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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)

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

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III. INTRODUCTION

Appellant David A. Kohles ("Kohles" or "Appellant") is a secured creditor of Appellee Donna Cook. Kohles was retained by Donna Cook's now deceased husband, Michael Cook, to pursue his workers compensation claims against Snohomish County, pursuant to a written contingent fee agreement. After eight years of representing Michael Cook, during which Kohles never took a fee, Kohles successfully obtained a large settlement award from Snohomish County and the Department of Labor and Industries ("DLI") in 2012. The settlement was multi-part, and included a stream of ongoing payments from DLI ("Monthly DLI Payments").

After obtaining the large settlement award, the Cooks stopped paying Kohles for the work he performed, contrary to the contingent fee agreement. The Cooks stopped allowing Kohles to deduct his earned fee from the Monthly DLI Payments, and changed the address to which the payments were sent. Then, the Cooks filed bankruptcy and discharged their personal liability for Kohles' earned fees.

Pursuant to RCW 60.40.010(1)(d), an attorney's lien automatically arose by operation of law when Kohles began pursuing Michael Cook's claims against Snohomish County. In order to protect this lien, Kohles filed an adversary case in the Cooks' bankruptcy. Upon Kohles' motion for summary judgment, the bankruptcy court issued an order holding that Kohles had a valid and perfected lien securing his contingent fee, and that the lien attached to all past and future payments made by the DLI and

Snohomish County on account of Kohles' work on behalf of Michael Cook. The Cooks were represented in the bankruptcy and the adversary case.

Subsequently, Michael Cook passed away and Donna Cook began receiving the Monthly DLI Payments as his survivor.

After the bankruptcy closed, Kohles initiated a lien foreclosure action in Snohomish County, seeking *in rem* relief against the Monthly DLI Payments only. Kohles filed a motion for summary judgment, requesting that the trial court enforce his statutory lien by ordering Donna Cook to turn over the Monthly DLI Payments so that he could deduct his fee. While finding that there were no issues of material fact, the trial court ruled that the lien could not be foreclosed because RCW 60.40 *et. seq.* did not specify a procedure for foreclosing such lien. The trial court denied prejudgment interest on the basis that the fee agreement did not provide for interest. The trial court also considered evidence regarding Donna Cook's financial situation and ultimately ruled that Donna Cook should pay $100 per month to Kohles on account of his lien.

Kohles filed a motion for reconsideration which was denied without opinion. He now seeks reversal of the trial court's order denying his motion for summary judgment and the subsequent order denying reconsideration of the order denying motion for summary judgment. For the reasons stated below, this Court should reverse the trial court and enter a judgment *in rem* in favor of Appellant, Kohles.

IV. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that Appellant could not foreclose on his attorney's lien because RCW 60.40 *et. seq.* does not set forth a specific procedure for how to do so.
2. The trial court erred in ruling that Appellant was not entitled to prejudgment interest because the fee agreement did not provide for interest.
3. The trial court erred in ruling that Donna Cook's financial situation was relevant to Appellant's motion for summary judgment.

V. STATEMENT OF ISSUES

1. Both the bankruptcy court and the trial court found that Kohles had a valid and perfected attorney's lien securing his contingent fee under RCW 60.40.010(1)(d) that attached to all past and future payments made by the DLI and Snohomish County, including the Monthly DLI Payments. Did the trial court err in ruling that the lien could not be enforced even though: (1) the statute itself references enforcement, and the legislative history of the statute confirms that the lien gives rise to a real, taxable, property right; (2) the statute contains an implied remedy pursuant to *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990); and (3) there are cases in which Washington courts have adjudicated and given effect to attorney's liens so long as due process has been met?

2. The trial court found that the amount owed under the fee agreement was liquidated and not in dispute. Did the trial court err in denying Appellant prejudgment interest as not being provided for in the fee agreement, when it is well established under Washington law that where the amount of the debt owed can be calculated with certainty, the plaintiff is entitled to prejudgment interest, regardless of contract terms?
3. RCW 60.40, like all lien statutes, contains no reference to the financial situation of the debtor. Did the trial court err in ruling that Donna Cook's financial situation was relevant to Kohles' motion for summary judgment, and in considering evidence regarding her financial situation?

V. STATEMENT OF THE CASE

Appellant David A. Kohles was retained by the Appellee Donna Cook's ("Appellee" or "Donna Cook") now-deceased husband, Michael Cook[1], to pursue workers compensation benefits for injuries he suffered as an employee of Snohomish County (the "County"). CP 77, ¶ 4. Kohles was retained pursuant to a written contingency fee agreement ("Fee Agreement"), which provided for fees to be calculated based on a percentage of the dollar amount of certain categories of benefits that were recovered. CP 77–78, ¶¶ 7–9, CP 86–87.

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[1] Hereinafter, Michael and Donna Cook are collectively referred to as the "Cooks."

A. Kohles obtains a large settlement award for Michael Cook on his workers compensation claim.

Kohles worked hard on Michael Cook's case and never took a fee until after many years, when he succeeded in recovering a significant award from the County and the DLI. *See,* CP 68; CP 78, ¶ 11.[2] This award consisted of various components. CP 78, ¶ 11.

One component was monthly payments ("Monthly DLI Payments") sent to Michael Cook by the DLI on account of his permanent partial disability ("PPD") claim. CP 78, ¶ 9, CP 79, ¶ 14, 88–92. For a short time, the Monthly DLI Payments were sent to Kohles' office. CP 79, ¶ 14, CP 94. Kohles would deduct an agreed-upon portion and apply it towards the fees owed under the Fee Agreement. CP 79, ¶ 14. The remainder of the payment would then be forwarded to Michael Cook. CP 79, ¶ 14.

B. The Cooks stop paying Kohles' earned fee under the Fee Agreement and file bankruptcy.

Shortly after Kohles succeeded in obtaining the award for Michael Cook, the Cooks terminated Kohles' services and notified DLI of a change of the address to which the payments were sent, preventing Kohles from being paid any further fees. CP 79, ¶ 15.

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[2] Donna Cook disputed and will likely continue to dispute that the settlement award was obtained as a result of Kohles' efforts, however, the court found that there was no issue of fact as to whether the benefits were obtained due to Kohles' efforts on behalf of Michael Cook. CP 12.

Thereafter, the Cooks filed a petition for Chapter 7 Bankruptcy in the Western District of Washington (the "Bankruptcy"). CP 80, ¶ 20. The Bankruptcy discharged the Cooks of personal liability for the fees owed to Kohles. CP 80, ¶ 21.

C. The bankruptcy court finds that Kohles has a valid attorney's lien on the Monthly DLI Payments securing his contingent fee.

Pursuant to RCW 60.40.010(1)(d), an attorney's lien automatically arose by operation of law when Kohles began pursuing Michael Cook's claims against the County. *See,* RCW 60.40.010(1)(d). Kohles filed an adversary case in the Cooks' bankruptcy to adjudicate and preserve these lien rights. CP 80, ¶ 18.

On December 13, 2015, upon Kohles' motion for summary judgment, the bankruptcy court entered an order holding that Appellant had a "valid and perfected lien created by RCW 60.40.010(1)(d) which secures the contingency fee which he is owed under the Fee Agreement entered into between Plaintiff and Michael Cook" (the "Bankruptcy Order"). CP 80, ¶ 22, CP 110. The Bankruptcy Order further provided "that such lien attaches to all past and future payments made by the Washington Department of Labor and Industries and/or Snohomish County to Michael Cook and/or Donna Cook on account of any work performed by David A. Kohles including Kohles' representation of Michael Cook in any claim or appeal process." CP 110.

The Cooks were represented in both the bankruptcy and the adversary proceeding. CP 13, ¶ R.

D. Donna Cook receives the Monthly DLI Payments as a survivor benefit, and Kohles moves for foreclosure of his lien.

Following closure of the Bankruptcy, Michael Cook died of causes unrelated to his injury. CP 81, ¶ 23. Appellee Donna Cook continued to receive the Monthly DLI Payment on account of the PPD claim as his survivor. CP 81, ¶ 27, CP 38. It was later revealed that the monthly benefits she receives are approximately $3,175.08 per month. CP 38.

On June 27, 2014, Kohles filed an *in rem* complaint in Snohomish County Superior Court against the above-named Appellees. CP 133–141. The complaint sought foreclosure of Kohles' attorney's lien on the Monthly DLI Payments and other injunctive relief necessary to enforce the lien. CP 139.

On February 9, 2015, Kohles filed a Motion for Summary Judgment ("Motion"). CP 122–131. Donna Cook filed a response and appeared at the first hearing held on March 10, 2014. *See,* CP 11. At Donna Cook's request, the trial court granted a continuance of the hearing. Donna Cook made further submissions to the trial court and on April 10, 2014, the parties attended the continued hearing. *See,* CP 11.

E. The trial court denies Kohles' motion for summary judgment and declines to enforce the lien as a matter of law even though there were no issues of material fact.

After considering the submissions by both sides, the trial court entered an Order Denying Plaintiff's Motion for Summary Judgment ("Order"). CP 10–15. The Order contained detailed findings of fact, including a finding that there was a valid contingent fee agreement (CP

10, ¶ A–E), that Kohles had not been paid all of the fees owed under the Fee Agreement (CP 12, ¶ J), that Donna Cook continued to receive the benefits in the amount of $3,175.08 per month (CP 12, ¶ M), that these benefits were the result of Kohles' efforts on behalf of Michael Cook (CP 12, ¶ O), and that Kohles had an attorney's lien on these funds pursuant to RCW 60.40.010 (CP 14, ¶ E).

Notwithstanding these findings, the trial court concluded that:

> Plaintiff's request for judgment in rem against the Settlement proceeds is denied on grounds that RCW 60.40. et. seq., though it provides for an attorney's lien under the facts of this case, such statute does not provide a process or mechanism for foreclosure of such personal property lien, and the Court is unaware of such procedure for doing so.

CP 14, ¶ J.

In addition, the trial court ruled that Kohles was not entitled to prejudgment interest on his claim because the Fee Agreement did not contain a provision for interest. CP 14, ¶ I. The trial court further concluded that "Donna Cook's budget and financial declaration is relevant to the instant motion." CP 14, ¶ K. Then, acting in "equity," the trial court ordered that Donna Cook remit payments of $100 per month to Kohles on account of his lien on the Monthly DLI Payments. CP 14, ¶ L, CP 15, ¶ 2.

Appellant timely filed a motion for reconsideration, which was denied without opinion. CP 2, CP 1. On June 19, 2015, Appellant filed the

instant notice of appeal, seeking review of the Order and the order denying reconsideration of the Order.[3]

VI. ARGUMENT

There are three issues before the 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.[4]

A. RCW 60.40.010 creates enforceable attorney's lien rights on an "action" and the settlement and proceeds therefrom.

Washington's attorney's lien statute, RCW 60.40 *et. seq.* creates an automatic lien on actions and their proceeds in favor of an attorney who

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[3] On July 22, 2015, Appellant received correspondence from the Court of Appeals requesting briefing on the reviewability of the notice of appeal. Appellant filed its briefing on same and review was granted without oral argument.

[4] Appellant would like to note for the Court what is *not* at issue in this appeal. First and foremost, all material factual issues have been resolved, as reflected in the findings of fact contained in the order denying summary judgment. CP 10–15. The factual findings of the trial court have not been appealed, and any attempt by Appellee to dispute them now must be considered rejected as untimely. Second, there are no issues regarding whether Appellant has a valid and perfected attorney's lien on the Monthly DLI Payments. CP 13, ¶ S; CP 14, ¶ E, G. Nor is there any question that the lien secures the fees owed under the contingent fee agreement pursuant to RCW 60.40.010(1)(d). CP 14, ¶ F, CP 109-110. Likewise, there is no question as to the amount secured by the lien: the trial court found that the amounts owed are not in dispute and that Appellant is owed $41,245.63 as of the date of the order (not including prejudgment interest). CP 14, ¶ H. Thus, the only issue for this Court's review with respect to the attorney's lien is narrow: whether the Appellant can foreclose on his attorney's lien under RCW 60.40 et seq.

renders services in that action. RCW 60.40.010. While the statute does not delineate specific procedures for enforcement, it does provide that the attorney's liens created therein be enforceable, as does Washington case law. For these reasons, the trial court erred in ruling that Appellant could not foreclose his attorney's lien due to an absence of procedural rules. The trial court's ruling is a conclusion of law and is reviewed de novo. *King County v. Seawest Inv. Assocs., LLC*, 141 Wn.App. 304, 309, 170 P.3d 53 (2007).

1. The attorney's lien statute and legislative notes explicitly contemplate enforcement of attorney's liens.

RCW 60.40.010 explicitly refers to enforcement of attorney's liens, supporting the conclusion that such liens are enforceable and capable of foreclosure. RCW 60.40.010(2). The Court's fundamental objective in reading a statute is to ascertain and carry out the legislature's intent. *King County v. Seawest Inv. Assocs., LLC*, 141 Wn.App. at 309. If a statute's meaning is plain on its face, then the Court must give effect to that plain meaning. *Id.* Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. *Id.*

Applying the plain meaning rule, RCW 60.40.010 evidences intent to create and allow enforcement of attorney's liens. The statute provides in pertinent part:

> (1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:
> . . .

> (d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement . . .

RCW 60.40.010(1)(d). The statute further provides that:

> (2) Attorneys have the same right and power over actions to **enforce their liens under subsection (1)(d)** of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.
>
> (3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is **superior to all other liens.**
>
> (4) The lien created by subsection (1)(d) of this section is **not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.**

(emphasis added) RCW 60.40.010.

The plain language of RCW 60.40.010 creates a lien right, *and* it contemplates enforcement. Not only does it contemplate enforcement, but subsection (3) provides that liens created under (1)(d) and (1)(e) are superior to all other liens. RCW 60.40.010(3). This super-priority is well-accorded, given that in many cases, including this one, there would not be any value in the action or judgment to which other liens attach, but for the efforts of counsel. Most importantly, if liens under (1)(d) were unenforceable, then there would be no need to discuss priority in the statute. The very fact that the lien is afforded super-priority over other liens means that the lien itself must be enforceable.

Subsection (4) protects the lien created by (1)(d) from being avoided by a settlement between the parties, until the underlying attorney fees are paid in full. RCW 60.50.010(4). Under this provision, a party cannot avoid the attorney's lien merely by settling the case, thus evidencing the legislature's intent to protect attorneys' hard-earned fees. *See also, Taylor v. Shigaki,* 84 Wn. App. 723, 730, 930 P.2d 340, 344 (1997) (holding that if a client is allowed to use an attorney's services to obtain a settlement offer and then fire the attorney before accepting to escape paying a contingency fee, the obligation to pay the fee could be unilaterally avoided and that "such a result cannot be sanctioned").

The legislative purpose of the amendments are stated as follows:

> The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, **Washington law clearly recognizes that attorneys have a property interest in their clients' cases** so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. **This statute should be liberally construed to effectuate its purpose.** This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW 60.40.010(4), the statute is intended to apply retroactively.

Laws of 2004, ch.73, § 2 (emphasis added); *see also, Smith v. Moran, Windes & Wong, PLLC,* 145 Wn. App. 459, 465–466, 187 P.3d 275, 279 (2008).

Here the Court may also look to the legislative intent of the statute to determine whether attorney's liens under (1)(d) are enforceable. If a statute is ambiguous, the reviewing court may look to outside sources such as legislative history to determine legislative intent. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56–57, 50 P.3d 627 (2002). In interpreting a statute, a court should not adopt an interpretation that renders any portion meaningless. *Seawest*, 141 Wn.App. at 309. Strained meanings and absurd results should be avoided. *Id.*

The legislative notes reinforce that attorney's liens under (1)(d) are enforceable. The notes state that the purpose of the act was to end double taxation of attorneys' fees obtained through judgment and settlements. Laws of 2004, ch.73, § 2. Personal property liens, unlike real property liens which have the effect of clouding title, have no value unless they are capable of execution. Thus, the fact that the legislative notes refer to taxation of attorneys' fees, shows that such fees are actually obtainable through enforcement of the liens. If the liens were not enforceable, there would be no income or value from fees to tax. Furthermore, the legislative notes state that "the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee." Laws of 2004, ch.73, § 2. An attorney holding a lien under (1)(5) would only be able to "actually receive the fee" if the lien was enforceable.

This conclusion is corroborated by recent Washington case law. In *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 466, 187 P.3d 275, 280 (2008), the court addressed the rights of competing creditors

to the settlement proceeds arising from a legal malpractice action under the lien statute. *Id.,* 461–62. In *Smith,* two judgment creditors of a plaintiff in a malpractice action purchased the plaintiff's malpractice claim at a sheriff's execution sale. *Id.* The claim was subject to an attorney's lien by the law firm that represented the plaintiff in the malpractice claim, but later withdrew when the judgment creditors intervened. *Id.* at 464. Subsequently, the judgment creditors and the defendant in the malpractice action reached a settlement, and the proceeds of that settlement were paid to the judgment creditors. *Id.* The law firm asserted an attorney's lien against these settlement proceeds. *Id.* At the request of the judgment creditors, the trial court invalidated the lien, and the law firm appealed. *Id.*

The court reversed on appeal. Applying the plain words of the statute to the undisputed facts of this case, the court concluded that an attorney's lien for compensation in favor of the law firm arose by operation of law upon the malpractice action and its proceeds. *Id.,* 466. The lien arose when the malpractice action was commenced, and attached to the action and any proceeds of the action, specifically the settlement funds. *Id.* The court then remanded for further proceedings.[5]

Smith properly recognized that the lien created by RCW 60.40.010(1)(d) is an actual property right, and not just a fictional or nominal interest. The *Smith* court held that under the 2004 amendments,

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[5] Furthermore, if the lien were unenforceable, there would be no need for further proceedings.

"Counsel's property interest by way of the lien, not the client's interest, is to be taxed." *Id.,* 468. It would be unreasonable to conclude that the statute intended to tax attorneys for a lien right that is unenforceable, as such right would have no value. Reading the statute to allow taxation on an unenforceable lien right – a valueless interest, is an absurd result that the legislature did not intend.

2. The Court may imply a remedy for the right created by RCW 60.40.010 pursuant to *Bennett v. Hardy.*

Simply by creating a statutory lien right, the legislature also created the right to foreclose on that lien. However, in the event the Court disagrees, the Court may still imply a remedy pursuant to *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

"When a statute has provided a right of recovery, it is incumbent upon the court to devise a remedy." *Bennett v. Hardy*, 113 Wn.2d at 920, citing *State v. Manuel*, 94 Wn.2d 695, 699, 619 P.2d 977 (1980). Nowhere should this be truer than in RCW 60.40.010, where the legislature created a clear right of attorneys to secure their unpaid fees with a lien upon the client's action and its proceeds. RCW 60.40.010(1)(d). As one prominent commentator has stated, "The law cannot allow the vacuum caused by the absence of a remedy in the statute to stand where there is a clear statutory right created." Michael R. Caryl, *The Use and Misuse of Attorney Liens: The Law, Practicalities, and Best Practices with Attorney's Liens*, 7-15 (2014).

Under Washington law, a cause of action may be implied from a statutory provision when the legislature creates a right or obligation without a corresponding remedy. *Ducote v. State, Dep't of Soc. & Health Servs.*, 167 Wn. 2d 697, 703, 222 P.3d 785, 787 (2009). To determine whether it is appropriate to imply a cause of action, courts use a three-part test: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Ducote v. State*, 167 Wn. 2d at 703, citing *Bennett v. Hardy*, 113 Wn.2d at 920–21, 784 P.2d 1258.

Applying this three part test, the Court must conclude that Appellant's attorney lien under RCW 60.40.010 is capable of foreclosure, by implying a procedural remedy to effect the same. First, Appellant is within the class of people for whom the statute was enacted, i.e. attorneys who are not paid for their services. Second, the legislative intent and the plain language of RCW 60.40.010 both explicitly and implicitly support creating a remedy, as discussed above, because it references and logically implies enforceability. Third, implying a remedy is consistent with the underlying purpose of the legislation, which was to recognize the clear property right of attorneys in their client's actions for tax purposes. No taxable property right exists if the liens created by the amendments cannot be foreclosed to generate actual cash.

Therefore, implying a remedy, which in this case means devising and executing a procedure for foreclosure, is consistent with the intent of the statute. An appropriate remedy here would involve directing DLI to send the payments directly to Kohles so that he may deduct his fee, in much the same way that a court may direct the clerk to disburse funds from a court registry, like the court did in *King Cnty. v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), discussed *infra.* In the alternative, the court could order Appellee to change the address to which the payments are sent, as originally requested in the Motion.

In *Bennett,* the Court noted that:

> The legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Without an implicit creation of a remedy, the statute is meaningless.

Bennett v. Hardy, 113 Wn. 2d at 919–20. Likewise, here the attorney's lien statute is meaningless if such liens are not capable of foreclosure. Furthermore, this case satisfies the three part test of *Bennett.* Therefore, the Court should rule that RCW 60.40.010 contains an implied remedy of foreclosure, and reverse the ruling of the trial court.

3. Case law provides guidance and authority for foreclosing attorney's liens in Washington.

Although the statute is silent on the *mechanism* for foreclosing attorney's liens, there is at least one Washington case in which such liens

have been enforced in the absence of procedural statutory language, consistent with *Bennett*.

In *King Cnty. v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), the law firm in an eminent domain action filed and served a notice of attorney's claim of lien after a dispute arose with the client regarding compensation for legal services. Seawest hired law firm Graham & Dunn to represent it in an eminent domain proceeding brought by King County as the matter approached trial. *Id.*, at 307. The matter went into a two-week trial after which the trial court awarded Seawest more than $7.6 million as just compensation for the taking of its property. *Id.*, at 308.

Shortly thereafter, a dispute arose between Seawest and Graham & Dunn over the firm's compensation for the legal services it provided. *Id.* Graham & Dunn filed and served a Notice of Attorney's Claim of Lien in the amount of $324,956.68. *Id.* In response to Seawest's motion, the court entered an order for partial disbursement of the award to Seawest. *Id.* The order further directed that $84,728.23 be disbursed to Graham & Dunn, which represented the unpaid balance for fees and costs that Seawest did not dispute. *Id.* The remaining $240,228.45 in the registry was the amount subject to the dispute between Graham & Dunn and Seawest. *Id.*

Thereafter, the trial court that conducted the original eminent domain proceedings trial set an evidentiary hearing on the fees. *Id.* The court took testimony from a number of witnesses, admitted exhibits, and reviewed a deposition transcript admitted as part of the evidence. *Id.* The

court held that Seawest and Graham & Dunn had entered into a binding written fee agreement. *Id.* The court further determined that Graham & Dunn's fees were reasonable. *Id.* The court entered its order directing disbursement of the balance of the $240,228.45 in the court registry to Graham & Dunn. *Id.*, at 309. Seawest appealed. *Id.*

On appeal, the court of appeals affirmed in all respects. The court found that the applicable attorney's lien statute was RCW 60.40.010 – the same as the one here. Specifically, the court addressed the issue of whether that section required a separate proceeding to adjudicate the attorney's lien, concluding that it did not. Furthermore, the court properly observed:

> . . . [T]he current version of the statute does not set out a procedure for adjudicating a lien against a judgment. Although the 2004 amendments mention an action to enforce a lien on a judgment in RCW 60.40.010(2), the statute does not set out a procedure for enforcement. Significantly, the statute does not require that such an action be separate from the underlying proceeding. **Thus, it places the question of how to properly adjudicate the lien with the court, requiring it to fashion some "form of proceeding by which the matters might be properly adjudicated."** Cases since *Angeles Brewing* have cited this principle with approval. Thus, we conclude that the trial court here was authorized to fashion an appropriate remedy, which it did.

(emphasis added) *King Cnty. v. Seawest Inv. Associates*, LLC, 141 Wn. App. at 315. The court then cited the procedural steps the trial court took, including ample time to conduct discovery and prepare for the evidentiary hearing, the opportunity to present evidence, bring counterclaims and

argue their theories, and found that the procedure fashioned by the trial court fully complied with due process. *Id.* Ultimately, the court affirmed the trial court's order for disbursing the attorney's fees and costs to Graham & Dunn as a result of their claim of lien, constituting foreclosure of its attorney's lien under RCW 60.40.010. *Id.* at 317.

These and other cases provide examples of foreclosure of attorney's liens pursuant to RCW 60.40.010, in the absence of statutory language describing the procedure. *See also, Krein v. Nordstrom,* 80 Wn. App. 306, 307, 908 P.2d 889, 890 (1995). So long as the trial court's procedure complies with due process, the attorney's lien can be foreclosed.

The key issue in these cases is whether sufficient due process was given prior to foreclosure of the attorney's lien. Here, Appellant has filed two formal complaints, one in the Cook's Bankruptcy, and the other in the Snohomish County Superior Court case, giving Appellee ample opportunities to present relevant evidence and argument. *See,* CP 80, ¶ 21; CP 11. The trial court has found that her defenses to the fees were meritless. CP 13, ¶ D. Having had notice and several opportunities to litigate, due process has been satisfied and there should be no impediments to foreclosure of Appellant's attorney's lien. Therefore, the trial court erred in denying foreclosure of the lien solely due to lack of procedural guidelines in the statute.

B. Appellant is entitled to prejudgment interest because the amount owed was a liquidated sum.

In Washington, prejudgment interest may be awarded when the claim is liquidated, even if there is no underlying contract that provides for interest. *See, Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 773, 82 P.3d 660 (2004). A claim is liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32 (1968). A claim is unliquidated "where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed." *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). "[T]he existence of a dispute over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated, sum . . ." (emphasis omitted) *Prier*, 74 Wn.2d at 33.

Here, the amount secured by Appellant's attorney's lien was liquidated because the data in the evidence made it possible to compute the amount with exactness, and without reliance on opinion or discretion. *See, Hadley v. Maxwell*, 120 Wn. App. 137, 142, 84 P.3d 286, 289 (2004). The Fee Agreement clearly provided the formula for calculation of Appellant's contingent fee, as a percentage of the total funds awarded to Michael Cook by the DLI. No opinion or discretion is necessary, as the

contingent fee was defined in the Fee Agreement by a straight mathematical calculation. Furthermore, as stated in *Prier,* the fact that Appellee disputed Appellant's claim did not change its liquidated nature.

Because it was liquidated, the trial court should have awarded prejudgment interest on the claim. Instead it denied it on the basis that the fee agreement did not provide for interest. CP 14, ¶ I. This is a question of law that is reviewed de novo. The ruling was erroneous because the right to prejudgment interest does not stem from contract but from the policy of making plaintiffs whole after money has been wrongfully withheld. "Generally prejudgment interest is favored because the law assumes that one who retains money owed to another should be charged interest on it." *Hadley v. Maxwell*, 120 Wn. App. at 142. A prejudgment interest award compensates the plaintiff for the "use value" of his damage amount from the time of loss to the date of judgment. *Matson v. Weidenkopf*, 101 Wn. App. 472, 485, 3 P.3d 805, 813 (2000).

Hypothetically, if a defendant wrongfully converted funds from a plaintiff and several years passed before plaintiff obtained judgment for conversion of those funds, there would be no question that the plaintiff is entitled to prejudgment interest on those funds, notwithstanding the fact that there is no contract between plaintiff and defendant. This is confirmed by the tort cases in which prejudgment interest is awarded on a liquidated claim, with no basis in contract. *See, e.g.*, *Matson v. Weidenkopf*, 101 Wn. App. 472, 3 P.3d 805 (2000); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 928, 250 P.3d 121, 130 (2011).

"Prejudgment interest" awards are based on the principle that that defendant who retains money which he or she ought to pay to another should, as matter of public policy, pay interest on it, not as penalty for wrongdoing, but simply as additional damages for use value of money owed for liquidated claim. *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 154, 948 P.2d 397, 400 (1997). This principle is no different in the context of attorney's fees.

In *Taylor v. Shigaki*, 84 Wn. App. 723, 731, 930 P.2d 340, 344 (1997), a client fired his lawyer just before the case settled in order to try to defeat the contingency fee on the anticipated settlement. The attorney filed a notice of lien for one third of a settlement offer he had originally obtained prior to being terminated. *Id.,* 727. The trial court awarded the attorney his contingent fee plus prejudgment interest, and his fees and costs in enforcing the fee agreement. *Id.* On appeal, this Court affirmed the trial court's award of prejudgment interest on the lawyer's one-third share of the settlement offer pursuant to the contingent fee agreement, because the percentage was a liquidated amount. *Id.* There was no reference by the court to whether there was an interest provision in the fee agreement. *See, id.*

Likewise, here, Mr. Kohles' fee was a liquidated amount. It is not necessary for an interest provision to be included in the fee agreement for the Court to award prejudgment interest.

The contingent fee amount that Appellee has withheld from Plaintiff represents a significant receivable for a small firm like

Appellant's. Appellee has enjoyed the use of these funds, and as a matter of law and public policy, should pay interest on it. The amount of the fee, according to the findings of fact that were entered, was liquidated and there is no case law requiring that prejudgment interest be provided for in contingent fee agreements. Therefore, the Court should reverse the trial court's ruling and hold that Appellant was entitled to prejudgment interest on his fee.

C. A debtor's financial situation is never legally relevant to the whether a secured lienholder is entitled to foreclose on its security interest.

The trial court erred in holding that Appellee's financial situation was relevant to the Motion to foreclose Appellant's lien. This is a question of law that is reviewed de novo. Appellant is unaware of any situation in which the financial condition of the debtor is relevant to whether a secured party has a valid lien that is capable of foreclosure. There is no Washington case law supporting such a proposition.

To the contrary, Washington courts have held that "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), *see also, Ma'ele v. Arrington,* 111 Wn. App. 557, 565, 45 P.3d 557, 561 (2002). Nowhere is this truer than in a foreclosure action, in which the only questions the court or factfinder should be asking is whether the legal prerequisites to foreclosure of the lien have been satisfied. The trial court reached far beyond these boundaries of relevance,

by considering submissions by Donna Cook regarding her pecuniary status.

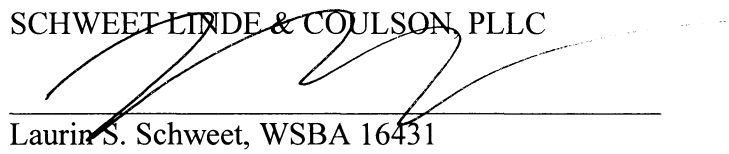
Because the court considered Donna Cook's financial circumstances relevant to the application of the attorney's lien statute, Appellant was forced to delve into those collateral issues and to demonstrate that repaying the amounts owed to Kohles was well within Donna Cook's means (which it happened to be). CP 18, ¶ 5. However, the court should not have considered this information at all. There is no relationship between Donna Cook's "ability to pay" and David Kohles' ability to enforce his lien. The trial court apparently felt sympathetic towards Donna Cook and relied on her income statement in concluding that Kohles was only entitled to payment of $100 per month on account of his lien. These essentially voluntary payments can cease at any time without a lien foreclosure mechanism. This is not a proper application of RCW 60.40 and must be reversed.

VII. CONCLUSION

For the reasons stated above, 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 September 24, 2015

SCHWEET LINDE & COULSON, PLLC



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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 September 24, 2015, I caused to be served the foregoing 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 legal messenger for service on 9-24-2015 AND
Via e-mail: donnanorriscook@icloud.com

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

Filed on 9-24-2015

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

September 24, 2015 at Seattle, Washington
(Date and Place)

(Signature)