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SUPREME COURT
OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A., a national association,

Petitioner,

v.

KENNETH TREIGER,

a married person as to his separate estate,

Respondent,

J'AMY LYN OWENS, an unmarried person, SHULKIN, HUTTON,
INC., P.S. a Washington professional service corporation; and
EDMUND JOHN WOOD,

Defendants.

ANSWER OF RESPONDENT KENNETH TREIGER
TO PETITION FOR REVIEW
(RAISING CONDITIONAL CROSS-PETITION)

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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A. Identity of Respondent.

The respondent is Kenneth Treiger, who was the appellant in the Court of Appeals.

B. Restatement of Facts.

The Court of Appeals' decision giving respondent Treiger's judgments priority over petitioner Bank of America's prejudgment writ of attachment was based on orders awarding respondent certain sums from his former wife and from the sale of real property that had been part of their marital estate, that were filed and recorded¹ before the Bank obtained its prejudgment writ. The Bank had both actual and constructive knowledge of the orders. This Restatement of Facts sets forth these undisputed facts, on which the Court of Appeals based its decision, and that the Bank has ignored in its petition:

1. A Dissolution Decree Ordered The Maplewood Property Sold, And Awarded Respondent One-Half Of The Net Proceeds.

During their marriage, respondent Treiger and J'Amy Lyn Owens purchased the Maplewood property. (CP 179, 269) When

¹ In this answer, the term "filed" is used to describe when an order was entered with the King County Superior Court; the term "recorded" is used to describe when the order was recorded with the King County Recorder's Office.

Treiger and Owens' marriage was dissolved on June 19, 2002, the dissolution court expressly reserved property and debt issues until Treiger's pending bankruptcy proceedings were concluded. (CP 84) Owens subsequently entered into an agreement with Treiger's bankruptcy trustee to purchase the Maplewood property out of Treiger's bankruptcy estate in exchange for \$215,000, which was used to partially satisfy community debts. (See CP 186-89) Among the community debts were amounts owed by Owens on her personal guarantee of business loans from the petitioner Bank. (CP 137, 148) Treiger's bankruptcy estate paid over \$95,000 to the Bank towards the \$455,308.78 debt alleged owed. (CP 137, 200) Thereafter, Treiger's bankruptcy was closed, discharging the community debt and any separate debts of Treiger, including the obligation to the Bank. (CP 137, 173-74)

Treiger and Owens returned to King County Superior Court to resolve their marital property issues. (See CP 84) The dissolution court rejected Owens' claim that the Maplewood property could not be distributed as part of the marital estate because she had purchased the property out of Treiger's bankruptcy estate, ordered the Maplewood property sold, and awarded Treiger one-half of the net proceeds from the sale. (CP

16, 19, 22, 88-89) The decree expressly defined "net proceeds" as the proceeds from the sale less the costs of sale and the outstanding mortgage. (CP 21) The decree also provided that any "lawsuits against the wife or liens or encumbrances against the property for wife's debts" would be paid from Owens' share of the proceeds. (CP 22)

The supplemental decree of dissolution dividing the marital estate was entered on May 9, 2006. (CP 15-23) The first page of the supplemental decree listed the Maplewood property under the "Real Property Judgment Summary." (CP 15) The supplemental decree's "Money Judgment Summary" included a \$27,501.42 judgment against Owens for back child support, an IRS refund, and attorney fees and costs. (CP 15-16)

2. Petitioner Bank Sued Respondent's Ex-Wife For Money Owed Under Her Personal Guarantee. While The Bank's Action Was Pending, Respondent Filed And Recorded Several Judgments Against The Wife.

On July 18, 2006, the Bank filed an action against Owens seeking payment from her separately of the outstanding amounts still owed on her business debt guarantee. (CP 138) On October 27, 2006, Treiger recorded several orders in the dissolution action, including the supplemental decree of dissolution awarding him one-

half of the net proceeds from the sale of the Maplewood property. (CP 5-46) On November 17, 2006, the Bank amended its complaint to add a claim "in rem against any and all separate property of J'Amy Lyn Owens awarded to Kenneth Treiger." (CP 138) On December 15, 2006, the court granted the Bank's request for a \$351,413.55 prejudgment writ of attachment against "the defendant J'Amy Owens' interest (including any and all rights to proceeds) in" the Maplewood property. (CP 64, 68-70) The court considered but declined the Bank's request to attach Treiger's interest in the Maplewood property and its proceeds as well. (See CP 63-64)

3. The Trial Court Granted Priority To The Bank Over Respondent's Interest In One-Half Of The Maplewood Net Proceeds.

The Maplewood property was sold in May 2007. (CP 135) Sale proceeds of \$1,114,054.83 were wired to a trustee pursuant to the parties' agreement that the remaining proceeds after closing costs and the mortgage were paid would be held pending a determination how the proceeds were to be distributed. (CP 51, 147) On December 14, 2007, the court entered a \$593,519.24 judgment in favor of the Bank against Owens on her personal guarantee, representing the remaining principal owed, accrued

interest, and attorney fees of \$57,228.09. (CP 58-61) On the same day, both Treiger and the Bank filed motions asking the trial court to determine the priority of their respective judgments and liens. (CP 135, 144)

The trial court refused to pay Treiger his one-half of the "net proceeds" as ordered by the dissolution court. Instead, the trial court ordered the Maplewood proceeds to be disbursed in the following order:

1. Unpaid fees and costs to the trustee;
2. \$40,000 to Owens for a homestead exemption;
3. \$72,288.57 to Treiger for four of Treiger's seven money judgments recorded before the Bank perfected its prejudgment writ of attachment. The trial court declined to give priority to three other recorded money judgments, totaling \$102,962, because "[n]one of [those] documents . . . contained a judgment summary or in any way purported to be a judgment. None of the documents referenced in this paragraph were entered by the Court clerk in the execution document." (FF 16, CP 292-93)
4. \$590,670.77 to the Bank for its judgment against Owens;

5. \$64,639.25 to Treiger for four judgments that Treiger recorded after the Bank perfected its prejudgment writ of attachment;

6. Any "remaining sums . . . to Kenneth Treiger as partial payment to him of his one-half share of the 'net proceeds.'"

(CP 301-02)

4. The Court of Appeals Reversed, And Gave Some But Not All Of Respondent's Judgments Priority.

Treiger appealed the trial court's order giving the Bank's prejudgment writ of attachment priority over his award of one-half the net proceeds in the Maplewood property and the three money awards against Owens that he had filed and recorded before the Bank's prejudgment writ of attachment. (CP 283) Division One reversed in part and affirmed in part. Division One held that the supplemental decree of dissolution was a judgment under RCW 26.09.010(5), and created a lien "as a matter of law on one-half of the proceeds of the sale of the Maplewood property." (Opinion 9)² Accordingly, the trial court erred "by failing to grant Treiger's lien priority" over the Bank's prejudgment writ of attachment, which was recorded *after* the supplemental decree was filed and recorded.

² This answer cites to the copy of the Court of Appeals decision attached to the Bank's petition for review.

(Opinion 9) The court held that a post-decree order that awarded Treiger \$99,012 also should have been granted priority because it was a "final order" filed and recorded prior to the prejudgment writ of attachment and there was "no question of constructive notice to the Bank." (Opinion 13) However, Division One affirmed the trial court's grant of priority to the Bank's prejudgment writ of attachment over two other orders filed and recorded before the writ. (Opinion 11)

C. Grounds for Denying Review.

With the exception of its holding that two orders that were filed and recorded before the Bank's writ were subordinate solely because they were not "final" judgments, the Court of Appeals decision is consistent with statutory and case law; review is not warranted as the Court of Appeals' decision is largely correct. If this Court grants the Bank's petition for review, however, it should also review the Court of Appeals decision holding that two filed and recorded orders of which the Bank indisputably had notice were subordinate to the Bank's later-filed and -recorded writ.

1. The Court Of Appeals Decision That The Supplemental Decree Was A Judgment That Had Priority Is Consistent With Statutory And Case Law. (Answer to Petition 10-13)

Division One's decision that the supplemental decree of dissolution was a judgment that had priority over the Bank's later-filed prejudgment writ of attachment is wholly consistent with statutory and case law. As Division One correctly noted, "RCW 26.09.010(5) specifically provides that the term '[dissolution] decree' includes the term 'judgment.'" (Opinion 8) Thus, the supplemental decree of dissolution "create[d] a lien against real estate in each county where the judgment is recorded." (Opinion 8, citing *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 246, 46 P.3d 812 (2002); RCW 6.13.090)

The supplemental decree of dissolution contained a "real property judgment summary" (CP 15) that gave notice that the decree awarded an interest in the Maplewood property. RCW 4.64.030(2)(b) ("if the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment

page number where the full legal description is included, if applicable; or the assessor's property tax parcel"). Division One properly held that the filing of the supplemental decree "constitute[d] constructive notice to third parties who deal with the judgment debtor with respect to real property which the lien attaches." (Opinion 8-9, citing *Hartley v. Liberty Park Associates*, 54 Wn. App. 434, 438, 774 P.2d 40, rev. denied, 113 Wn.2d 1013 (1989); see also, 28 Marjorie Dick Rombauer, *Washington Practice: Creditors' Remedies-Debtors' Relief* § 7.7, at 88-89 (1998))

In *Hartley*, the husband was given a \$40,000 lien against real property awarded to the wife in a decree of dissolution that was filed but not recorded. A deed of trust thereafter was recorded in favor of third party Liberty Park. Division One rejected Liberty Park's claim that its deed had priority because it was recorded before the decree. Division One held that the decree was a judgment in the nature of an "owelty lien" that attached when the decree was filed. *Hartley*, 54 Wn. App. at 438. While the husband could have recorded the decree as a lien, "such recording was not necessary for the lien to be effective against purchasers of the property. Thus, Liberty Park had constructive notice of [the

husband]'s lien and its deed of trust is subordinate to [the husband]'s lien." **Hartley**, 54 Wn. App. at 438-39 (*citations omitted*).

Consistent with its holding in **Hartley**, Division One held here that the supplemental decree of dissolution was an effective judgment when it was filed on May 9, 2006. (Opinion 9) The court acknowledged that while Treiger recorded the supplemental decree on October 27, 2006, recording was not necessary for it to be given priority. (Opinion 9) Just as Liberty Park had constructive notice of the husband's lien in **Hartley**, the Bank here had both constructive *and* actual notice of Treiger's lien. Because the supplemental decree was filed and recorded before the Bank's prejudgment writ of attachment, Division One properly held that Treiger was entitled to his interest in the proceeds before the Bank could be paid. See **Hartley**, 54 Wn. App. at 438-39.

The Bank attempts to distinguish **Hartley**, claiming that Division One's decision in that case was predicated on the fact that a specific value was placed on the husband's lien, whereas in this case Treiger was only awarded half of the net proceeds of the ordered sale of the Maplewood property. (Petition 10-11) But the Bank cites to nothing in the **Hartley** decision to support this

distinction. Nor does the Bank cite to any public policy to warrant such a rule, as there is none.

A spouse who is awarded a specific percentage from the proceeds of the sale of real property is treated no differently, and no less well, than a spouse who is awarded a specific value from real property. In this case, the decree could not have awarded Treiger a "money judgment" because no specific amount could be determined when the decree was entered, as the price at which the Maplewood property would sell was unknown. (Petition 13) The real property judgment summary on the front page of the decree nevertheless provided notice to all creditors that Treiger held an interest in the Maplewood property. Regardless of the exact amount Treiger would eventually receive from the ordered sale, the Bank was on notice that Treiger owned one-half of the "net proceeds," which were defined as the proceeds less "costs of sale (real estate commission, excise tax, etc.) [and] mortgage owing to Select Portfolio Servicing (approximately \$469,982)." (CP 21)

The Bank further attempts to distinguish *Hartley* by asserting that because the real property in that case was community property, whereas the real property in this case was determined to be the wife's separate property, "the doctrine of

owelty is simply not applicable as the award was in no way an equalization for an unequal partition of community property.” (Petition 11) The Bank cites no authority to support its claim that the doctrine of owelty cannot be used in a dissolution action to equitably distribute all of the parties’ property, regardless of its character.

To the contrary, RCW 26.09.080 specifically mandates the court to distribute all property of the parties, “either community or separate, as shall appear just and equitable after considering all relevant factors.” Here, excluding the Maplewood property, the husband would have received property worth \$84,834.12, compared to \$264,300 awarded to the wife. (See CP 23) As a means to equitably distribute all of the marital estate, the dissolution court properly ordered the Maplewood property to be held by the parties jointly until sold and the proceeds divided between the parties. (CP 89) The Court of Appeals decision that the supplemental decree was a judgment that had priority over the Bank’s later writ is consistent with statutory and case law.

2. **The Court Of Appeals Decision That The Supplemental Decree Was Binding On The Bank Is Not Inconsistent With *Kshensky*.** (Answer to Petition 9-10)

"A lien is binding on all persons who acquire property with notice of the lien or who have constructive notice of the lien by reason of its recordation." *Kshensky v. Pioneer National Title Insurance Co.*, 22 Wn. App. 817, 820, 592 P.2d 667, *rev. denied*, 92 Wn.2d 1025 (1979). Division One's decision in this case is consistent with the holding in *Kshensky*, as the Bank indisputably had both actual and constructive notice of the award to Treiger of one-half of the Maplewood proceeds in the supplemental decree. Accordingly, Division One properly held that the supplemental decree was binding on the Bank and held that it had priority over the later recorded prejudgment writ of attachment. (Opinion 9) Division One's decision in this case is also not inconsistent with *Kshensky's* other holding, that the husband's lien in that case on one-half of sale proceeds was not a lien on the real property itself. (Petition 8) As the concurrence in this case property noted, the petitioner's "heav[y]" reliance on the case is misplaced because *Kshensky* is "distinguishable from this case on both the facts and the law." (Concurrence 3, 4)

In *Kshensky*, a decree of dissolution awarded the family residence to the wife. The decree provided that in the event the wife ever sold the residence, the husband would be entitled to a lien on the proceeds in a sum equal to one-half of the total sales price in excess of \$14,250. *Kshensky*, 22 Wn. App. at 818. The decree was never recorded. Twelve years after the divorce, the wife sold the home for \$61,000 and left the country with all the proceeds. The husband then sued the purchaser, who had no actual knowledge of the lien, for the amount he would have received under the decree. *Kshensky*, 22 Wn. App. at 818-19. Division One affirmed trial court's order dismissing the action because the decree "unambiguously" awarded the wife the residence, and did not create a lien on the property, as the lien was "by its terms limited to the proceeds" and the "proceeds of sale in this context means moneys actually received by the seller." *Kshensky*, 22 Wn. App. at 820-21.

Kshensky is distinguishable on the facts. First, in this case the residence itself was not specifically awarded to either party. Second, in this case the "proceeds" were defined in the decree "by its terms" as the sale proceeds less "costs of sale (real estate commission, excise tax, etc.) [and] mortgage owing to Select

Portfolio Servicing (approximately \$469,982)." (CP 21) Third, as the concurrence accurately noted, "the purchaser of the property in ***Kshensky*** was a bona fide purchaser. Herrin had no notice of the lien created by the decree. Unlike Herrin, Bank of America is not entitled to the status of a bona fide purchaser for two reasons. The first reason is that it had constructive notice of Treiger's judgment lien against Maplewood from May 9, 2006, the date of entry of the supplemental decree. The second reason is that the Bank had further constructive notice of that judgment lien because Treiger ***recorded*** the supplemental decree in the King County Auditor's Office on October 27, 2006. That supplemental decree was of record in the auditor's office prior to the time the bank recorded its writ of attachment against Maplewood on December 20, 2006." (Concurrence 4-5, emphasis in original)

Kshensky is also distinguishable on the law. As the concurrence noted, "the ***Kshensky*** court did not consider or discuss the judgment lien statutes . . . Thus, that court did not rule on the question whether the divorce decree in that case created a judgment lien, by operation of law, against the real estate described in that decree. In contrast, we hold that the decree in this case created a judgment lien against the Maplewood real estate on the

date of entry of the decree, May 9, 2006. Treiger, as a judgment lien creditor of Owens, has a fully perfected right to payment from the proceeds of sale of the real estate prior to payment of the bank's later recorded lien." (Concurrence 4) The Court of Appeals decision that the supplemental decree was binding on the Bank is not inconsistent with *Kshensky*.

3. The Court Of Appeals Correctly Held That An Order That "Fully And Finally Disposes Of The Matter At Hand" Is A "Judgment," Which When Filed And Recorded Has Priority. (Answer to Petition 14-19)

Division One correctly determined that a post-decree order that "fully and finally disposes of the matter at hand" is a "judgment" under CR 54. (Opinion 12) CR 54(a) ("a judgment is the final determination of the rights of the parties in the action") (Opinion 10). Under RCW 6.01.020, the post-decree order at issue in this case ("document 1376") was considered "entered when it is delivered to the clerk's office for filing." (See Opinion 12-13) Further, under RCW 4.56.200, the lien created as a result the post-decree order commenced "from the time of the entry or filing thereof." (Opinion 8) Accordingly, Division One correctly held that because the post-decree order was filed "before the Bank obtained and filed its writ of attachment," it had priority. (Opinion 13)

Contrary to the Bank's claim, there is no "apparent conflict" between RCW 6.01.020, relied upon by Division One to hold that a judgment is entered when delivered to the clerk for filing, and RCW 4.64.030(3), which provides that a "judgment does not take effect, until the judgment has a summary in compliance with this section." (Petition 16) The intent of the provision in RCW 4.64.030 requiring a judgment summary, which directs the clerk to enter the judgment in the execution docket, is to give notice to any persons subsequently acquiring title to or a lien upon the real property of a party against whom a judgment is entered. See RCW 4.64.020; 1 *Washington Practice: Methods of Practice* § 12.5 (4th ed. 1997) ("Entry of a judgment imparts constructive notice to a purchaser even if it is not recorded in real property records"). Here, while the post-decree order did not contain a judgment summary, it nevertheless complied with the substantive purpose of RCW 4.64.030 because it was *recorded* in the county where the real property was located, providing notice to the Bank of the existence of Treiger's judgment.

Division One determined that the post-decree order substantially complied with RCW 4.64.030 when it was recorded, giving notice to the Bank of the lien, consistent with its decision in

Kim v. Lee, 102 Wn. App. 586, 591, 9 P.3d 245 (2000), *overruled on other grounds by* 145 Wn.2d 79, 31 P.3d 665 (2001). (Opinion 14) In *Kim*, Division One held that "strict compliance with legislatively mandated procedures [of RCW 4.64.030] is not always required. Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections." 102 Wn. App. at 591.

The respondent had recorded a judgment in the county where appellants owned property in *Kim*. The judgment did not technically comply with RCW 4.64.030(2) because the summary was on the second, not the first, page of the judgment. A lender seeking priority over the judgment for its lien asserted that the judgment was not effective due to this procedural imperfection, claiming to have not found an abstract within the clerk's office. See *Kim*, 145 Wn.2d at 84. Division One held that even though the judgment did not comply with RCW 4.64.030, requiring a summary to be on the first page, the judgment was nevertheless effective because it "was in actual compliance with the substantive purpose of RCW 4.64.030 despite the minor procedural imperfection." *Kim*, 102 Wn. App. at 592.

The *Kim* court noted that the “apparent purpose of the first page summary is to facilitate lien and title searches. There is no evidence that Yakima Title failed to locate the judgment because the summary continued to the second page.” 102 Wn. App. at 592. Likewise in this case, the filed and recorded orders were valid judgments as they “actually complied with the substantive purpose” of RCW 4.64.030 by providing notice to the Bank of the existence of Treiger’s judgments. The Bank does not, nor can it, claim that it was unaware of these judgments. The Court of Appeals correctly held that an order that “fully and finally disposes of the matter at hand” is a “judgment,” which when filed and recorded has priority. (Opinion 12-13)

D. Conditional Cross-Petition.

If this Court grants review of the Court of Appeals decision, it should also review the portion of the decision holding that two other orders awarding respondent attorney fees were not “judgments” for purposes of granting them priority over the Bank’s later-filed and -recorded prejudgment writ of attachment. (Opinion 10-11) These orders were recorded nearly two months before the Bank recorded its prejudgment writ of attachment, and there is no dispute that the Bank had both actual and constructive knowledge of them. An

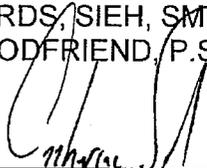
order is effective as a judgment if it "actually complied with the substantive purpose" of RCW 4.64.030 by providing notice to third parties of the existence of the order "despite the minor procedural imperfection." *Kim*, 102 Wn. App. at 592. Only if the Court grants review of the Bank's petition, this Court should also review this issue as well under RAP 13.4(b)(2).

E. Conclusion.

This Court should deny review. The Court of Appeals' decision is consistent with statutory law and other Court of Appeals' decisions and does not involve an issue of substantial public interest. In the event this Court grants review, it should also consider respondent's conditional cross-petition.

Dated this 15th day of January, 2010.

EDWARDS, SIEH, SMITH
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By: 

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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 15, 2010, I arranged for service of the Answer of Respondent Kenneth Treiger to Petition for Review (raising Conditional Cross-Petition), to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of January, 2010.


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Subject: Bank of America v. J'Amy Lyn Owens, et al., Cause No. 84044-0

Attached for filing in .pdf format is the Answer of Respondent Kenneth Treiger to Petition for Review (Raising Conditional Cross-Petition), in *Bank of America v. J'Amy Lyn Owens, et al.*, Cause No. 84044-0. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com

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