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No. 720490-0-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

THOMAS BARTH and SANDRA A. BARTH
Respondents/Cross-Appellants /Plaintiffs

v.

PATRICK HAFEY and GINA L. HAFEY,
Defendants,

and

AMERICAN PENSION SERVICES, INC.,
Appellant/Cross-Respondent /Defendant.

**BRIEF OF RESPONDENTS / CROSS-APPELLANTS
THOMAS and SANDRA BARTH**

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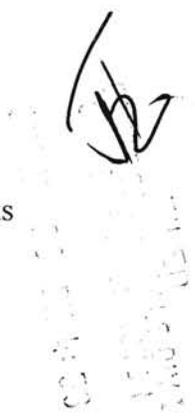
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I. INTRODUCTION

At issue in this partition action is a single-family residential property located at 3017 120th Pl. SE, in Everett, Washington (hereinafter the “Property”), and the disbursement of proceeds from the court-authorized sale of the Property.

Sandra Barth and her brother Patrick Hafey inherited the Property from their mother’s estate in 2002. From 2002 until the court-authorized partition sale of the Property in November 2013, the siblings held ownership of the Property as tenants in common (each holding a one-half interest). Beginning in November 2009, Patrick Hafey ignored all efforts by the Barths to manage, lease, or sell the Property and exerted sole control of the Property to the exclusion of the Barths.

In August 2012, Sandra Barth and her husband, Thomas Barth (hereinafter collectively “the Barths”), initiated this action against Patrick Hafey for partition and ejectment. Patrick Hafey failed to appear in this action and the trial court entered a default order and judgment.

Appellant and additional Defendant below, American Pension Services, Inc. (hereinafter “American Pension”), alleged an owelty or equalizing lien against the one-half interest of Patrick Hafey in the Property. In 2009, Patrick Hafey divorced Tammy M. Hafey. As part of their dissolution decree, Tammy Hafey obtained an owelty lien in the

amount of \$150,000 to equalize the distribution of their former family Home awarded to Patrick Hafey. This home is located at 12020 52nd Ave. S.E., in Everett, Washington (hereinafter “Former Family Home”). On October 14, 2009, Tammy Hafey assigned her owelty lien to American Pension.

As part of this partition action, the trial court authorized a private sale of the Property. The Property sold in November 2013, and sale proceeds amounting to \$219,348.07 were deposited into the registry of the court.

American Pension appeals from the Amended Order issued by Judge George F. Appel of the Snohomish County Superior Court entered on May 22, 2014, disbursing the proceeds from the court-authorized sale of the Property.

The Barths filed a cross-appeal from the court’s ruling in the Amended Order that American Pension’s owelty lien attached to the one-half interest of Patrick Hafey in the Property.

II. RESTATEMENT OF ISSUES

1. In ordering disbursement of the sale proceeds in this partition action, did the trial court abuse its discretion by finding that American Pension’s owelty lien was subordinate and lower in priority to the claims and offsets asserted by the Barths against the one-half interest of Patrick Hafey in the Property?

2. Did the trial court abuse its discretion by disbursing to the Barths, as an offset against co-tenant Patrick Hafey's interest in the Property, one-half of the reasonable rental value of the Property from November 2009 through June 2013, due upon ouster or active exclusion from the Property?

3. Did the trial court abuse its discretion by disbursing to the Barths, as an offset against co-tenant Patrick Hafey's half interest in the Property, the enhanced value of the Property resulting from the Barth's investment of materials and labor?

III. RESTATEMENT OF FACTS

A. Defendant American Pension Services, Inc.

American Pension Services alleged an owelty or equalizing lien against the one-half interest of Patrick Hafey in the Property. Sandra Barth (Patrick Hafey's sister) owned the other half interest in the Property. (CP 98)

In 2009, Patrick and Tammy Hafey divorced. As part of their dissolution decree, Tammy Hafey obtained an owelty lien in the amount of \$150,000 to equalize the distribution of their Former Family Home awarded to Patrick Hafey (12020 52nd Ave. S.E., in Everett, Washington). (CP 24-25, 45-53) On October 14, 2009, Tammy Hafey assigned her owelty lien to American Pension. (CP 24-25)

In its Second Amended Answer, American Pension described the nature of its alleged interest in the half share of Patrick Hafey in the Property:

2. . . . [T]he nature of its interest in the one half share of the property herein, the subject matter of this action, is its assigned judgment of \$150,000.00 granted to Tammy M. Hafey, assigned to American by Tammy Hafey on October 14, 2009 by Tammy Hafey. This judgment is the result of a marriage dissolution made and entered on July 9, 2009 by this court

3. There may be offsets to the balance of the judgment from any excess from a recent foreclosure of the Hafey home which is located at 12020 52nd Ave. S.E., in Everett, Washington.

(CP 24-25)

In 2013, a bank foreclosed upon the Former Family Home of Patrick and Tammy Hafey. On June 14, 2013, the Snohomish County Superior Court awarded American Pension the sum of \$44,263.37, representing its share of the surplus monies on foreclosure of the Former Hafey Family Home. (CP 24-25, 125-26; *see also* Appellant's Brief, p. 5)

During the trial court proceedings in this case, American Pension did not submit any declarations or affidavits in support of any of its claims or to dispute any factual statements set forth by the Barths.

B. Use and Ownership of the Property.

In 2002, Sandra Barth and her estranged brother Patrick Hafey acquired title of the Property, as tenants in common, from their mother's estate. (CP 38, 86-87, 98) From 2002 until the court-authorized partition sale in November 2013, Sandra Barth and Patrick Hafey owned the Property together, as tenants in common. (CP 2, 98)

Throughout this time, the Barths resided in White Bear Lake,

Minnesota, and Patrick Hafey resided in Everett, Washington. (CP 86-89)

Beginning in November 2009, Patrick Hafey exerted sole control of the Property to the exclusion of the Barths. (CP 86-89) Patrick Hafey stopped responding to the Barths efforts to jointly manage the Property. (CP 86-89) The Barths were excluded from any participation in the management and use of the Property from November 2009 through June 20, 2013. During this time period, the Barths traveled to Everett, Washington from Minnesota, made numerous telephone calls to Patrick Hafey, and mailed several letters to Patrick Hafey regarding the use and management of the Property and efforts to rent or sell the Property. Despite continued efforts by the Barths, Patrick Hafey refused to respond to the Barths' communications. (CP 86-89)

C. Procedural History.

In August 2012, the Barths filed a complaint in the Snohomish County Superior Court against Patrick Hafey, for partition and ejectment. (CP 31-38).

On October 19, 2012, the court entered an order joining as an additional defendant below, American Pension (an interested party to the pending partition action). (CP 29-30) American Pension claimed an owelty or equalizing lien interest against Patrick Hafey's one-half share in the Property. On December 27, 2012, American Pension filed an

Amended Answer, and thereafter amended it again two months later. (CP 24-28)

On May 29, 2013, the trial court entered an order of default and default judgment against Patrick Hafey. Patrick Hafey had failed to appear, answer or otherwise defend in this action. The default order and judgment authorized the Court to issue a writ of assistance/ejectment (hereinafter the "Writ") directing the Snohomish County Sheriff to eject Patrick Hafey from the Property. (CP 89, 121)

On June 20, 2013, the Snohomish County Sheriff's Office executed the Writ at the Property. Following the ejectment and pursuant to the Writ, the Barths gained possession and access to the Property. (CP 89, 121)

On August 21, 2013, the Court entered an order dismissing Defendant Gina Hafey from the case. Gina Hafey, an ex-wife of Patrick Hafey, held no interest in the Property. (CP 22-23)

Additionally, on August 21, 2013, the trial court issued an order setting the terms of sale of the Property subject to this partition action. The order authorized a private sale of the Property through a real estate agent and set terms of the sale as the mechanism to terminate this tenancy in common. The order further authorized that the Property be sold by a real estate broker, as soon as possible by private sale (rather than a public

auction sale on the steps of the court house), in order to better realize the market value of the Property and maximize the recovery for the parties. (CP 91, 121-22)

In support of the court authorized private sale of the Property, the Barths submitted evidence to the trial court of the fair market value of the Property. The Barths had obtained a fair market value review of the Property and offer to list from two real estate professionals, Jerry Martin (and Pamela Pitt) of Jerry Martin & Associates, RE/MAX Northwest Realtors, and Bradford Green, Coldwell Banker Bain. (CP 90-91, 106)

At his initial assessment of the Property, real estate broker Jerry Martin (hereinafter "Martin") estimated the value to be in the range of \$185,000 to \$200,000. Martin discussed with Mr. Barth that if certain repair and improvement work were to be completed, as Mr. Barth intended, it would significantly enhance the value of the Property. Martin's analysis of comparable properties suggested a list price for the Property in the range of \$231,800-\$246,200. The suggested list price factored in the increase in value to the Property resulting from the Barths' planned repairs and improvements. (CP 67-77)

Jerry Martin & Associates listed the Property for sale in September 2013. In October 2013, the Barths obtained additional authority from the Court pertaining to the terms of the Property sale and conveyance. On

November 18, 2013, the Property sold for the full asking price of \$246,200. The sale proceeds, after Court authorized deductions, amounted to \$219,348.07 and were deposited into the Court registry. The funds were held in the Court registry, pending further order of the Court for distribution. (CP 20-21)

Thereafter, the Barths filed a motion for disbursement of the sale proceeds. (CP 43-66, 67-141) Following oral argument, on May 20, 2014, Judge George F. Appel of the Snohomish County Superior Court issued an order disbursing the sale proceeds. On May 22, 2014, Judge Appel amended his order with regard to the disbursement. (CP 1-3) American Pension has appealed the Amended Order dated May 22, 2014 (CP 1-3).

D. Repairs and Improvements to the Property.

Following the June 20, 2013 execution of the Writ, the Barths obtained possession and access to the Property. The Property was in disrepair. (CP 86-97)

For the following ten weeks, Mr. Barth remained in Everett, Washington to complete repair and improvement work on the Property, to make it suitable for sale. Mr. Barth had worked in the trades for 45 years and had significant experience in home repair and improvement work. He also received assistance from his two sons (one a flooring contractor and

the other a union carpenter who previously worked as a professional landscaper). Mr. Barth and his two sons spent more than 700 hours cleaning, repairing and improving the Property. Rather than hire contractors to prepare the Property for sale at considerably higher costs, the Barths completed the extensive and time-consuming repair and improvement work themselves, greatly enhancing the value of the Property. (CP 86-97) The repair and improvement work included, for example, new and repaired floors (hardwoods/laminate), ceiling (repair/texturing), walls, plumbing (new faucets, pipes, toilets, etc.), electrical (lighting), painting (the interior of the home including ceilings), landscaping, and other outdoor patio and yard work. (CP 67-70, 78-105)

Experienced real estate broker Martin, in his Declaration dated April 28, 2014, stated his opinion that the repair and improvement work completed by the Barths enhanced the value of the Property by \$53,700. Had the Barths not completed the extensive repair and improvement work, the Property would have sold for roughly \$192,500. (CP 67-77) American Pension did not contest the enhanced value of the improvements.

IV. ARGUMENT

A. Standard of Review in a Partition Action.

In Washington State, appellate courts review partition orders for an abuse of discretion. Friend v. Friend, 92 Wn. App. 799, 803-04, 964 P.2d

1219 (1998), *review denied*, 137 Wn.2d 1030, 980 P.2d 1283 (1999).

Partition is an equitable action. Kelsey v. Kelsey, 179 Wn. App. 360, 365, 317 P.3d 1096 (2014) (citation omitted). An action to partition property is “both a right and a flexible equitable remedy subject to judicial discretion. The trial court is accorded great flexibility in fashioning relief under its equitable powers.” Friend, 92 Wn. App. at 803 (citations omitted). As the Supreme Court noted:

The great flexibility afforded to the courts in a partition action is indicated by a quotation from 2 Story’s Equity Jurisprudence 269 (14th ed. 1918), as follows:

‘. . . in all cases of partition a Court of Equity does not act merely in a ministerial character and in obedience to the call of the parties who have a right to the partition, but it finds itself upon its general jurisdiction as a Court of Equity, and administers its relief ex aequo et bono according to its own notions of general justice and equity between the parties.’

Leinweber v. Leinweber, 63 Wn.2d 54, 56, 385 P.2d 556 (1963).

A court abuses its discretion when “its decision is not based on tenable grounds or tenable reasons.” Kelsey, 179 Wn. App. at 365 (citation omitted). Moreover, an abuse of discretion occurs if the trial court’s ruling is manifestly unreasonable, or in other words, “no reasonable judge would take the position adopted by the trial court.” Bauman v. Turpen, 139 Wn. App. 78, 93, 160 P.3d 1050 (2007).

Here, a review of the trial court’s decision under this exceedingly deferential standard is warranted because it involves an equitable remedy.

The trial court exercised its broad equitable powers in ordering a just distribution of the sale proceeds in this partition action.

B. The Trial Court Did Not Abuse Its Discretion by Awarding the Barths, Offsets or Charges Against the Interest of Co-tenant Patrick Hafey in the Property, Ahead of American Pension's Owelty Lien Claim.

American Pension asserts that an owelty or equalizing lien cannot be impaired by partition and holds priority over all other claims to proceeds from a sale in partition. Specifically, American Pension contends that the trial court erred by distributing sale proceeds to the Barths, as offsets or charges against the share of Patrick Hafey, ahead of its owelty lien.

The offsets claimed by the Barths against the half interest of co-tenant Patrick Hafey in the Property, may be recognized as equitable liens and accorded priority ahead of the alleged owelty or equalizing lien. The trial court, in exercising its broad equitable powers in partition actions, distributed the sale proceeds in such a manner that provided a just resolution under the factual circumstances present in this case. As stated in the Amended Order, the trial court determined American Pension's owelty lien to be subordinate and lower in priority to the claims and offsets asserted by the Barth against the interest of Patrick Hafey in the Property.

(CP 1-3)

As noted above, courts have “‘great flexibility’ in fashioning equitable relief for the parties” in a partition action. Friend, 92 Wn. App. at 365 (citation omitted). The courts have exercised broad powers with respect to liens against real property to provide equitable remedies. *See, e.g., McKnight v. Basilides*, 19 Wn.2d 391, 408, 143 P.2d 307 (1943) (imposing a lien against the proceeds of sale of one co-tenant in favor of the other cotenant for rents and attorney fees in a partition by sale); MGIC Financial Corp. v. H.A. Briggs Co., 24 Wn. App. 1, 6, 600 P.2d 573 (1979) (discharging a lien of a deed of trust against real property on grounds of equity).

Under the partition statute, RCW 7.52.220 provides for the distribution of sale proceeds in a partition action as follows:

- (1) to pay its just proportion of the general cost of the suit.
- (2) To pay the costs of the reference.
- (3) To satisfy the several liens in their order of priority, by payment of the sums due, and to become due, according to the decree
- (4) The residue among the owners of the property sold according to their respective shares.

Although these statutory provisions provide the court with direction in the distribution of the proceeds of a sale, they do not limit a court’s exercise of equitable powers to structure an appropriate remedy that is just and reasonable under the circumstances.. In other words, “a court in the exercise of its equitable powers may fashion remedies to

address the particular facts of each case, even if the partition statute does not strictly provide for such a remedy.” Kelsey v. Kelsey, 179 Wn. App. 360, 369, 317 P.3d 1096 (2014) (affirming trial court’s power to partition personal property in addition to real property under the partition statute, Chapter 7.52 RCW).

The Washington Supreme Court’s decision in McKnight, an action involving the partition of real property among co-tenants, is illustrative of the court’s broad equitable powers. Following trial, the court entered a decree of partition, which provided plaintiffs with a judgment against the other co-tenant for rents and rental use of the property, and for attorney’s fees. The decree further stated that the judgment amounts for rents and rental use of the property and attorney’s fees each constituted a lien in favor of plaintiffs against the interest of the other co-tenant on the proceeds of the sale of the property. McKnight, 19 Wn.2d at 392. On appeal, an issue raised was whether a co-tenant was entitled to a lien upon another cotenant’s interest in the property. The Supreme Court held that despite no express lien in the partition statute, the court may impose a lien upon another co-tenant’s interest in the property, stating:

Finally, it is argued that the court erred in impressing a lien upon the interest which appellant owned in the property. It is rule that no lien exists in favor of one cotenant against the share owned by the others. However, the court may, in the exercise of its equitable powers and in order to do full justice to all parties

concerned, impose a lien upon the interest in the property owned by the one who has benefitted by possession, and may provide for the payment of the judgment from the proceeds of the sale in a partition action. 14 Am.Jur. 107, Cotenancy, § 40.

Id. at 408. This case stands for the proposition that although no express lien exists in favor of one-cotenant against share owned by other cotenants, a court may impose a lien upon interest owned by one who has benefitted by possession and may provide for payment of judgment from proceeds of sale in a partition action.

As in McKnight, the trial court here was entitled to impose a lien against a co-tenant and may provide for the payment of such from the proceeds of the sale in a partition action. In this case, Patrick Hafey exercised sole and exclusive control over the Property for 44 months and benefitted from his possession. Patrick Hafey also failed to maintain the Property to the detriment of the Barths. In order to do full justice, equitable liens in the form of offsets were imposed upon Patrick Hafey's half interest in the Property to provide a just result under the facts and circumstances of this case. The offsets against that interest included past rent, property taxes and insurance, and the enhanced value of the Property resulting from the sole efforts of the Barths. The trial court was well within its discretion to find these equitable liens or offsets superior to American Pension's owelty lien claim.

In its brief, American Pension does not address the equitable lien issue. American Pension simply asserts that its owelty lien should have priority under RCW 7.52.220 and should be paid out as part of the distribution of proceeds ahead of any offsets or equitable liens set forth by the Barths. However, as the trial court determined under its broad discretion, this would lead to an unjust and inequitable result.

American Pension, as authority for its contention that the trial court erred by failing to give it priority in the distribution of sale proceeds, cites one Washington case, Hartley v. Liberty Park, 54 Wn. App. 434, 774 P.2d 40 (1989). (Appellant's Brief, p. 9) Hartley involved lien priority as to the surplus proceeds in a non-judicial foreclosure of a deed of trust.

In Hartley, pursuant to the dissolution decree, the court awarded the Issaquah property to the wife subject to the husband's lien in the amount of \$40,000 payable upon sale of the property, or 24 months from the date of decree of dissolution. The court noted that "[a] sum of money paid in the case of partition of unequal proportions for the purpose of equalizing the portions is an owelty, and may be allowed as a lien on the excessive allotment if payment cannot be made at once." Id. at 437 (citations omitted). The Court of Appeals, in awarding the former husband surplus proceeds following a nonjudicial foreclosure of a home owned by his former wife, held that the dissolution decree awarding

husband \$40,000 to equalize the distribution of the family home awarded to wife in dissolution proceedings amounted to an owelty which became a lien on the property upon filing of the dissolution decree and was senior to deed of trusts former wife later executed.

Hartley, however, has no application to this case as it did not involve a court exercising its equitable powers with regards to the priority of liens in a partition action. Furthermore, unlike in Hartley, the Property at issue in this case is not the foreclosed upon Former Family Home (12020 52nd Ave. S.E., Everett, Washington) that was subject to the divorce owelty or equalizing lien (and secured by a note and deed of trust against the Former Family Home). Rather, the Property at issue in this partition action is the Property inherited by Patrick Hafey and Sandra Barth, located 3017 120th Pl. SE, Everett, Washington. In fact, American Pension already recovered surplus proceeds (\$44,253.00) in a separate action involving the non-judicial deed of trust foreclosure of the Former Former Family Home.

As additional authority, American Pension cites four older cases from out-of-state jurisdictions (Reed v. Fidelity Ins. Trust & S.D. Co., 113 Pa. 574, 6 A. 163 (1886); Stewart v. Allegheny Nat. Bank, 101 Pa. 342 (1882); Pace v. Shields-Geise Lumber Co., 147 Ga. 36, 92 S.E. 755 (1917); Smith v. Smith, 206 Okla. 206, 242 P.2d 436 (1952)) to support its

contention that “valid judgment liens cannot be impaired by partition of a co-tenancy.” (Appellants’ Brief, p. 7) These cases are not applicable to the facts or circumstances here. American Pension fails to demonstrate that these cases are persuasive authority to support its claim of priority, either factually or legally. These cases do not support American Pension’s argument that its owelty lien is superior in priority to the claims and offsets asserted by the Barths against Patrick Hafey’s interest in the Property.

The trial court did not abuse its discretion in finding that American Pension’s owelty lien was subordinate and lower in priority to the Barths’ equitable liens and claims of offsets against the one-half interest of Patrick Hafey in the Property.

C. The Trial Court did Not Abuse its Discretion by Awarding to the Barths, as an Offset or Charge Against the Interest of Co-tenant Patrick Hafey, One-half of the Reasonable Rental Value of the Property Due Upon Ouster or Active Exclusion from the Property.

The trial court correctly charged the interest of co-tenant Patrick Hafey in the Property with a rental value offset of one-half the reasonable rental value (\$30,653.63) during the time period of ouster or active exclusion (November 2009 through June 20, 2013).¹

¹ In its brief, American Pension claims that “[t]he trial court initially refused to allow any monies to be paid to American out of the sales proceeds even though Barth recognized and agreed to pay \$3,646.74.” (Appellant’s Brief, p. 11). There is nothing in the record supporting this assertion that the Barths agreed to pay American Pension \$3,646.74.

The rule related to rental liability among co-tenants, as stated by the Supreme Court in Cummings v. Anderson, 94 Wn.2d 135, 614 P.2d 1283 (1980), follows:

It is the rule in Washington that, in the absence of an agreement to pay rent, or limiting or assigning rights of occupancy, a cotenant in possession who has **not ousted or actively excluded** the cotenant is not liable for rent based upon his occupancy of the premises.

Id. at 145 (citing Fulton v. Fulton, 57 Wn.2d 331, 357 P.2d 169 (1960) (emphasis added). In its brief, American Pension cites the above Washington rule as authority in part, but disregards the exception under the general rule stated in the bolded portion of the above-quoted statement (for ouster or active exclusion), and supported by the record in this case. (Appellant's Brief, p. 11) Furthermore, as the court stated in Fulton:

The rule of law adhered to in a great majority of American jurisdictions with regard to a cotenant's liability for personal use and occupancy of common property is set forth in an annotation in 51 A.L.R.2d at page 413 as follows: '. . . absent statute construed to work a different result . . . a tenant in common, joint tenant or coparcener who has enjoyed occupancy of the common premises or some part thereof is not liable to pay rent to the others therefor, or to account to them respecting the reasonable value of his occupancy, *where they have not been ousted or excluded nor their equal rights denied*, and no agreement to pay for occupancy, or limiting or assigning rights of occupancy, has been entered into.' (italics ours.)

Fulton, 57 Wn.2d at 334-35.

Accordingly, when a non-occupying co-tenant has been ousted or

actively excluded from the property, such co-tenant is entitled to receive a share of the rent from the occupying co-tenant. *See, e.g., Cummings v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980). Ouster “does not necessarily mean the possessor has to force or keep them off the land, but it does mean he has to have exclusive possession and has to engage in acts or words, or both, that clearly show he claims to hold in his sole right and not as co-tenant.” 17 William B. Stoebuck, *Wash. Prac.: Real Estate: Property Law* § 1.31, at 70 (2004) (citations omitted).

In this case, the trial court record is replete with evidence of ouster and exclusion from the Property by co-tenant Patrick Hafey. The facts demonstrating ouster and active exclusion in this case are set forth in the Declaration of Thomas Barth dated April 28, 2014 (CP 86-97). Beginning in November 2009, Patrick Hafey stopped responding to the Barths’ phone calls and letters to address the Property. Due to the costs of travel, the distance, and the ill health of Sandra Barth, the Barths had limited opportunities to travel from Minnesota to Washington. When the Barths traveled to Everett, Washington in September 2011 to speak with Patrick Hafey in person about the Property, he was angry at the Barths for showing up at his residence and refused to discuss the Property. The Barths wanted to rent or sell the Property and gain access to the Property for those purposes. Patrick Hafey, by his actions, omissions, and

occupation of the Everett Property, asserted an ownership of the Property to the exclusion of the Barths. (CP 86-97)

No evidence in the record disputes the Barths' assertions related to their encounters of hostile intent and acts of exclusive ownership by co-tenant Patrick Hafey. The undisputed facts and evidence support that the Barths were ousted and actively excluded from the Property by co-tenant Patrick Hafey beginning in November 2009. In fact, it took the issuance of a Writ of Assistance/Ejectment by the court and enforcement by the Snohomish County Sheriff's Office for the Barths to regain entry to the Property on June 20, 2013.

Courts have determined that the fairest method is to charge the co-tenant with its share of the reasonable rental value. *See, e.g., Yakavonis*, 93 Wn. App. at 310-11. Since the occupying cotenant, Patrick Hafey committed ouster beginning in November 2009, Patrick Hafey began to owe rent at that time to the Barths. At the trial court, American Pension did not dispute the testimony regarding the fair rental value of the Property during this timeframe (\$1,337 per month from November 2009 through June 2011 and \$1,461.00 per month from July 2011 to June 20, 2013). (CP 67-70) At that rate, the fair market rental value of the Property from November 2009 through June 20, 2013 was \$61,307.26. The Barths one-half share of the reasonable rental value during this time period amounts to

\$30,653.63.

In its brief, American Pension cites four cases as authority to support nothing more than a general principle of possession in co-tenancy, referring to an old term “moiety”. Moiety is simply defined as “the half of anything.” BLACK’S LAW DICTIONARY 1005 (6th ed. 1990). This principle means “that each tenant in common of a possessory estate is entitled to possession, equally with his co-tenants, of all parts of the land at all times.” 17 William B. Stoebuck, Wash. Prac.: Real Estate: Property Law § 1.28, at 57-58 (2004). In this case, the record supports that co-tenant Patrick Hafey ousted and excluded the Barths from the Property.

As additional authority, American Pension cites a 1960 California case, Hunter v. Schultz, 24 Cal.App.2d 24 (1966) for the proposition that it disallows rent claimed in a partition like Washington. That case, however, is not factually similar nor is it persuasive authority. In fact, the Washington Court of Appeals, Division One, in Yakavonis v. Tilton, 93 Wn. App. 304, 968 P.2d 908 (1998), declined to follow the Hunter case, in finding that an equitable defense of a rental value offset prior to ouster does not apply.

The determinative issue under consideration at the trial court for co-tenant rental liability was whether or not the Barths had been ousted or actively excluded from the Property by co-tenant Patrick Hafey.

American Pension has not contested any of the facts in this case related to ouster or active exclusion nor has it contested or even addressed the legal basis for rent due upon ouster or active exclusion. The record does not support American Pension's assertion that the Barths' claim for rent is improper and should not be allowed.

A court "will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation to authority." McKee v. Am. Home Prods. Corp., 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (citation omitted); RAP 10.3(a)(4) and (6). Since American Pension does not set forth any argument, assignment of error, or legal authority addressing the ouster or active exclusion exception for co-tenant rental liability, American Pension's claim should not be considered.

In this case, American Pension did not address the issue of ouster or active exclusion by co-tenant Patrick Hafey, nor does the appellant question the amount so charged for the reasonable rental value of the Property. The trial court did not abuse its discretion, under its broad equitable powers, by charging one-half of the reasonable rental value (\$30,653.63) during the time period of ouster and active exclusion as an offset against the interest of Patrick Hafey in the Property.

D. The Trial Court Did Not Abuse Its Discretion by Awarding to the Barths, as an Offset or Charge Against the Interest of Co-tenant Patrick Hafey in the Property, the Full Enhanced Value of the Property Resulting from the Barths' Sole Efforts, Labor, and Expenditures.

The trial court's Amended Order disbursing sale proceeds provided that "Plaintiffs are to be distributed out of the one-half interest of Defendant Hafey the enhanced value of the Property which was the result of Plaintiffs' sole efforts, expenditures, and labor in repairing and improving the Property: \$53,700." (CP 1-3)

In its discretion, a court in a partition action is entitled to award a co-tenant the enhanced value of the property. The Supreme Court in Cummings stated, "[t]he rule is that improvements placed upon the property by one cotenant cannot be charged against the other cotenant unless they were either necessary or actually enhanced the value of the property." Cummings v. Anderson, 94 Wn.2d 135, 144, 614 P.2d 1283 (1980) (citing In re Estate of Foster, 139 Wn. 224, 246 P. 290 (1926)). Furthermore, the court in Cummings noted:

The equitable principle involved in these cases is in harmony with the rule that while a cotenant cannot at his own suit recover for improvements placed upon the common estate without the request or consent of his cotenant, **yet a court of equity, in a partition suit**, will give the cotenant the fruits of his industry and expenditures, by allotting to him the parcel so enhanced in value or so much thereof as represents his share of the whole tract. That rule is stated and followed in Bishop v. Lynch, 9 Wash.2d 278, 111 P.2d 996 (1941), citing A. Freeman,

Cotenancy and Partition § 509 (2d ed. 1886).

Id. at 141-42 (emphasis added). This principle reflects the just concept that “a cotenant should not be permitted to take inequitable advantage of another’s investment.” Id. at 142. Furthermore, this principle of law was not only addressed in Bishop, but also noted by the court in Leake v. Hayes, 13 Wn. 213, 43 P. 48 (1895):

While it is a well-settled general rule of law that one tenant in common cannot at his own suit, recover for improvements placed upon the common estate without the request or consent of his cotenant, yet a court of equity will not, ‘if it can avoid so inequitable a result, enable a cotenant to take advantage of the improvements for which he has contributed nothing. . . .

Additionally, in a recent case addressing enhanced value, the court stated:

If one cotenant improves property, the trial court has discretion to reimburse him or her for the improvement value. *See Leinweber*, 63 Wash.2d at 58, 385 P.2d 556 (cotenant could recover ‘the benefits created by the sweat of his brow (the enhanced valuation realized upon the partition sale),’ preventing a windfall to the other cotenants.)

Kelsey v. Kelsey, 179 Wn. App. 360, 365, 317 P.3d 1096 (2014).

In its brief, American Pension cites Bishop v. Lynch, 8 Wn.2d 278, 111 P.2d 996 (1941) for the proposition that “[t]he general rule, however, is that one co-tenant may not in his own partition suit, recover for improvements placed upon the common estate without the request and consent of his co-tenant.” (Appellant’s Brief, p. 12) Although the case of Bishop involved an agreement that respondent would build a dwelling on

a portion of the later partitioned property (which respondent was awarded the benefit of the improvements which she had placed upon the property), it does not stand for a general rule requiring the request and consent of a co-tenant in order to recover for improvements.

In the instant case, the trial court had the discretion under its equitable powers to award the Barths the enhanced value of the Property from the sale proceeds, as an offset or charge against the interest of co-tenant Patrick Hafey. The enhanced value resulted from the investment of money, time and labor solely by the Barths. Co-tenant Patrick Hafey in no way contributed to the improvements of the Property. (CP 86-97)

The record supports a finding that the added value to the Property was directly contributable to and the result of the significant investment of expenditures and labor by the Barths and their two sons in 2013, prior to placing it on the market for sale. (CP 67-70, 86-97). In his Declaration dated April 28, 2014, Thomas Barth summarizes the repair and improvement work. (CP 86-97).

The Barths' investment of money and labor turned a property in disrepair into a quality home, which sold in short time at the full asking price of \$246,200. (CP 67-70) The Barths' improvements enhanced the valuation of the Property, which was realized upon the partition sale of the Property. In other words, had the work by the Barths not been completed,

the Property would have sold for around \$192,500 (it sold for \$246,200). (CP 67-70) The evidence at the trial court that the Barths' improvements added \$53,7000 in value to the Property is not rebutted, disputed, or contested in any manner by American Pension. (CP 67-70)

The other co-tenant (or, in this case, the owelty lien holder attempting to claim all of the co-tenants interest) should not be allowed to take inequitable advantage of the fruits of the Barths' expenditures and industry. The trial court was well within its discretion to award, under the factual circumstances presented, the full enhanced value of the Property.

E. Appellant American Pension Services, Inc. is Not Entitled to Attorney's Fees on Appeal.

Finally, American Pension requests an award of attorney's fees on appeal citing RCW 7.52.480. RCW 7.52.480 governs the apportionment of costs for partition actions, and provides:

The cost of partition, including fees of referees and other disbursements including reasonable attorney fees to be fixed by the court and in case the land is ordered sold, costs of an abstract of title, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

In Hamilton v. Huggins, 70 Wn. App. 842, 855 P.2d 1216 (1993),

a partition action, the trial court could not charge one of the owners with attorney's fees that were not for the common benefit of the parties involved in the partition. American Pension is basing its claim as a lien creditor. However, American Pension cannot show that it is acting for the common benefit of parties of interest and should not be awarded attorney's fees on appeal.

F. Appendix A to the Brief of Appellant American Pension Should be Stricken.

American Pension submitted an Appendix A to its brief that inaccurately attempts to summarize how the sale proceeds (\$219,348.07) deposited into the registry of the Court were disbursed. Appendix A includes an item labeled "Costs of Fix Up" and there was no disbursement of funds identified in the record as such. In its Amended Order the Court authorized a disbursement for the "enhanced value" in the total amount of \$53,700. (CP 1-3) The funds labeled "enhanced value" were not split with American Pension as indicated in Appendix A.

RAP 10.3(a)(8) provides that an appendix may not include materials not contained in the record on review. Accordingly, Appendix A should be excluded because it contains items that are not in the record and that are inaccurately described. The Court's Amended Order accurately describes how the funds in the registry of the Court were disbursed and

there is no need for Appendix A.

V. CROSS-APPEAL

A. Cross-Assignment of Error

The trial court erred in ruling that the divorce owelty or equalizing lien held by American Pension attached to the half interest of Patrick Hafey in the Property in its May 22, 2014, Amended Order disbursing sale proceeds.

B. Issue Pertaining to Cross-Assignment of Error

Did the trial court err in finding that the Owelty or Equalizing Lien, Assigned to Defendant American Pension by Tammy Hafey (Patrick Hafey's ex-wife), attached to the half Interest of Patrick Hafey in the subject Property?

C. Argument on Cross-Appeal

1. **The Trial Court Abused Its Discretion in Ruling in its Amended Order that American Pension Services Inc.'s Owelty or Equalizing lien, Attached to the One-half Interest of Patrick Hafey in the Property.**

Here, the trial court erred by finding in its Amended Order disbursing sale proceeds, that the owelty or equalizing lien assigned to and claimed by Appellant American Pension attached to the one-half interest of Patrick Hafey in the Property. In this case, the divorce owelty or equalizing lien assigned to American Pension by the ex-wife of co-tenant Patrick Hafey is more focused and limited in scope than a general judgment lien and attached to a different property (the former family home) as security, not the interest of Patrick Hafey in the subject Property.

Here, there are two distinct properties in which Patrick Hafey held an ownership interest. First, there is the Property at issue in this partition action located at 3017 120th Pl. SE, in Everett, Washington. Patrick Hafey and his sister, Sandra Barth, inherited this Property from their mother in 2002 and held ownership as tenants in common.

Second, there is the property owned by Patrick Hafey and his ex-wife, Tammy Hafey located at 12020 52nd Ave SE, in Everett Washington (“Former Family Home”). In 2009, Patrick Hafey and Tammy Hafey were granted a decree of dissolution. As part of the divorce decree, Patrick Hafey was awarded the Former Family Home as his sole and separate property. Rather than require a sale of the Former Family Home at the time of the divorce, Tammy Hafey was awarded an equalizing lien in the amount of \$150,000 as part of the divorce decree. The divorce decree states:

Wife’s right to payment of the equalizing lien will be protected by a promissory note and a deed of trust. Her equalizing lien shall not bear interest for a period of 2 years from the date of dissolution. After the expiration of 2 years, interest shall accrue at 12% per annum

(CP 45-53) On October 14, 2009, Tammy Hafey assigned her owelty lien to American Pension. This owelty lien was secured by a note and deed of Trust on the Former Family Home.

In or around June 2013, a bank foreclosed upon the Former Family

Home of Patrick and Tammy Hafey due to non-payment. As part of the foreclosure of the Former Family Home, American Pension was awarded \$44,263.37 (as its interest was subordinate to the foreclosing banks that held first and second home mortgages). (Appellant's Brief, p. 5)

An owelty lien, however, is more limited in nature than a general judgment lien (which attaches to all real property owned by the debtor in the county in which the judgment lien is entered or filed). In re Marriage of Wintermute, 70 Wn. App. 741, 855 P.2d 1186 (1993). The Washington Real Property Deskbook describes the limited nature of owelty liens as follows:

The central concept of owelty is equalization. Owelty is the pecuniary compensation decreed by the court to adjust the inequality of shares. When a partition in kind cannot be made equal between the parties according to their respective rights without prejudicing rights and interests of some of them, the court may judge compensation to be made by one party to another on account of the inequality of partition. RCW 7.52.440. . . .

Owelty is confirmed in a judgment and becomes an equitable lien on the property. The owelty lien is in the nature of a vendor's lien, *Adams v. Rowe*, 39 Wn.2d 446, 236 P.2d 355 (1951), and attaches to a particular piece of real property upon its entry to assure payment of a debt related to that property. **The owelty lien is more focused and limited in scope than a general judgment lien, which attaches to all real property owned by the debtor in the county in which the judgment lien is entered or filed.** RCW 4.56.190-.200; *In re Marriage of Wintermute*, 70 Wn. App. 741, 855 P.2d 1186 (1993).

4 Washington Real Property Deskbook, § 10-6 at 10-7 (4th ed.

2010)(emphasis added). The court in In re Marriage of Wintermute, further describes the limited scope of an owelty lien:

This kind of equalization derives from the ancient doctrine of owelty, *Hartley v. Liberty Park Assocs.*, 54 Wn. App. 434, 437, 774 P.2d 40, and is authorized by statute, RCW 7.52.440. A judgment for owelty creates an equitable lien on the property in the nature of a vendor's lien. *Adams v. Rowe*, 39 Wn.2d 446, 236 P.2d 355 (1951); *Hartley*, supra.

A vendor's lien affords the seller of real property a means of securing the unpaid portion of the purchase price. Black's Law Dictionary 1555 (6th rev. ed. 1990). When, as in this case, a particular piece of real property cannot be fairly apportioned, an equalizing monetary award can be made in lieu of partition. See *Adams* (citations omitted). An owelty lien to secure the debt may be created by agreement of the parties, or **it may be decreed by the court as an equitable alternative to partition.** 4 G. Thompson, Real Property, section 1827 (1979); *Von Herberg* 6 Wash.2d at 121, 106 P.2d 737. **The owelty lien is like a vendor's lien in that it attaches to a particular piece of real property to assure payment of a debt related to that property. . . .**

By attaching to a particular piece of real property to secure an equalizing award of money, an owelty lien is significantly more focused and limited in scope than a general judgment lien. It is a compensating device tailored by the court or the parties to address a specific situation.

In re Marriage of Wintermute, 70 Wn. App. at 745-46

(emphasis added).

The owelty lien in In re Marriage of Wintermute, is similar to that held by American Pension in this case. In In re Marriage of Wintermute, the divorce decree awarded the family home to Florence subject to: "a lien to [Leslie] in the amount of \$12,000 at 8% to be paid in 8 years from the

date of the entry of the Decree of Dissolution herein, or upon the sale of the home and real property...” *Id.* at 742. Here, the Former Family Home of Patrick Hafey and Tammy Hafey was awarded to Patrick Hafey as his separate property in the divorce decree, and in exchange, Tammy Hafey was awarded an owelty or equalizing lien of \$150,000 cash to be secured by a Promissory Note and Deed of Trust *due and payable to the wife two years from the date of dissolution, or upon sale or refinance of the Former Family Home.* (CP 45-53). This allowed Patrick Hafey to stay in the Former Family Home for two years, and Tammy Hafey was awarded an equalizing or owelty lien secured by the Former Family Home in lieu of partition.

Clearly, Tammy Hafey’s divorce owelty or equalizing lien, assigned to American Pension, could be enforced against the Former Family Home. And, as noted above, American Pension collected surplus proceeds from the non-judicial deed of trust foreclosure of the Former Family Home as a result of its owelty lien interest (secured by a note and deed of trust).

American Pension’s owelty lien, however, should not reach Patrick Hafey’s half interest in the subject Property. It is not a general judgment lien. American Pension’s assigned owelty or equalizing lien is more focused and limited in scope than a general judgment lien and attached to

a particular property only, the Former Family Home. It attached to the Former Family Home to assure payment of a debt related to the Former Family Home only and secure an equalizing award of money from the dissolution. Due to its limited nature, American Pension's equalizing lien should not have attached to Patrick Hafey's half interest in the subject property.

VI. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1 and RCW 7.52.480 (outlined supra), the Barths request their costs and fees on appeal. The Barths are acting for the common benefit in defending against the claims of a lien creditor. Fees incurred for the common benefit may be awarded. Hamilton v. Huggins, 70 Wn. App. 842, 855 P.2d 1216 (1993).

American Pension is a lien creditor and as such its share under RCW 7.52.030 shall be charged with its just proportion of the costs.

Since the Barths should prevail on appeal, pursuant to the arguments set forth above, they should also be awarded their attorney's fees and costs on appeal.

VII. CONCLUSION

For the foregoing reasons, the Barths respectfully request that the Court affirm the trial court's Amended Order dated May 22, 2014 disbursing the Property sale proceeds in this partition action, except as

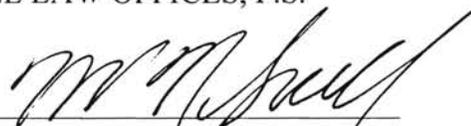
noted below.

The Barths respectfully request that the Court reverse the trial court's ruling in the Amended Order that Defendant American Pension's owelty lien attached to the one-half interest of Defendant Patrick Hafey in the Property

The Barths also request an award of legal fees and costs.

RESPECTFULLY SUBMITTED this 26th day of August, 2014.

SNELL LAW OFFICES, P.S.

By: 

William N. Snell, WSBA #3684

Matthew Snell, WSBA #40460

Attorneys for Respondents / Cross-Appellants

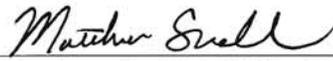
Thomas and Sandra Barth

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2014, I caused the foregoing *Brief of Respondent / Cross-Appellants / Plaintiffs Thomas and Sandra Barth* to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

Attorney for Defendant American Pension Services, Inc. Robert H. Stevenson Attorney at Law 810 Third Avenue, Suite 228 Seattle, WA 98104 (206) 682-3624	<input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic
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Dated this 26th day of August 2014.


Matthew Snell, WSBA #40460

2014 AUG 26 PM 4:59
CLERK OF SUPERIOR COURT
JANICE M. HARRIS