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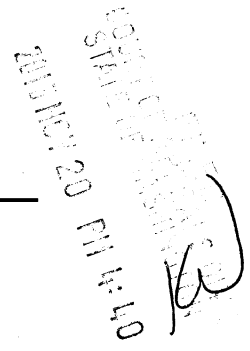
No. 73614-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I



DAVID A. KOHLES, INC. P.S.,

Plaintiff/Appellant,

v.

MICHAEL COOK, individually; DONNA COOK, individually; and the marital community composed of MICHAEL COOK and DONNA COOK; AND IN REM AGAINST ANY ALL PAYMENTS RECEIVED BY MICHAEL COOK AND DONNA COOK FROM THE DEPARTMENT OF LABOR AND INDUSTRIES ON ACCOUNT OF WORKER'S COMPENSATION BENEFITS, et al.,
Defendants/Appellees.

ON APPEAL FROM THE SUPERIOR COURT FOR SNOHOMISH COUNTY
(Honorable Ellen J. Fair)

REPLY BRIEF OF APPELLANT DAVID A. KOHLES, INC. P.S.

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Despite Appellee's attempts to open the floodgates to her numerous unsupported factual allegations,[1] there remains only three reviewable issues before this Court: (1) whether Appellant may foreclose his attorney's lien under RCW 60.40 *et. seq.*; (2) whether Appellant is entitled to prejudgment interest on the liquidated debt owed to him; and (3) whether the trial court improperly considered evidence regarding Donna Cook's financial situation when it was not relevant to the motion for summary judgment. For the reasons discussed below, the Court should disregard the Appellee's unreferenced factual allegations and unsupported arguments, and rule in favor of Appellant.

A. Appellee's untimely attempt to seek review of additional issues and affirmative relief violates RAPs 5.2 and 2.4.

i. Appellee failed to timely file her own notice of appeal or notice for discretionary review under RAP 5.2, and is barred from raising additional issues on appeal now.

Appellee is barred from seeking review of the factual findings entered by the trial court, which she raises in her brief, because she failed to timely seek review of these issues in the first place. *See generally,* Brief of Appellee (hereinafter "Response").

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[1] Appellant states as a general objection that Appellee has failed to provide any references to the record to support her statements. The Court should strike those portions of the Response that are unsupported by the record, and also deny any attempts by Appellee to introduce unreferenced or unauthenticated evidence into the record such as Exhibits A and B attached to the Response, or at any subsequent hearing.

The Order Denying Plaintiff's Motion for Summary Judgment was entered by the Court on April 24, 2015.[2] CP 10. The order denying reconsideration of the Order Denying MSJ was entered on May 22, 2015. CP 1. On June 19, 2015, Appellant filed the instant notice of appeal, seeking review of the Order Denying MSJ and the order denying motion for reconsideration.

Washington Rule of Appellate Procedure (RAP) 5.2(f) provides that if a timely notice of appeal or notice for discretionary review is filed, any other party who wants relief from the decision must file a notice of appeal or notice for discretionary review within the later of: (1) 14 days after service by the trial court clerk of the notice filed by the party initiating review; or (2) the time within which notice must be given under 5.2(a), (b), (d) or (e).[3] RAP 5.2.

In this case, the latest time period was 14 days after service of the Appellant's notice of appeal, which occurred on June 19, 2015. Thus, the last day for Appellee to file her notice of cross-appeal was July 6, 2015.[4] Assuming *arguendo* that the Response, which was received on October 26, 2015, suffices as an informal notice of cross-appeal, it is untimely and over three months late.

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[2] Defined terms used herein retain their same meanings as in Appellant's opening brief.
[3] Under RAP 5.2(a), a party has 30 days from entry of the trial court decision to file a notice of appeal. Under RAP 5.2(b), a party has 30 days from the entry of the trial court decision or of an order deciding a timely motion for reconsideration, to seek discretionary review.
[4] July 3, 2015 is 14 days after June 19, 2015, the date of service of Appellant's notice of appeal. However, July 3, 2015 was the substitute holiday for Independence Day so the next following non-court holiday or weekend was Monday, July 6, 2015.

There is no basis for allowing Appellee to raise additional factual disputes tardily and without compliance with the RAPs. RAP 18.8(b) regarding the waiver of rules and extension and reduction of time states that:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. . .

RAP 18.8(b). These restrictions on extensions of time apply to notices of cross-appeal, even though they are not specifically listed in the rule. *Bostwick v. Ballard Marine, Inc.*, 127 Wn.App. 762, 112 P.3d 571 (2005).

"Extraordinary circumstances" under this provision means circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control; in such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice, because of the appellant's reasonably diligent conduct. *Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 694, 11 P.3d 313, 316 (2000). Negligence, or a lack of reasonable diligence, does not amount to extraordinary circumstances sufficient to allow extension of time within which a party must file a notice of appeal. *Id.* at 695.

Here, there are no extraordinary circumstances that would justify extending the time for Appellee to file a notice of appeal. Appellee simply made no effort to comply with the RAPs – there is no evidence that she acted reasonably diligently. The prejudice of granting an extension of time would be "to the appellate system and to litigants generally, who are entitled to an end to their day in court." *Beckman,* 102 Wn. App. at 694. Here, actual prejudice would result to the Appellant himself. This is the third tribunal before which Appellee has asserted her factual allegations and both prior courts independently found no dispute as to the facts of this case and ruled against her. *See,* CP 109–110, 10–15. Appellant is entitled to finality at least regarding the factual issues in this case.

There are no extraordinary circumstances that prevented Appellee from timely filing her own notice of appeal or notice for discretionary review. As stated in the rule, the "desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time . . ." RAP 18.8(b). Appellant spent significant time and effort in compiling and submitting documentary evidence and supporting declarations in order to allow the trial court to make the necessary factual findings before reaching the lien foreclosure issue. *See,* CP 76–121, 40–49. Multiple hearings were held on these factual issues, resulting in the trial court's detailed findings of fact. CP 11.

To allow Appellee to attempt to overturn these findings at this late stage without complying with the rules and procedure for doing so will prejudice Appellant. Since the deadline for Appellee to file her own notice

of appeal had passed without event, Appellant proceeded on the assumption that at least these factual findings were final. In addition, Appellant will be prejudiced because he will not have a sufficient opportunity to rebut the 21 pages of unsupported and unreferenced factual allegations.

For these reasons, the Court should decline to review the factual disputes raised by Appellee in her Response.

ii. Appellee is not entitled to additional affirmative relief because she failed to timely file a notice of appeal and review of these findings is not necessary to the case.

As noted above, a party seeking cross-review must file a notice of appeal or a notice of discretionary review within the times mentioned in RAP 5.1(d). RAP 5.1(d). Without a timely filed notice of cross-appeal, the appellate court will not generally grant a respondent affirmative relief by modifying the decision on review, unless demanded by the necessities of the case. 2A Wash. Prac., Rules Practice RAP 5.2 (7th ed.).

RAP 2.4 defines the scope of review of a trial court decision. RAP 2.4. Subsection (a) provides:

> (a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e) in the notice for discretionary review and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below **which if repeated on remand would constitute error prejudicial to respondent**. The appellate court will grant a respondent affirmative relief by modifying the decision

> which is the subject matter of the review **only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.**

RAP 2.4(a) (emphasis added). None of the circumstances in which the appellate court should review issues not designated in a timely filed notice of appeal exist here. In applying RAP 2.4(a) to this case, the Court must determine two things: (1) whether Appellee's request for review of nearly every factual finding by the trial court constitutes "affirmative relief," and (2) whether Appellee is excused from filing a notice of appeal because the relief she seeks is demanded by the necessities of the case. *See, State v. Sims,* 171 Wn.2d 436, 442, 256 P.3d 285, 289 (2011).

"Affirmative relief normally means a change in the final result at trial." *State v. Sims*, at 442. In the context of an appeal, a respondent seeks affirmative relief when she seeks reversal of the trial court's decision, rather than just additional grounds for affirmance. *Id.* While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court. *Id.*

Here, Appellee is seeking affirmative relief because she seeks reversal of the trial court's factual findings. *See,* Response, 5 ("The only error the trial court made was in ruling that Mr. Kohles was owed 15% of my pension based on the fee agreement that Michael signed."); Response, 15 ("I seek review on one more issue: (4) whether my pension should be at issue at considering the reasons Mr. Kohles states he is entitled to them are

lies."); Response, 20 (". . . I am seeking review on whether Mr. Kohles has any right to my pension.").

The trial court recited the findings of the bankruptcy court regarding the validity and subject of Appellant's attorney's lien and specifically found that Appellant had an attorney's lien for his compensation upon the pension. CP 13 ¶ S, CP 14 ¶ E. Appellee seeks reversal of these findings. Therefore, since Appellee is seeking reversal of these findings, she is seeking "affirmative relief" within the meaning of RAP 2.4.

Appellee is clearly seeking affirmative relief because the majority of the Response concerns factual allegations that are in direct contradiction with the trial court's other findings of fact. For example, Appellee repeatedly accuses Appellant of "lying" about pursuing claims on behalf of deceased Michael Cook (Response, 3, 5, 6, 14, 15, 16, 20), even though the trial court specifically found that the monthly pension Appellee continues to receive was the result of Kohles' efforts on behalf of Michael Cook (CP 12, ¶ O). Appellee accuses Appellant of settling their case without consent (Response, 9, 11, 14) even though the trial court found no dispute that the Settlement was obtained with the consent of Michael Cook (CP 13, 24–26). Similarly, Appellee disputes the validity of Appellant's lien and the contingent fee it secured (Response, 5, 17, 20), even though the trial court specifically found that the lien was valid and secured the contingency fee under the Fee Agreement (CP 13, 9–11). In

order to dispute these specific findings, Appellee was required to file a timely notice of cross-appeal, which she failed to do.

The next question is whether Appellee is excused from filing a notice of cross-appeal because the relief she seeks is "demanded by the necessities of the case." RAP 2.4(a). Washington courts generally apply the necessities provision of RAP 2.4(a) when the petitioner's claim cannot be considered separately from issues a respondent raises in response. *State v. Sims*, at 444.

Here, the Court can easily consider the limited legal questions raised by Appellant separately from the factual issues improperly raised by Appellee. The questions of law raised by Appellant can be examined and answered without consideration of the facts – all three questions strictly involve the interpretation of Washington law and have no factual components. Therefore, consideration of Appellee's factual disputes is *not* demanded by the necessities of this case.

This Court reached the same conclusion in *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P.2d 1377, 1380 (1996), a case with nearly identical procedural facts. The appellant in that case appealed the sole legal question of whether the measure of damage to real property could include both the cost of restoration and any remaining diminution in value of the property. *Id.* at 691. The appellee failed to challenge the trial court's underlying findings of fact, and did not file a timely cross-appeal. *Id.* at 693. Nevertheless, the appellee submitted a brief assigning error and making various claims for affirmative relief. *Id.* The appellant filed a reply

brief in response to the claims for affirmative relief. *Id.* The court found that the appellee violated RAP 2.4(a) by raising new issues in his response and awarded attorney fees to the appellant pursuant to RAP 18.9 for having to respond to the request for affirmative relief. *Id.*

Likewise, in *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 91, 173 P.3d 959, 964 (2007), this Court declined to address issues raised by a respondent who failed to file a notice of cross-appeal and failed to demonstrate a basis for review under RAP 2.4:

> Grandview, however, never filed a notice of appeal. The appellate court will grant a respondent affirmative relief only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case. **Failure to cross-appeal the superior court's judgment precludes further review of issues decided by that court and not raised by the appellant.** Given that Grandview neither filed the required notice of appeal **nor independently demonstrated a basis for relieving it of the requirements of RAP 2.4**, it may not obtain affirmative relief in this appeal. Thus, we construe the assignments of error and the accompanying arguments Grandview presents as urging affirmance of the trial court's judgment. To the extent that Grandview's arguments are not designed to urge affirmance, we decline to address them.

Happy Bunch, LLC, 142 Wn. App. at 91 (emphasis added)(citations omitted)(internal quotation marks omitted).

Because Appellee has failed to timely file a notice of cross-appeal, now seeks affirmative relief, and has failed to demonstrate why the necessities of the case require review of the separate and distinct factual findings of the trial court, this Court should decline to address her

assignments of error. Pursuant to RAP 2.4, there is no basis for opening the floodgates on the trial court's findings of fact or depriving Appellant of finality in these issues.

B. Appellee fails to cite any legal authority contrary to Appellant's position; Appellant's authority is unrebutted.

Appellee's response is devoid of statute, case law, or other legal authority regarding the three limited issues raised by Appellant on this appeal: (1) whether the attorney's lien under RCW 60.40.010 (1)(d) could be foreclosed; (2) whether Appellant was entitled to prejudgment interest on the liquidated debt; and (3) whether the trial court erred in considering evidence regarding the Appellee's financial situation in applying RCW 60.40 *et. seq*. The authorities cited by Appellant in his opening brief therefore remain unrebutted.

RCW 60.40.010 creates enforceable attorney's lien rights on an "action" and the settlement and proceeds therefrom. RCW 60.40.010. The language of the statute itself and the legislative notes accompanying it explicitly contemplate enforcement of attorney's liens. Although the statute does not describe a procedure for foreclosing these liens, the courts have the ability to create one. As observed by a prominent commentator, "[A] charging lien that cannot be foreclosed is essentially worthless. The law abhors a vacuum. Courts fashion remedies. Charging liens do have real value, and are used frequently for security, although court foreclosures of charging liens are relatively uncommon." Michael R. Caryl, *Asserting And Foreclosing Attorney Liens: Common Sense*

Practices In Using The Attorney's Lien Statute To Collect Unpaid Fees (2015).

Cases such as *Bennett v. Hardy,* 113 Wn.2d 912, 784 P.2d 1258 (1990), explicitly support the ability of a court to imply a cause of action from a statutory provision when the legislature creates a right without a corresponding remedy. The ability to fashion such remedies is confirmed by the existing cases in Washington, in which courts *have* foreclosed attorney's liens in the absence of procedural statutory language. *See, e.g. King Cnty. v. Seawest Inv. Associates, LLC,* 141 Wn.App. 304, 170 P.3d 53 (2007); *Krein v. Nordstrom,* 80 Wn. App. 306, 307, 908 P.2d 889, 890 (1995). Appellee has failed to show why in the face of statutory, legislative, and case law authority the trial court did not err in determining that an attorney's lien could not be foreclosed.

Likewise, the law on prejudgment interest in Washington is clear. A claimant is entitled to prejudgment interest on a liquidated sum, even if there is no underlying contractual provision for interest. *See, Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 773, 82 P.3d 660 (2004). Such interest is to compensate for the deprivation of funds, and need not be based on an agreement. *See, Matson v. Weidenkopf*, 101 Wn. App. 472, 485, 3 P.3d 805, 813 (2000). Appellee has not set forth any legal authority to the contrary.

Finally, Appellee has provided no authority for her argument that her financial situation is relevant to application of the attorney's lien statute. In fact, the unsupported factual allegations she submits under this

heading is exactly why a debtor's financial situation cannot be relevant to the application of a lien statute — because of the inherent risk that the fact finder will misapply the law in order to reach a desired result based on the perceived fortunate or unfortunate situation of the debtor.[5]

"Generally, evidence of financial circumstances of parties to an action is immaterial and irrelevant." *Cramer v. Van Parys*, 7 Wn. App. 584, 500 P.2d 1255 (1972). Appellee has not provided any support to the contrary. Therefore, the trial court failed to follow this principle and its ruling on this issue should be reversed.

C. Public policy supports the enforcement of attorney's liens in contingent fee cases.

Society benefits when attorney's liens are enforced in contingent fee cases, such as the one at hand. Because contingent fee arrangements provide increased access to justice, it is crucial that such agreements are honored and enforced by the courts through enforcement of liens. Otherwise, there would be little to no incentive for attorneys to handle cases on a contingent basis, resulting in loss of representation to many.

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[5] In any event, Appellee is not destitute as she makes out to be. Appellee receives a pension of $3,175.08 per month, which is in addition to Social Security income for a total of $5,010.08 per month. CP 12, ¶ M, CP 38. Appellee was discharged in bankruptcy and thus has little to no personal liability for debt, yet is trying to maintain excessive monthly payments on a 3300 square foot house. Response, 18. Even with these undisputed facts, Appellant was asked by the trial court to prove that Appellee could afford to make payments on account of the lien, an issue which should have never arisen in the first place.

Under a contingency fee arrangement, a lawyer will take a case without any money up front.[6] In return, the lawyer is entitled to a percentage of the amount of money collected if the case is successful – usually one-third. *Id.* If the victim does not prevail, the attorney receives no fee at all. *Id.*

Many of the claimants represented by attorneys like Appellant would not be able to pursue their claims on an hourly basis. In exchange for the contingent fee, the attorney takes on 100% of the financial risk in pursuing the case. When both parties perform their side of the agreement, everyone benefits. The client benefits from being able to pursue the case at no out-of-pocket expense, and also from the recovery if one is obtained. The attorney benefits from receiving compensation for his work proportionate to the outcome obtained. On the other hand, if there is no recovery, the attorney does not receive any compensation but the client has not suffered any additional losses.

The contingent fee system is an important component of access to justice in the American court system:

> The contingency fee system provides injured consumers with access to the courts. Injured people may be in pain, unable to work or lack funds to pay next month's mortgage or rent, let alone an hourly attorney fee. [. . .] Without such a system, injured consumers could never find attorneys to

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[6] *Facts About Lawyers' Income and Fees,* Center for Justice and Democracy at New York Law School (July 2012), *available at* http://centerjd.org/system/files/Factsaboutlawyers2012.pdf (hereinafter "Facts About Lawyers Income and Fees").

> fight insurance companies or take on large corporations and institutions, like the drug and tobacco industries. James Gattuso, then with the conservative Heritage Foundation, agreed in a 1986 Wall Street Journal piece, stating that the contingency fee system "acts to provide the services of attorneys to injured people who may not be able to otherwise afford legal representation, at no cost to the taxpayer."

Facts About Lawyers' Income and Fees, *supra,* at 1.

Despite its importance, the structure of contingent fee cases necessarily presents opportunities for abuse. This case is a typical example of the potential for unjust outcomes when an attorney agrees to represent a client on a contingent fee basis, and is later "discharged" once a recovery is obtained. The attorney's lien was created by the legislature to protect attorneys from such unjust results. The attorney is protected from losing his or her earned compensation by the lien upon "an action" and "its proceeds" under RCW 60.40.010. RCW 60.40.010 specifically refers to "special agreements," meaning contingent fee agreements.

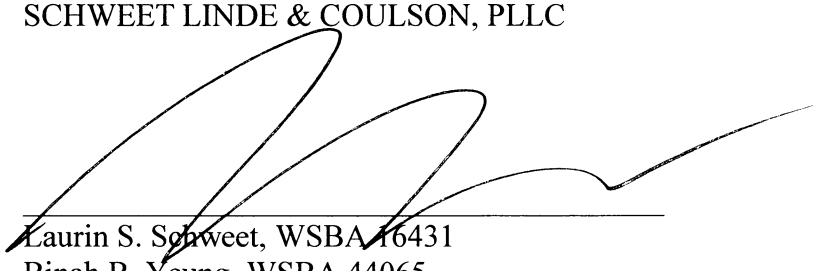
Without enforcement of liens under this provision, there would be no real protections for attorneys who perform work in these areas. Without protection for attorneys performing contingent fee work, there is no protection for would-be claimants' abilities to obtain legal representation where they would otherwise not be able to obtain or afford it. Thus, public policy dictates that these provisions be given effect. Attorney's liens must be capable of foreclosure if they are to have any benefit to attorneys and their would-be clients.

IV. CONCLUSION

Appellee's response attempts to raise issues which she failed to designate for appeal by filing her own notice of cross-appeal, and none of the exceptions under RAP 5.2 or 2.4 exist. Furthermore, she has failed to cite any legal authority or support rebutting Appellant's arguments. Finally, public policy concerning access to justice supports the enforcement of liens created under RCW 60.40.010. For these reasons, Appellant requests the Court reverse the decision of the trial court and hold that Appellant is entitled to enforce his attorney's lien under RCW 60.40.010, that Appellant is entitled to prejudgment interest, and that the trial court erred in considering irrelevant evidence regarding Appellee's financial situation.

DATED November 20, 2015

SCHWEET LINDE & COULSON, PLLC



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Attorneys for Appellant, David A. Kohles, Inc. P.S.

CERTIFICATE OF SERVICE

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington, over the age of eighteen years, not a party to the above entitled proceeding and competent to be a witness therein.

On November 20, 2015, I caused to be served the foregoing REPLY BRIEF OF APPELLANT DAVID A. KOHLES, INC. P.S., and this Certificate of Service on the following:

Donna Cook
15507 72nd Drive NW
Stanwood, WA 98292
Appellee, Pro Se

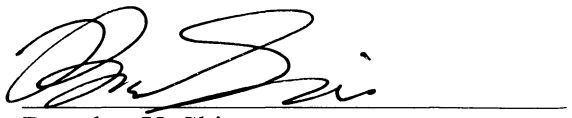
Via USPS First Class Mail, sufficient postage affixed AND
Via e-mail: donnanorriscook@icloud.com

Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA 98101-1176

Filed on November 20, 2015

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

November 20, 2015 at Seattle, Washington
(Date and Place)



Brandon Y. Shin