 2006. (L.F. 54, ¶ 6; L.F. 53, ¶ 4; L.F. 69-70). In opposition, Appellant argued that the funds belonged to Appellant at the time Plaintiff filed his petition, again offering the authorization document and Bass' affidavit that the document was signed on April 13, 2006. (Appx. A6, ¶ 9; L.F. 87, ¶ 8; L.F. 70, ¶ 9).

Appellant's response in opposition included a statement of additional uncontroverted material facts, with paragraphs numbered from 1-18. (L.F. 85-89). Plaintiff's reply to Appellant's response failed to controvert the allegations made in Appellant's paragraphs 5-10 and 13-14 of its response. (L.F. 104-106). Furthermore, as to those paragraphs (5-10 and 13-14), Plaintiff failed to cite to the record as required by Mo. S. Ct. R. 74.04. Id.

In particular, Plaintiff failed to controvert Appellant's paragraph 8 of its statement of additional uncontroverted material facts that, on April 13, 2006, Bass signed a document authorizing the release of said \$4,421.00 to Appellant as the remainder of Bass' outstanding legal fees. (L.F. 87, ¶ 8; L.F. 105, ¶ 8; L.F. 38, ¶ 9; L.F. 47, ¶ 9; L.F. 70, ¶ 9). In fact, Plaintiff admitted that Bass authorized the release of the funds to Appellant. (L.F. 105, ¶ 8). Furthermore, Plaintiff affirmatively relied on Bass' affidavit in support of his motion for summary judgment, which affidavit states that he executed the authorization document on April 13, 2006. (Appx. A6, ¶ 9; L.F. 53, ¶ 4; L.F. 70, ¶ 9).

Plaintiff also failed to controvert the allegation of paragraph 9 of Appellant's response that the State would dismiss the forfeiture action pursuant to the testimonial agreement. (L.F. 87, ¶ 9; L.F. 105, ¶ 9; Appx. A8-A9, ¶¶ 5 and 8). In fact, Plaintiff admitted that the forfeiture action was dismissed. (L.F. 106, ¶ 11). Bass' affidavit, on which Plaintiff relied in support of his motion for summary judgment, also states that the State would dismiss the forfeiture action and allow the funds to be released to Appellant. (L.F. 53, ¶ 4; L.F. 70, ¶ 10).

The circuit court entered summary judgment in favor of Plaintiff on June 29, 2007, without an analysis, finding, or conclusion regarding whether Bass

assigned the funds to Appellant. (Appx. A2, ¶ 5). The circuit court found that the document signed by Bass on April 13, 2006, authorizing the release of the funds to Appellant was not dated. (Appx. A2, ¶ 6). The circuit court also found that there was no mention in the testimonial agreement between the State and Appellant, on behalf of Bass, regarding the forfeiture action, and it found that the testimonial agreement does not state that Bass was induced to plead guilty based on a promise to dismiss the forfeiture action. (Appx. A2, ¶ 8). It can only be inferred that, based on these two findings, the circuit court concluded there was no assignment because it granted Plaintiff summary judgment.

Appellant timely filed its notice of appeal on July 24, 2007. (L.F. 125). The Court of Appeals raised an issue that was never raised below: that the assignment document referred to Appellant's fee as a retainer, and that retainers belong to the client until earned. (Appx. A14). The court's panel majority ruled that the money belonged to Bass at the time Plaintiff filed its petition, without making a finding regarding whether Appellant may have earned the entirety thereof. (Id.). It also ruled that Plaintiff had a statutorily-superior right to the money. (Id.). This Court granted transfer of this appeal on December 16, 2008.

POINTS RELIED ON

Point I.

The circuit court erred in granting summary judgment in favor of Plaintiff and finding the funds at issue to be subject to incarceration reimbursement because prior to the time Plaintiff filed his petition the funds were not an asset belonging to or due Bass in that there was uncontroverted evidence on which Plaintiff affirmatively relied that Bass had assigned the funds to Appellant.

Greater K.C. Baptist & Community Hosp. Ass'n, Inc., v. Businessmen's Assurance Co., 585 S.W.2d 118 (Mo. App. W.D. 1979)

Keisker v. Farmer,
90 S.W.3d 71 (Mo. 2002)

State ex rel. Nixon v. Karpierz,
105 S.W.3d 487 (Mo. 2003)

United Missouri Bank, N.A. v. City of Grandview,
105 S.W.3d 890 (Mo. App. W.D. 2003)

Point II.

The circuit court erred in granting summary judgment in favor of Plaintiff and finding the funds at issue to be subject to incarceration reimbursement because prior to the time Plaintiff filed his petition the funds were not an asset belonging to or due Bass in that Appellant had been retained by Bass to represent him in the underlying criminal case and there was no evidence that Appellant had not by then earned the entirety of its fee.

Roberds v. Sweitzer, 733 S.W.2d 444 (Mo. 1987)

Mo. Ct. R. 74.04

STANDARD OF REVIEW²

This Court reviews the grant of summary judgment *de novo*. See Hoffman v. Union Elec. Co., 176 S.W.3d 706, 707 (Mo. 2005). Summary judgment is a drastic remedy and must be exercised with extreme caution in order to prevent taking genuine issues of fact away from juries. See ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 377 (Mo. 1993). This Court views the pleadings and the developed record in a light most favorable to Appellant and give it the benefit of all reasonable inferences therefrom. See *id.* at 376; see also Jarrett v. Jones, 258 S.W.3d 442, 445 (Mo. 2008). "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." Jarrett v. Jones, 258 S.W.3d at 445. "Summary judgment requires that the parties not be disputing any issue of material fact and that the party seeking summary judgment be entitled to judgment as a matter of law." Taylor v. Richland Motors, 159 S.W.3d 492, 497 (Mo. App. W.D. 2005). "A 'genuine issue' that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts. . . ." Southers v. City of Farmington, 263 S.W.3d 603, 608 (Mo. 2008).

² This standard of review is applicable to both points relied on.

ARGUMENT

POINT I.

The circuit court erred in granting summary judgment in favor of Plaintiff and finding the funds at issue to be subject to incarceration reimbursement because prior to the time Plaintiff filed his petition the funds were not an asset belonging to or due Bass in that there was uncontroverted evidence on which Plaintiff affirmatively relied that Bass had assigned the funds to Appellant.

An essential element of Plaintiff's cause of action is that the funds at issue be an "asset" belonging to or due Bass at the time Plaintiff filed his petition. The Missouri Incarceration Reimbursement Act ("MIRA") defines "asset" as that "belonging to or due an offender." Mo. Rev. Stat. § 217.827(1)(a). In the context of this statute, this Court has referred to the dictionary to define "belonging" as "'to be suitable, appropriate, or advantageous' or 'to be in a proper, rightful, or fitting place, situation, or connection.'" State ex rel. Nixon v. Karpierz, 105 S.W.3d 487, 491 (Mo. 2003) (citation omitted). Similarly, this Court found that "due to an offender" meant "'owed or owing as a debt' or 'satisfying or capable of satisfying a need, obligation, or duty.'" Id. at 490. The funds at issue actually belonged to and were due Appellant because Bass

assigned them to Appellant in order to satisfy his obligation to pay legal fees. (Appx. A4-A6).

The circuit court's judgment expressly acknowledged that Appellant had claimed that Bass assigned the funds to Appellant, (Appx. A2, ¶ 5), but the judgment does not state whether Bass assigned the funds. We are left to infer that the circuit court did not believe Bass did so because the court ruled that the funds were subject to incarceration reimbursement, apparently because the document signed by Bass on April 13, 2006, was undated and because the court did not believe there was any agreement between Bass and the State regarding dismissal of the forfeiture action. (Appx. A2, ¶¶ 6 and 8). The circuit court's findings and conclusions are clearly erroneous as shown *infra*.

The circuit court provided no reasoning for granting summary judgment to Plaintiff. Regarding its finding that Bass' authorization was not dated, the circuit court's implicit conclusion that there thereby was no assignment could be supported only if there was undisputed evidence that it was unknown when he signed it; however, it was undisputed that Bass signed the authorization on April 13, 2006. Plaintiff both admitted that Bass signed the authorization and affirmatively relied on Bass' affidavit which states that Bass signed it on April 13, 2006. (Appx. A6, ¶ 9; L.F. 38, ¶ 9; L.F. 47, ¶ 9; L.F. 53, ¶ 4; L.F. 70, ¶ 9).

Furthermore, Plaintiff failed to controvert this fact in his reply to Appellant's summary judgment response, thus resulting in his admitting the fact. See ITT, supra, 854 S.W.2d at 382; Chopin v. Amer. Auto. Ass'n of Mo., 969 S.W.2d 248, 250 (Mo. App. S.D. 1998).

There is only one possible basis for the circuit court's finding that the authorization was not dated: the court just did not believe Appellant, Plaintiff, or Bass that Bass signed the document on April 13, 2006. Clearly, the circuit court made its own credibility determination; however, the court "is not allowed to make credibility determinations when considering summary judgment motions. . . ." United Missouri Bank, N.A. v. City of Grandview, 105 S.W.3d 890, 898 (Mo. App. W.D. 2003). The only reasonable conclusion that could be drawn from the undisputed facts was not if, but when Bass signed the authorization. According to all of the parties, he did so on April 13, 2006. Had the circuit court construed the pleadings and evidence in favor of Appellant, as required, it would have found so. See Jarrett v. Jones, supra, 258 S.W.3d at 445.

The circuit court also apparently disbelieved that Bass and the State agreed that Bass would testify against others upon the State dismissing its forfeiture action, finding that there was no mention in the testimonial agreement between

the State and Appellant, on behalf of Bass, regarding the forfeiture action and that the testimonial agreement does not state that Bass was induced to plead guilty based on a promise to dismiss the forfeiture action. (Appx. A2, ¶ 8). Notwithstanding that these issues are wholly immaterial as to whether Bass made an assignment, Appellant had presented uncontroverted evidence that Bass and the State had agreed that the State would "permit Bass to plead guilty to a reduced charge and to dismiss the said forfeiture action in exchange for Bass' testimony in several other cases." (Appx. A8-A9, ¶¶ 5 and 8 (Affidavit of Asst. P.A. Randall M. England); L.F. 87, ¶ 9; L.F. 98-99, ¶¶ 5 and 8). Indeed, as evidence in support of his motion for summary judgment, Plaintiff cited Bass' affidavit stating as much. (L.F. 53, ¶ 4; L.F. 69-70). Furthermore, Plaintiff admitted this fact by failing to controvert it in his reply to Appellant's summary judgment response. See ITT, supra, at 382; Chopin, supra, at 250. Again, the circuit court resorted to making a prohibited credibility determination by refusing to believe any party. See United Missouri Bank, 105 S.W.3d at 898. The record provides no basis to not find so, and the circuit court again failed to construe the pleadings and evidence in favor of Appellant. See Jarrett v. Jones, supra, 258 S.W.3d at 445.

The record plainly does not support either the circuit court's findings or its

implicit conclusion that there was no assignment. In fact, the record compels a finding and conclusion that Bass assigned the funds to Appellant on April 13, 2006. "An assignment is a right *in* the property itself." Ford Motor Credit Co. v. Allstate Ins. Co., 2 S.W.3d 810, 812 (Mo. App. W.D. 1999) (emphasis in original). An assignor's intention controls whether an assignment has been made. See Keisker v. Farmer, 90 S.W.3d 71, 74 (Mo. 2002). The Missouri Court of Appeals has held that "'any language, however informal or poorly expressed, if it shows the intention of the owner of the property or chose in action to transfer it, clearly and unconditionally, and sufficiently identifies the subject matter will be sufficient to vest the property therein in the assignee.'" Greater K.C. Baptist & Community Hosp. Ass'n, Inc., v. Businessmen's Assurance Co., 585 S.W.2d 118, 119 (Mo. App. W.D. 1979) (citation omitted). Cf. Darr v. Structural Systems, Inc., 747 S.W.2d 690, 693 (Mo. App. E.D. 1988); Eastern Atlantic Transp. and Mech. Engineering, Inc. v. Dingman, 727 S.W.2d 418, 421 (Mo. App. W.D. 1987); Rotert v. Faulkner, 660 S.W.2d 463, 469 (Mo. App. S.D. 1983).

Plaintiff argued below that the document signed by Bass on April 13, 2006, "merely authorizes the release of funds for a specific purpose" and that, accordingly, Bass did not make a valid assignment. (L.F. 77-78). An identical

argument had long-ago been rejected by the Court of Appeals in Greater K.C. Baptist, supra, wherein an insured signed a document which read, in pertinent part, as follows:

I HEREBY AUTHORIZE PAYMENT directly to the below named hospital of the group hospital insurance benefits specified and otherwise payable to me but not to exceed the balance due of the hospital's regular charges for this period of hospitalization.

Greater K.C. Baptist, supra, 585 S.W.2d at 119. The respondent therein argued, like Plaintiff, that the document did not qualify as an assignment because it was allegedly "nothing more than an authorization to pay." Id. In rejecting this argument, the court cited Halvorson v. Commerce Trust Co., 222 S.W. 897, 898 (Mo. App. W.D. 1920), and stated

In Halvorson v. Commerce Trust Co., supra, the purported assignment "If the sale is finally concluded, you have our consent to pay over to F. B. Gillette \$3,750 out of said sum (\$10,000), as his commission" was attacked on the ground it was "a mere consent or direction to . . . pay part of the funds in its possession at a future time". The court on authority of

the citation from Corpus Juris held the written "consent" or "direction" was a valid assignment.

Greater K.C. Baptist, 585 S.W.2d at 119.

Here, Bass stated

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 \$4,421.00) to the firm of Hanrahan Trapp, P.C., as the initial retainer for legal representation.

(L.F. 36, 45, 77). The instant circumstances are indistinguishable from those in Greater K.C. Baptist and Halvorson, and the reasoning in those cases is dispositive on this point. There is no dispute that, on April 13, 2006, Bass had evinced a clear and unconditional intention to transfer the funds to Appellant, particularly where Plaintiff admitted as much and affirmatively relied on Bass' affidavit stating so. Clearly, Bass had "directed" that the funds at issue be given to Appellant for legal fees due and owing to Appellant. Greater K.C. Baptist, 585 S.W.2d at 119. The moment the State dismissed its forfeiture action, the funds should have been given to Appellant because Bass had already made a valid assignment thereof and the funds belonged to and were due Appellant.

This Court in Karpierz sought to avoid absurd results in the application of the MIRA. See Karpierz at 491. One absurd result would be for inmates' attorney's fees to be confiscated where the attorney created a pool of money in pursuing a damages claim. Id. Furthermore, Appellant performed legal services for Bass' benefit, only to have the State — which had already agreed to allow Bass to use the money to finish paying Appellant — turn around and claim it in its MIRA petition filed by Plaintiff. The absurd result in this case is identical to that condemned in Karpierz, and is thus contrary to Karpierz.

This Court in Karpierz held that an attorney who filed a civil action on behalf of an inmate and who obtained a judgment thereon is entitled to his fees for procuring the judgment because "the phrase 'property . . . belonging to or due the offender' necessarily implies the amount due the offender is the judgment and interest less the attorney fees and costs." Karpierz, 105 S.W.3d at 491. Here, the amount due Bass, if any after conclusion of his criminal case and dismissal of the forfeiture action, would be whatever Appellant had not earned. Even moreso than the attorney in Karpierz, however, Appellant is due the money at issue not only by Appellant negotiating to procure the money, but by Bass' express assignment thereof. The circuit court's decision is contrary to Karpierz and should be reversed, and this matter should be remanded for the

development of evidence regarding how much of the money at issue Appellant earned prior to the filing of the MIRA petition.

Plaintiff has argued that, pursuant to Mo. Rev. Stat. § 217.837.4, he had a priority over the funds superior to Appellant at the time he filed his petition; however, § 217.837.4 would grant Plaintiff such a priority only *after* he obtained a judgment on his petition. Said statute is unambiguous in this regard. At the time Plaintiff first made this argument, the judgment at issue had yet to be entered. Now, the case is before this Court on appeal to decide whether the judgment is sound. Until this Court's decision is issued herein, Plaintiff will continue to have no more priority to the funds than Appellant.

The funds at the time of Plaintiff's filing neither belonged to nor were due Bass; therefore, the funds were not an "asset" subject to reimbursement under the MIRA. Because it is essential to Plaintiff's case that the funds in fact be an "asset" belonging to or due Bass, and because the facts clearly show otherwise, Plaintiff should not have prevailed in the circuit court. See ITT, supra, at 381. As a matter of law, the circuit court erred in finding the funds to be subject to incarceration reimbursement and, based on the foregoing, judgment instead should have been entered in Appellant's favor. This Court should reverse the circuit court's judgment and enter judgment in Appellant's favor that Bass made

a valid assignment. See Mo. Ct. R. 84.14; Wilson-Trice v. Trice, 191 S.W.3d 70, 73 (Mo. App. W.D. 2006).

POINT II.

The circuit court erred in granting summary judgment in favor of Plaintiff and finding the funds at issue to be subject to incarceration reimbursement because prior to the time Plaintiff filed his petition the funds were not an asset belonging to or due Bass in that Appellant had been retained by Bass to represent him in the underlying criminal case and there was no evidence that Appellant had not by then earned the entirety of its fee.

The Court of Appeals decided an issue that was neither presented to the circuit court nor urged on appeal — namely, that the funds represented the remainder of an initial retainer, which retainer purportedly belonged to Bass. According to the court majority, Bass could have assigned the money to others, kept it, or disposed of it in any way he saw fit, subject to Plaintiff's purported right to recover. The court majority went on to again state that it would not consider any issue raised for the first time on appeal, and then proceeded to consider whether Bass' release was a conditional assignment. This issue, too, was not raised on appeal. (Slip Op. 6-7).

By considering and deciding issues that were not raised at any time, the court of appeals wholly ran afoul of appellate practice where such issues were unrelated to the court's jurisdiction and where there was no finding of manifest

injustice. See Comm'ee for Educ. Equality v. State, 878 S.W.2d 446, 450 (Mo. 1994) (an appellate Court must determine its own jurisdiction *sua sponte*); State v. Tisius, 92 S.W.3d 751, 767 (Mo. 2002) (plain error review available, but discretionary, in face of manifest injustice). The decision also runs afoul of summary-judgment practice because it not only considered issues not before the circuit court, but expressly acknowledged that it should consider them and then decided them *against* Appellant, the non-moving party, *contra* Jarrett v. Jones, *supra*, 258 S.W.3d at 445 and Mo. Ct. R. 74.04.

There was no evidence developed as to the nature of Bass' fee arrangement with Appellant, much less evidence as to how much of the fee was earned. If the fee was a flat fee, then Appellant would be due the entirety thereof; if an hourly fee, then Appellant would be due whatever was earned. "[A]ttorney fees are personal in nature and depend upon a contract." Morris v. Jesky, 796 S.W.2d 139, 141 (Mo. App. W.D. 1990). Furthermore, "[w]hen nothing is said about fees, 'the universal rule is that courts will find an agreement to pay the attorney the reasonable value of the services rendered.'" Roberds v. Sweitzer, 733 S.W.2d 444, 447 (Mo. 1987) (quoting Morfeld v. Andrews, 579 P.2d 426, 429 (Wyo. 1978)). At the very least, then, a triable issue existed regarding the amount to which Appellant would be entitled, assuming the existence of a valid

assignment. Because it is clear that Bass assigned the money to Appellant, summary judgment was inappropriate where there was no finding as to the attorney-fee agreement or the amount Appellant earned. The circuit court's decision should be reversed, and this matter should be remanded for the development of evidence regarding how much of the money at issue Appellant earned prior to the filing of the MIRA petition.

CONCLUSION

As a matter of law, Plaintiff was not entitled to judgment where the funds at issue were not an asset belonging to or due Bass at the time Plaintiff filed his petition but belonged to and were due Appellant. Based on the foregoing, the Court should reverse the circuit court and remand this case for the development of evidence regarding how much of the money at issue Appellant earned prior to the filing of the MIRA petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) in that:

1. It contains 4,867 words, as calculated by the undersigned's word-processing program;
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3. The diskette has been scanned for viruses by the undersigned's anti-virus program and is free from any virus.

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CERTIFICATE OF SERVICE

I hereby certify that I did, on January 5, 2009, forward true copies of the foregoing brief, as required, by 1st class U.S. mail, postage prepaid, to:

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