

FILED
APR 04 2016
WASHINGTON STATE
SUPREME COURT

No. 73614-1-1

929599

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

DAVID A. KOHLES, INC. P.S.,
Petitioner/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.,
Respondents/Appellee.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION I

PETITION FOR REVIEW

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STATE OF WASHINGTON
2016 MAR 30 PM 12:11

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III. INTRODUCTION

A. Identity of Petitioner

The Petitioner is David A. Kohles P.S., Inc. and its principal David A. Kohles (“Petitioner” or “Kohles”), a workers compensation attorney serving clients in the Puget Sound area. Kohles is the Plaintiff and Appellant below.

B. Court of Appeals Decision

Petitioner seeks review of the Court of Appeals, Division I’s unpublished opinion, filed on February 29, 2016, affirming the decision by Snohomish County Superior Court Judge Ellen J. Fair denying his motion for summary judgment, which sought to foreclose his already-established attorney’s lien. A copy of the decision is included in the Appendix at pages A-1 through A-7.

C. Issues Presented for Review

This appeal presents the following issues:

1. Is an issue of substantial public interest presented where the Court of Appeals affirms a decision holding that an attorney’s lien on the proceeds of the action may not be foreclosed upon?
2. Is the Court of Appeals opinion in conflict with existing case law when it holds that the trial court has discretion to reduce the portion of the lien to be enforced, when no published or unpublished opinion in the State of Washington has found that such discretion exists?

IV. STATEMENT OF THE CASE

Petitioner David A. Kohles was retained by the Respondent/Appellee Donna Cook's ("Respondent" or "Donna Cook") now-deceased husband, Michael Cook¹, 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.

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 Department of Labor and Industries ("DLI"). *See*, CP 68; CP 78, ¶ 11. 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 total disability ("PTD") 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.

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

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.

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 Petitioner 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 by legal counsel 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. Respondent Donna Cook continued to receive the Monthly DLI Payment on account of the PTD 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 Respondents. 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. The trial court's order in essence started a 32-year payment schedule for benefits that would end when Donna Cook passes away.

Petitioner timely filed a motion for reconsideration, which was denied without opinion. CP 2, CP 1. On June 19, 2015, Petitioner filed a notice of appeal with the Court of Appeals, Division I, seeking review of the Order and the order denying reconsideration of the Order.²

F. The Court of Appeals affirms the Trial Court's decision denying foreclosure of the attorney's lien.

The Court of Appeals considered briefing for both parties and without oral argument, filed an opinion ("Opinion") on February 29, 2016 affirming the trial court. App. 1–7. The Opinion stated that "[N]otwithstanding its conclusion that the statute does not provide a process for foreclosure, the trial court engaged in an equitable proceeding to *enforce* his attorney's lien." App. 5. The Court of Appeals ultimately concluded that based on *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 314, 170 P.3d 53 (2007), the trial court had discretion to "enforce," as opposed to foreclose, the attorney's lien by: (1) ordering Donna Cook to pay an amount that would never pay off the lien in its entirety in her or Petitioner's lifetime; (2) denying prejudgment interest on the contingent fee even though the amount was a liquidated sum; and (3)

² On July 22, 2015, Petitioner received correspondence from the Court of Appeals requesting briefing on the reviewability of the notice of appeal. Petitioner filed its briefing on same and review was granted without oral argument.

considering Donna Cook's financial situation, despite its irrelevance to the lien foreclosure. App. 6–7. The Opinion, citing *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), held that because foreclosure of an attorney's lien is an equitable proceeding, the trial court's decision was subject to review for abuse of discretion. Notwithstanding the fact that the trial court's decision was unsupported by any Washington case law, the Court of Appeals affirmed the trial court, finding that it acted within its discretion in ordering the above remedy.

V. ARGUMENT

RAP 13.4(b) provides four grounds for acceptance of review by the Supreme Court, including:

- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- ...
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The issues raised by this appeal are a matter of substantial public interest that should be determined by the Supreme Court because the enforceability of attorney's liens implicates access to justice issues that affect many would-be claimants. Furthermore, the Opinion is in conflict with *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007) and existing Washington case law on attorney's liens because it permits the trial court to exercise discretion as to the amount of an established lien that it chooses to enforce, whereas *Seawest* and other

cases only permit the trial court to exercise discretion as to the proper procedure for adjudication of the lien. For these reasons, the Supreme Court should accept review of this matter.

A. An issue of substantial public interest is presented because the Opinion impacts the availability of contingent fee representation to would-be claimants.

The ability to fairly adjudicate and foreclose an attorney's lien securing a contingent fee, especially in a workers compensation case such as here, is a matter of substantial public interest. As discussed below, enforceability of an attorney's lien directly impacts many would-be claimants' access to justice. Furthermore, the issue of attorney's lien foreclosure is in dire need of review by the Supreme Court because of the paucity of guidance from the statute and the lack of recent Supreme Court opinions on the issue.

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

Under a contingency fee arrangement, a lawyer will take a case without any money up front.³ In return, the lawyer is entitled to a

³ *Facts About Lawyers' Income and Fees*, Center for Justice and Democracy at New York Law School (July 2012), available at

percentage of the amount of money collected if the case is successful – usually one-third. *Id.* If the victim does not prevail, the attorney receives no fee at all. *Id.*

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

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

The contingency fee system provides injured consumers with access to the courts. Injured people may be in pain, unable to work or lack funds to pay next month's mortgage or rent, let alone an hourly attorney fee. [. . .] Without such a system, injured consumers could never find attorneys to fight insurance companies or take on large corporations and institutions, like the drug and tobacco industries. James Gattuso, then with the conservative Heritage Foundation, agreed in a 1986 Wall Street Journal piece, stating that the contingency fee system "acts to provide the

<http://centerjd.org/system/files/Factsaboutlawyers2012.pdf> (hereinafter "Facts About Lawyers Income and Fees").

services of attorneys to injured people who may not be able to otherwise afford legal representation, at no cost to the taxpayer.”

Facts About Lawyers’ Income and Fees, supra, at 3.

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

The trial court below held 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. The Court of Appeals affirmed this decision, with the ramification that a statutorily-created attorney’s lien cannot be foreclosed.

Without foreclosure of liens under this provision, there would be no real protection for attorneys who perform work in these areas. Without protection for attorneys performing contingent fee work, there is no protection for would-be claimants’ abilities to obtain legal representation

where they would otherwise not be able to obtain or afford it. Thus, public policy dictates that these provisions be given effect. Attorney's liens must be capable of foreclosure if they are to have any benefit to attorneys and their would-be clients.

Rather than furthering this public policy, the Opinion renders attorney's liens and RCW 60.40 *et. seq.* practically useless. By affirming the trial court's decision, the Court of Appeals has endangered the availability of representation to many of those who need it most. "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."⁴ This statutory right was created to protect attorneys but it also has the effect of protecting the type of representation that they provide. The ability to foreclose an attorney's lien is therefore an issue of substantial public interest that requires review by this Court.

B. The Court of Appeals Opinion is in conflict with *Seawest* and existing case law because it holds that the trial court has discretion to determine what portion of an already-established attorney's lien to enforce.

In addition to being an issue of substantial public interest, the Opinion is in conflict with *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007) and other existing cases with respect to the discretion a trial court has when foreclosing an attorneys lien.

⁴ Michael R. Caryl, *The Use and Misuse of Attorney Liens: The Law, Practicalities, and Best Practices with Attorney's Liens*, 7-15 (2014).

In *King County v. Seawest Inv. Assocs* (“*Seawest*”), the Court of Appeals held that the question of how to properly adjudicate an attorney’s lien on a judgment was within the discretion of the trial court. 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.

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.

Seawest does not support the position taken by the Court of Appeals. The trial court's discretion in that case was limited to: (1) determining the appropriate procedural steps for adjudication of the lien (i.e. determining its existence and validity); and (2) determining the reasonableness of the attorney's fees at issue. *See, id.*, at 308. The trial court in *Seawest*, after finding that a valid lien existed and that the fees they secured were reasonable, ultimately ordered disbursement of the encumbered funds contained in the court registry to be paid to the attorney claimant. *Id.* at 309. The Court of Appeals affirmed, finding that the trial court's selected procedure for adjudicating the lien was within its discretion. *Id.*, at 315.

There is no support in the *Seawest* opinion for the proposition that trial court had discretion to enforce only a portion of the adjudicated lien. Had the trial court conducted the same procedural steps, found that the attorney's fees were reasonable, but chose to order only \$100 of the court registry funds be disbursed to the attorney claimant for "equitable" reasons, the Court of Appeals opinion would have come out quite differently. Nothing in *Seawest* gives the trial court the option to enforce only a portion of an existing and valid lien. In fact, if the trial court had such discretion, there would be no need for proceedings to determine the

existence, validity, or amount of an attorney's lien as the court could simply pick an arbitrary amount for what it wanted to enforce.

The trial court in *Seawest* determined the existence, validity, and amount of the attorney lien at issue through an evidentiary hearing. *See, id.* at 315. Upon adjudicating the lien, the trial court in fact disbursed the funds in the court registry subject to the lien. *Id.*, at 309. It did not, and could not, exercise discretion as to how much of the encumbered funds it wanted to disburse. *Seawest* does not stand for the proposition that the trial court has the discretion to enforce any amount it desires – to the contrary, it only affirms that the trial court may select the appropriate procedure for determining the existence, validity, and amount of an attorney's lien.⁵ Once these facts are determined, the court does not have discretion to determine how much of the lien will be foreclosed, or in this case “enforced.”

The trial court may not arbitrarily refuse to foreclose an existing and valid attorney's lien. The Court of Appeals has suggested this much in *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275, 280 (2008). In *Smith*, the Court of Appeals addressed the rights of

⁵ The Supreme Court has made similar holdings in *Price v. Chambers*, 148 Wash. 170, 172, 268 P. 143, 144 (1928) and *State v. Superior Court for King Cty.*, 89 Wash. 342, 345, 154 P. 603, 604 (1916), both cited by *Seawest* for holding that “[T]he court has a right to determine all questions affecting the judgment raised by parties properly before the court, in some form of proceeding by which the matters might be properly adjudicated.” Neither of these cases give the trial court discretion to determine how much of an adjudicated lien it feels like foreclosing.

competing creditors to the settlement proceeds arising from a legal malpractice action under the lien statute. *Id.*, 461–62. 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 of Appeals reversed on appeal, holding that the trial court erred in invalidating the attorney’s lien asserted against the settlement proceeds. 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 of Appeals remanded for further proceedings to establish the amount of the lien.

Petitioner notes that if the *Smith* lien were unenforceable, there would be no need for further proceedings. *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. Therefore, the *Smith* court properly found that the trial court did not have discretion to invalidate the lien. To the contrary, the Court of Appeals here has ruled that the trial court has discretion to essentially invalidate the majority of Petitioner's lien by refusing to foreclose it, and "enforcing" only a *de minimus* portion. The trial court did not have the discretion to do so under *Smith*, and the Opinion is therefore in conflict with existing case law.

In Petitioner's case, the existence, validity, and amount of the attorney's lien was already adjudicated. The only discretion remaining for the trial court to exercise was therefore how to foreclose the lien (i.e. to order the Respondent to change her address with DLI, etc.). The trial court did not have discretion to determine whether to foreclose the lien at all, or how much of the lien to enforce. By affirming the trial court, the Opinion condones abuse of discretion that the trial court did not have in the first place.⁶

⁶ In addition, the trial court abused its discretion by denying Petitioner prejudgment interest when the amount of the lien was liquidated, contrary to *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621, 625 (1968).⁶ The trial court also did not have discretion to consider respondents personal financial situation, because it did not have discretion to determine whether to foreclose the lien in the first place. Petitioner raises and preserves these issues in this appeal and reserves its rights to further brief these matters if review is accepted by this Court.

In summary, Petitioner 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.” CP 80, ¶ 22, CP 110. That lien “attache[d] 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. These lien rights were confirmed by the bankruptcy court, the trial court, and even the Court of Appeals. Under *Seawest* and *Smith*, the only remaining issue for determination by the trial court was therefore how to foreclose the lien — not how much of it to foreclose.

The Court of Appeals inexplicably found that despite these established lien rights, the trial court could order a remedy that failed to give Petitioner any meaningful recovery. Petitioner was unable to locate any published or unpublished opinion in Washington reaching a similar conclusion as that reached by the trial court and affirmed by the Court of Appeals. The trial court’s position and the Opinion affirming the same is therefore in conflict with existing law and should be reviewed by the Supreme Court.

VI. CONCLUSION

“The purpose of a lien is to secure payment for amounts owed.” *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. at 471. The trial

court's decision and the Opinion affirming it fails to fulfill this purpose, and such failure is a matter of substantial public interest affecting the rights of attorneys and their client's access to justice. Furthermore, the Opinion is unsupported by Washington case law, as existing cases have only held that a trial court may determine the appropriate procedure for determining the existence, validity, and amount of an attorney's lien, not how much of an established lien to foreclose. For these reasons, Petitioner requests the Supreme Court accept review of this matter and reverse the Court of Appeals' Opinion and the trial court's decision below.

DATED March 30, 2016

SCHWEET LINDE & COULSON, PLLC



Larrin S. Schweet, WSBA 16431
Binah B. Yeung, WSBA 44065
Attorneys for Petitioner, David A. Kohles, Inc. P.S.

VII. APPENDIX

Appendix 1-7	Court of Appeals Opinion
Appendix 8-9	Copy of RCW 60.40 – Lien for Attorney’s Fees

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 March 30, 2016, I caused to be served the foregoing Petition for Review, Appendix to Same, and this Certificate of Service on the following:

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

Via legal messenger, for delivery on 3-30-2016 AND
Via e-mail: donnanorriscook@icloud.com

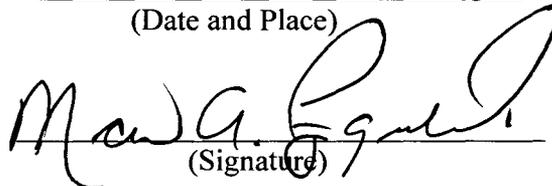
Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA 98101-1176

Filed on 3-30-2016

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

March 30, 2016 at Seattle, Washington

(Date and Place)


(Signature)

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2016 MAR 30 PM 12:11

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID A. KOHLES, INC. P.S., a)
 Washington professional services)
 corporation,)
)
 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,)
)
 Respondents.)

No. 73614-1-1
 DIVISION ONE
 UNPUBLISHED OPINION

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 COURT OF APPEALS
 STATE OF WASHINGTON

FILED: February 29, 2016

TRICKEY, J. — David A. Kohles appeals the order denying his motion for summary judgment and directing Donna Cook, the surviving spouse of one of Kohles' former clients, to pay Kohles \$100 per month as a result of an attorney's lien. Cook did not file a cross-appeal. Although Kohles presented the foreclosure of his attorney's lien in the form of a motion for summary judgment, it is clear that the trial court ultimately resolved the enforcement of the lien by means of an equitable proceeding on written declarations and oral argument. Because an attorney lien foreclosure is an equitable proceeding and the trial court did not abuse its discretion by fashioning its equitable remedy, we affirm.

FACTS

Kohles and the trial court rely upon the following material facts.¹

In January 2005, Michael Cook retained Kohles to provide legal services on his behalf for his industrial insurance claims. Michael² entered into an attorney fee agreement, which provided the terms of compensation to Kohles. Michael agreed to compensate Kohles on a contingent fee basis. According to the terms of the agreement, Kohles would receive: (1) 30 percent of the gross benefits, including awards of any nature where no prior award has been made; (2) 30 percent of all time loss payments; and (3) 15 percent of the pension reserve awarded to Michael.

Kohles represented Michael and achieved settlements on claims with Snohomish County and the Department of Labor and Industries. The dollar amounts were as follows: (1) a cash payment of \$37,000; (2) permanent partial disability benefits totaling \$35,787.90; and (3) permanent total disability benefits for which the pension reserve amount was \$238,255.

In March 2013, Michael and Donna filed for bankruptcy. Kohles filed an adversary suit in the bankruptcy proceeding to determine the validity, priority, and extent of his attorney's lien on payment proceeds from the Department of Labor and Industries and/or Snohomish County.

¹ Much of Donna Cook's response brief is devoted to relitigating factual disputes. However, Cook failed to file a notice of appeal as required by RAP 5.1(d), which provides, "A party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed." Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). For these reasons, we do not consider her factual challenges.

² Due to the similarity in names, we use Michael and Donna Cook's first names for clarity.

In December 2013, the bankruptcy court entered an order granting Kohles' motion for summary judgment in the adversary suit. The order provided: (1) that Kohles had a valid and perfected lien created by RCW 60.40.010(1)(d) that secured the contingency fee, which he is owed under the fee agreement; (2) that such lien attached to all past and future payments made by the Department of Labor and Industries and/or Snohomish County to Michael and/or Donna because of work performed by Kohles, including Kohles' representation of Michael in any claim or appeal process; and (3) that the lien attached to any proceeds as defined by RCW 60.40.010, the attorney's lien statute.

In June 2014, Kohles filed an in rem complaint in the Snohomish County Superior Court against Michael and Donna. The complaint sought foreclosure of Kohles' attorney's lien on the worker's compensation benefits and injunctive relief.

In August 2014, Michael died due to causes unrelated to his industrial injuries. As Michael's survivor, Donna continued to receive Michael's pension benefits in the amount of \$3,175.08 per month.

In February 2015, Kohles moved for summary judgment. He argued that he was entitled to foreclose his attorney's lien on the payments from the Department of Labor and Industries and Snohomish County. He requested that the trial court enforce his lien by entering an order requiring Donna to change her address with the Department of Labor and Industries so that the payments would be sent directly to Kohles for him to deduct a portion of each payment. He provided several declarations in support of his motion.

Donna, acting pro se, opposed Kohles' motion. She disputed a number of assertions in Kohles' declaration, including that Michael retained Kohles and that the settlement was a result of Kohles' legal services. Donna also provided declarations in support of her position.

The trial court held hearings on Kohles' motion on March 10, 2015, and April 10, 2015. Following these hearings, the trial court entered findings of fact and conclusions of law regarding the fee agreement and Kohles' legal services. The trial court rejected Donna's arguments that the settlement was not the result of Kohles' legal services. It concluded that the contingent fee due to Kohles was \$5,507.38 on the permanent partial disability and \$35,738.25 on the pension. It also concluded that Kohles had an attorney's lien on the settlement funds.

The trial court rejected Kohles' request for judgment in rem against the settlement proceeds.³ It concluded that chapter 60.40 RCW does not provide a process for foreclosure of such personal property lien. It also rejected Kohles' request for prejudgment interest. The court concluded, however, that as a court of equity, it could order Donna to pay a monthly fee to Kohles toward the contingent fee obligation of \$41,245.63. In determining the amount of the monthly fee, the court considered Donna's financial situation.

The court entered an order denying Kohles' motion for summary judgment and ordering Donna to remit payments in the amount of \$100 per month to Kohles. Kohles moved for reconsideration, which the court denied.

³ Donna has not challenged the use of an in rem proceeding for the foreclosure of an attorney's lien against the proceeds of an action, and we express no opinion on that question.

Kohles appeals. Donna did not file a notice of cross-appeal.

ANALYSIS

Attorney's Lien Enforcement

Kohles argues that the trial court erred in ruling that he could not foreclose on his attorney's lien because chapter 60.40 RCW does not provide a mechanism for foreclosure. He contends that the attorney's lien statute "explicitly contemplate[s] enforcement of attorney's liens," that the court "may imply a remedy for the right created by RCW 60.40.010," and that "[c]ase law provides guidance and authority for foreclosing attorney's liens in Washington."⁴ Kohles asks this court to reverse the decision of the trial court and hold that he "is entitled to enforce his attorney's lien under RCW 60.40.010."⁵

In making these arguments, Kohles overlooks the fact that, notwithstanding its conclusion that the statute does not provide a process for foreclosure, the trial court engaged in an equitable proceeding to *enforce* his attorney's lien. After concluding that Kohles had a valid attorney's lien on the settlement funds, the court ordered Donna to pay Kohles \$100 per month because of this lien.

The statute and case law provide limited guidance on the form of the proceedings appropriate to enforce an attorney's lien, especially as a charging (nonpossessory) lien against the proceeds of an action under RCW 60.40.010(1)(d). But the trial court has broad discretion. "Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding." King County v. Seawest Inv.

⁴ Br. of Appellant David A. Kohles, Inc. P.S. at 14, 19, 21 (boldface omitted).

⁵ Br. of Appellant David A. Kohles, Inc. P.S. at 29.

Assocs., LLC, 141 Wn. App. 304, 314, 170 P.3d 53 (2007). “A proceeding to enforce a lien is an equitable proceeding.” Seawest, 141 Wn. App. at 314. “Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion.” Seawest, 141 Wn. App. at 314. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Seawest, 141 Wn. App. at 314.

The trial court’s decision to adjudicate the attorney’s lien based on the documentary evidence and argument presented by both parties was a tenable choice. Kohles does not argue otherwise. For all practical purposes, the trial court decided to impose an equitable remedy as part of an equitable proceeding enforcing the attorney’s lien. In these circumstances, we conclude that the trial court was not compelled to apply the summary judgment standards, and had the authority to engage in an equitable proceeding to adjudicate the enforcement of Kohles’ attorney’s lien.⁶

Likewise, the trial court’s decision to enforce this lien by requiring monthly payments in the amount of \$100 was not an abuse of discretion. In fashioning this remedy, the court properly considered all the equities, including Donna’s budget and financial situation.

Kohles argues that the court erred by considering Donna’s financial situation, because a debtor’s financial situation “is never legally relevant” to

⁶ Further, we have no verbatim or narrative report of proceedings that might help to explain how the trial court arrived at its decision to utilize an equitable proceeding to enforce Kohles’ attorney’s lien. The appellant bears the burden of providing an adequate record on appeal. Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1149 (1997); RAP 9.2(b).

whether a secured lienholder is entitled to foreclose on its security interest.⁷ But he cites no compelling authority for this proposition. Donna's financial situation was a relevant and proper consideration in this equitable proceeding.

Finally, Kohles argues that the court erred in ruling that he was not entitled to prejudgment interest. He contends that the trial court should have awarded prejudgment interest because his claim was liquidated. But a court has broad discretion to fashion equitable remedies. Kohles provides no authority requiring the court to award prejudgment interest under these circumstances, especially where a large portion of the settlement proceeds took the form of monthly pension payments under the Industrial Insurance Act, Title 51 RCW. Kohles does not establish that the contingent fees for such installment payments were due and owing until each installment payment was received. As Donna points out, the settlement did not generate any pension fund available to her to pay attorney fees.⁸

We affirm.

Trickey, J

WE CONCUR:

[Signature]

[Signature]

⁷ Br. of Appellant David A. Kohles, Inc. P.S. at 28-29 (boldface omitted).

⁸ We also note that Donna has not raised any statutory or administrative limitations on contingent attorney fees that may apply to an industrial insurance award and we express no opinion on how any such limitations may be implicated by Kohles' attempt to enforce his attorney's lien against the settlement proceeds.

Chapter 60.40 RCW**LIEN FOR ATTORNEY'S FEES****Chapter Listing****Sections**

- 60.40.010 Lien created—Enforcement—Definition—Exception.
 60.40.020 Proceedings to compel delivery of money or papers.
 60.40.030 Procedure when lien is claimed.

NOTES:

Rules of court: *Return of files of disbarred or suspended attorney—RLD 8.1.*

60.40.010**Lien created—Enforcement—Definition—Exception.**

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

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(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; and

(e) Upon a judgment 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, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(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.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

(6) Child support liens are exempt from this section.

[2004 c 73 § 2; Code 1881 § 3286; 1863 p 406 § 12; RRS § 136.]

NOTES:

Purpose—Intent—Application—2004 c 73: "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." [2004 c 73 § 1.]

60.40.020

Proceedings to compel delivery of money or papers.

When an attorney refuses to deliver over money or papers, to a person from or for whom he or she has received them in the course of professional employment, whether in an action or not, he or she may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he or she should not be punished for a contempt.

[2012 c 117 § 152; Code 1881 § 3287; 1863 p 406 § 13; RRS § 137.]

60.40.030

Procedure when lien is claimed.

If, however, the attorney claim a lien, upon the money or papers, under the provisions of *this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

[Code 1881 § 3288; 1863 p 406 § 14; RRS § 138.]

NOTES:

*Reviser's note: "this chapter" appeared in section 3288, chapter 250 of the Code of 1881, the lien sections of which are codified as chapter 60.40 RCW.

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Dear Clerk of Court,

Attached is a copy of the missing appendix to the Petition for Review. A copy of the complete petition with the appendix attached is being mailed to Respondent today.

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