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NO. 720490-0-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

THOMAS BARTH and SANDRA A. BARTH,
his wife,

Respondent/Cross-Appellants/Plaintiffs

v.

PATRICK HAFEY and GINA LORAE HAFEY, HIS WIFE
Defendants

and

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

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~~FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON~~

REPLY BRIEF OF AMERICAN PENSION SERVICES, INC.

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REPLY OF PETITIONER

I. Barth's Contention:

The trial court did not abuse its discretion in applying offsets against the owelty judgment of American Pension Services.

This appeal is an equitable case of partition of real property between a brother and sister of their mother's home. The trial court awarded only \$3,646 to American Pension Services, out of Hafey's one-half interest as a co-tenant with his sister. This represents 3.3% out of Hafey's one-half interest. This is hardly in keeping with the ancient maxim of "He who seeks Equity, must also do Equity."

O'Brien v. Johnson, 32 Wash 2d 404, 407, 202 Pac. 2d 248 (1949).

There is no soundness to the argument of Barth (the sister) that the exercise of discretion by the trial Court was not abused. The rule is, that the application of erroneous principles of law is itself an abuse of discretion. State v. Kinneman, 155 Wn.2d 272, 289, (2005); Personal Restraint of Dyer, 157 Wash. 2d 358 (2006).

The offset of a charge by Barth of her brother's occupation of his mother's home, amounting to \$30,653 is not equitable or proper. The sister did not live in Washington and really had no interest in the possession and occupation of the property. The ousting of her brother was by default without a hearing or Hafey's testimony. Co-tenants of real property each have a legal and equitable right to

the premises. Cummings v. Anderson, 94 Wash.2d 135, 614 Pac. 2d 1283 (1980). There was no showing of any agreement between the sister and brother as to payment of rent for the temporary occupation of the home. Since Barth had already charged her brother for the improved value and repairs of the property, the rent charge is a double charge.

Barth never sought or got the permission of the Court to repair the property or charge rent; no person was appointed by the partition Court to oversee the sale and improvements. The rental offset should be stricken as inequitable and against legal principles in this state. Barth should not be able to ask for partition of the co-tenancy and, by that claim, eject her brother from the home relying on the action to produce rent.

The offset of \$53,700 for repairs and enhancement of the value of the property is inequitable because Barth takes all of the funds and gives her brother nothing. It ends up with Barth claiming both rent and all of the costs of repairs and the enhanced value. This violates the maxim cited above and is duplicative. The cost of repairs and enhanced value should be shared by Hafey. The rule in this state is, basically, that one co-tenant in common cannot, by his own partition action, recover for improvements placed upon the property without the consent or request of his co-tenant. Equity will intervene in this case if an inequitable result can be reached. It is inequitable for Barth to take \$107,400 for repairs and enhanced value, giving her brother nothing. The Barth offset should

be cut in half with Hafey getting \$53,700 as his share. Bishop v. Lynch, 8 Wash. 2d 278, 111 Pac. 2d 996 (1941).

II. Barth's Contention:

The owelty judgment lien does not attach to Hafey's interest.

The award of \$3,646 to American Pension Services is challenged in this appeal for the first time and is not proper. Matters not raised in the trial court are ordinarily not permitted on appeal.

More importantly, this question is barred by the judicial admission of Barth's attorney that \$3,646 was the proper award for the court to allow. CP 45, 48 & 53. The trial Court at first rejected that American's interest attached to the proceeds at all. CP 53. Several days later, the Court reversed his ruling and allowed the \$3,646. CP 55 & 57.

Judicial admissions are exceptions to the hearsay rule and have a special value in that they are statements that are inconsistent with the party's position in the case. Restatement, Agency, § 286-88 (1958); ER 801 (d) (2), Rules of Evidence, Wigmore, Evidence, pp. 2-5 (3d Ed. 1940). Barth should not be allowed to admit the \$3,646 award was proper, at trial, and on appeal, to deny its validity in a cross-claim.

III. Barth's Contention:

The owelty judgment has no priority over Barth's interest.

RCW 4.56.190 provides, in part:

"Lien of Judgment.

The real estate of any judgment debtor and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the.....Superior Court.....and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200....."
(Emphasis Added).

RCW 4.56.190 is clear and unambiguous. It creates a judgment lien, on any real estate interest of a judgment debtor, that the debtor has or may acquire.

An owelty judgment is an equitable lien on the present and future interest of Patrick Hafey in his mother's real estate and the proceeds arising from the sale of the Property. Marriage of Wintermute, 70 Wash. App. 741 (1993). This lien of owelty, payable to a co-tenant, is a charge in rem on all property subject to the judgment until it is fully paid. It has priority over proceeds from the partition sale over other competing debts on the property. The owelty lien is divested from the land and becomes a lien on the proceeds in favor of the holder of the lien and prior to other encumbrances. Petitioner's Opening Brief, Citations, pp. 7, 8, 9, and 10. Barth's contention on appeal that

Wintermute narrows the scope of an owelty judgment is not justified by the holding of the case. The Court in Wintermute was asked to impose a 10 year statute of limitations which would have barred an owelty judgment. It chose, instead, to use the date of payment of the judgment as the yardstick. The Court did not consider RCW 4.56.190, the judgment statute; the narrowness quote by Barth is dicta. Where RCW 4.56.190 is plain, it means exactly what it says and needs no interpretation or construction by the Court. Carkonen v. Alberts, 196 Wash. 575, 83 Pac. 2d 899 (1938).

The total sales proceeds in the partition sale was \$219,348. The partition statute provides the order in which these proceeds are to be distributed in order of priority. RCW 7.52.220(3). RCW 4.56.190 makes that priority over Barth clear. The former wife of Patrick Hafey received an owelty judgment of \$150,000, plus interest of 12% per annum. She is owed a total of \$179,638 less the amount of \$44,263 she received on her judgment when her former marital home was foreclosed. The sum of \$135,375 plus interest is still owed to her on the owelty judgment. It is the later sum that has priority over any monies claimed by Barth under the judgment statute and owelty cases. Hartley v. Liberty Park Assoc., 54 Wash. App. 434, 774 Pac. 2d 40 (1989). The Hartley Court quoted the rule in this state:

“An award of owelty will become a lien on all partitioned property as established in RCW 4.56.190.”
(Emphasis Added.)

The acquired interest by Hafey in his mother’s home is expressly covered by the judgment statute.

IV. Barth’s Contention:

Barth is entitled to attorneys’ fees and costs on appeal.

Attorneys’ fees and costs are governed by RCW 7.52.480 in partitions and Barth has already received an offset in the trial court of \$32,372.

If this Court finds that Barth is inequitable in calculating offsets and/or the calculations are based upon faulty legal grounds, American should be entitled to its fees on appeal. If Barth had followed the maxim of doing Equity, this appeal would not have been necessary. Barth should not collect further fees and costs on appeal in light of this analysis.

V. Conclusions:


A. American Pension's owelty judgment is entitled to the first \$135,375 out of the sale proceeds, plus interest thereon by statutory and case authority.

B. In the alternative, American should receive credit for the one half share of the rent offset of \$30,653 and one half share of the costs and enhancement value of \$26,850; together with the previous award of \$3,646, for a total credit of \$61,149.

C. American should receive its costs and attorneys' fees on this appeal.

D. The Exhibit attached to Petitioner's opening brief is merely an outline used at trial reflecting the offsets taken by Barth, and was admitted by the Court.

Dated this ____ day of October, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on October 21st, 2014, I caused the foregoing *Reply Brief of American Pension Services, Inc. /Appellant/Cross-Respondent/Defendant* to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

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Dated this 21st day of October, 2014.



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