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No. 68539-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARY FUNG KOEHLER,

Appellant (Plaintiff),

v.

BLYTHE C. LAWRENCE, as Personal Representative of the ESTATE OF
REXFORD LAWRENCE, deceased,

Respondent (Defendant).

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BRIEF OF RESPONDENT

Attorney for Respondents
BLACKMON HOLMES PLLC
Craig Blackmon, WSBA No. 29240
808 Fifth Ave. N.
Seattle, WA 98109
craig@blackmonholmes.com
(206) 357-4222 office
(206) 816-1898 fax

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I. INTRODUCTION

This complex and convoluted matter had very humble beginnings. In 1999, Ms. Koehler and Rexford Lawrence entered into a mutually beneficial relationship in regards to a condominium in Woodinville, WA (the “Condo”). Ms. Koehler and Mr. Lawrence agreed to cooperatively purchase and own the Condo. Mr. Lawrence made the down payment at closing and thereafter made all payments associated with ownership (mortgage payments, property tax payments, homeowner dues, etc.). Ms. Koehler obtained the purchase money mortgage and took title in her name. To formalize this relationship, they entered into two agreements in regards to the Condo: a 20 year lease, with Mr. Lawrence as tenant; and an option to purchase, also for a 20 year term, held by Mr. Lawrence. Upon exercise, Ms. Koehler would retain one third of the net appreciation of the Condo.

In 2005, Mr. Lawrence attempted to exercise his option to purchase the Condo. Ms. Koehler unlawfully refused to honor her contractual obligation and refused to convey ownership of the Condo to Mr. Lawrence as required by the terms of the option. Mr. Lawrence filed suit shortly thereafter in 2006 (the “Original Litigation”) and related litigation continues through this appeal. In 2008, Mr. Lawrence obtained a money judgment against Ms. Koehler of about \$108,000 for his losses incurred as a result of her unlawful failure to honor his option right.

Quite simply, Ms. Koehler has from Day One fought tooth and nail to retain ownership of the condo for her own personal benefit, notwithstanding the fact that she has never paid a nickel towards it and

unlawfully refused to convey to Mr. Lawrence her ownership interest in it. As a former practicing member of the Washington State Bar Association, Ms. Koehler has the skills and knowledge necessary to litigate this matter *pro se* in a “scorched earth” fashion, which she has most certainly done.¹ She contested every single conceivable point in the Original Litigation; before judgment was entered in that matter, she filed and pursued an unlawful detainer action against Mr. Lawrence (the matter now on appeal); she appealed the judgment entered in the Original Litigation to the Court of Appeals (which affirmed) and to the Supreme Court (which declined review); she contested every single conceivable point in the matter she filed as an unlawful detainer; she sought discretionary review by the Supreme Court during the pendency of the unlawful detainer action (the motion was denied); she filed a bankruptcy action in an effort to forestall conveyance of the Condo by the court-appointed receiver; and she continues today with this appeal.

As of today, Mr. Lawrence has passed away (in 2008); his estate is the fee simple owner of the Condo under a statutory warranty deed executed by the court-appointed receiver; and Ms. Koehler has received a discharge in bankruptcy relieving her of any remaining obligation under the judgment entered against her.

Mrs. Koehler failed to pursue this appeal in a timely fashion by failing to file her notice of appeal within 30 days of entry of the appealable order. Accordingly, it is the fervent hope of Blythe Lawrence (Rexford’s

¹ Indeed, Ms. Koehler was sanctioned previously as a practicing attorney for willfully delaying the administration of justice. CP at 492-501.

younger child and Personal Representative of her father's estate), her brother William (who is disabled), and her mother Carole (Rexford's ex-wife and the guardian for William) that this Court will help to end this litigation so that they may all move forward with their lives without spending even more of their inheritance on legal fees.² They have, quite simply, suffered too much already at the hands of Ms. Koehler.

II. ASSIGNMENTS OF ERROR

Appellant fails to identify a single Assignment of Error. As explained further below, this alone may be fatal to this appeal. If the Court considers this appeal notwithstanding appellant's failure to identify a single assignment of error, then respondent provides the following list of issues raised by this appeal (needless to say, without reference to the associated Assignments of Error since there are none). Note that it is an open question whether these issues are actually raised by this appeal given the exceptionally poor briefing of appellant (dozens of egregious typos, several incoherent passages, multiple missing citations, repeated failure to explain applicability of cited legal authority, etc.). After slogging through Ms. Koehler's nearly indecipherable brief, respondent believes this appeal raises the following issues:

1. Is this appeal time-barred, where appellant filed her notice of appeal more than 30 days after entry of the appealable order?
2. Did the trial court correctly use its discretion in appointing a receiver for the Condo, where appointment is within the discretion of the

² William's inheritance will be placed into a special needs trust to assist with his care for the remainder of his life.

trial court, the trial court converted this matter to one of general jurisdiction, and the record includes factual findings showing that appointment of a receiver was appropriate?

3. Did the Receiver have the authority to sell the subject property, where the superior court specifically authorized and confirmed the sale?

4. Was it appropriate for the Estate of Lawrence to purchase the Condo from the Receiver free of Ms. Koehler's asserted homestead interest, where the superior court found that the Estate was entitled to an equitable lien that attached to the Condo at the time of Ms. Koehler's original acquisition of it?

5. Did the trial court correctly use its discretion in substituting the Estate of Lawrence for the decedent Rexford Lawrence, where substitution was proper and there was no prejudice to appellant?

III. STATEMENT OF THE CASE

From a procedural perspective, this is a long-standing and remarkably complex matter, which is ironic in light of its very humble origins. In 1999 Mary Fung Koehler and Rexford Lawrence entered into an agreement regarding the purchase and possession of a condo in Woodinville, WA (the "Condo"). CP at 25-26. Specifically, Ms. Koehler agreed to obtain a purchase money mortgage in her name and to take title to the Condo; Mr. Lawrence agreed to put up the down payment (of about 40%) and to make all payments of ownership thereafter (including all

mortgage payments). *Id.* In addition, Ms. Koehler agreed to lease the Condo to Mr. Lawrence for 20 years, CP at 14, with a concurrent option to purchase, CP at 12. Upon exercise, the option would require Ms. Koehler to convey title to the Condo to Mr. Lawrence in exchange for one third of the net appreciation of the Condo through the date of exercise, less certain costs incurred. CP at 12.

In 2005, Mr. Lawrence gave notice of exercise of the option. CP at 10. Ms. Koehler refused to honor her contractual obligations. *Id.* Mr. Lawrence then sued Ms. Koehler (the Original Litigation, *Lawrence v. Koehler*, King Co. Cause No. 06-2-05945-0). Because the option did not include a specific mechanism to determine the sale price, Mr. Lawrence was entitled only to a money judgment in his breach of contract action. *See id.* Ms. Koehler was found liable as a matter of law on summary judgment, CP at 10-11, and following trial in the spring of 2008 on the issue of damages, judgment was entered against Ms. Koehler in excess of \$108,000, CP at 117-119. This judgment created a judgment lien that attached to the Condo in favor of Mr. Lawrence, the judgment creditor (the “Judgment Lien”). RCW 4.56.190.

During that trial and prior to entry of judgment, Ms. Koehler filed another action in the King County Superior Court, an unlawful detainer action against Mr. Lawrence (*Koehler v. Lawrence*, King Co. Cause No.

08-2-05568-0), which is the matter currently on appeal. Initially, the court in the unlawful detainer action found that the issue of possession was premature prior to entry of judgment in the matter of *Lawrence v. Koehler*. See CP at 75, 124-25. Once judgment was entered in *Lawrence v. Koehler*, the court in *Koehler v. Lawrence* tried the unlawful detainer matter. CP at 147-48. Following trial, the Court found that Mr. Lawrence's regular payments of rent, and Ms. Koehler's acceptance of those payments, created a month-to-month tenancy in the Condo in favor of Mr. Lawrence, notwithstanding prior exercise of the option and the resulting award of damages. CP at 239-43. Because Ms. Koehler failed to give notice of termination of this month-to-month tenancy, she was not entitled to a writ of unlawful detainer and Mr. Lawrence retained his leasehold interest on a month-to-month basis. CP at 615.

At around this same time, Ms. Koehler claimed the Condo as her homestead by recording her Declaration of Homestead with the King County Recorder. CP at 633.

Approximately two weeks prior to entry of the Findings of Fact in the unlawful detainer matter, the Court *sua sponte* appointed a receiver for the Condo, James Varnell, WSBA No. 3013 (the "Receiver"). CP at 244-46.

Shortly after entry of the Findings of Fact, Mr. Lawrence passed

away. CP at 282. He was survived by his ex-wife Carole and their two children: William, his eldest, who suffers from Asperger's Syndrome (and for whom Carole is the guardian); and Blythe, his daughter, who was 24 years old at the time. *See id.* Per the terms of his will, Blythe was appointed Personal Representative. *Id.* In 2010 Blythe was substituted as the correct party in the matter of *Koehler v. Lawrence*. CP at 624-25.³

Following his appointment as receiver in 2008, Mr. Varnell determined that it was in the interests of all parties to lease the Condo for fair market value (because the real estate market was in the midst of its post-bubble free fall). *See* CP at 219-20; RP at 15. Recognizing that Mr. Lawrence's heirs would make excellent tenants given their interest in the Condo (emotionally, as their father's home; and legally, pursuant to the judgment lien in favor of the Estate), Mr. Varnell leased the Condo to Carole and Blythe for \$1450 per month. *See* CP at 254. They were excellent tenants. RP at 3. This lease was then renewed several times. CP at 570.

In 2011, Mr. Varnell determined that the market had recovered

³ All parties were timely notified of Mr. Lawrence's passing. CP at 196. However, Blythe was not substituted as the correct party in this matter until two years after her appointment as Personal Representative. CP at 282, 624-25. In contrast, shortly after her appointment she was substituted as the correct party in the prior matter then on appeal, *Lawrence v. Koehler*. This difference flowed from the fact that the Rules of Appellate Procedure explicitly require substitution under these circumstances. RAP 3.2(b). There is no comparable Civil Rule.

sufficiently such that it was appropriate for him to sell the Condo and close the receivership. CP at 339-40. At about that same time, on April 6, 2011, Ms. Koehler filed for Chapter 7 bankruptcy. CP at 425. For reasons unknown, Ms. Koehler initially failed to seek avoidance of the Judgment Lien during the pendency of her Chapter 7 bankruptcy. She received her discharge July 14, 2011, and the bankruptcy court closed the matter on July 18. CP at 427. Thereafter, undoubtedly upon realizing that she failed to timely address the issue, Ms. Koehler reopened her case and sought to avoid the Judgment Lien on the Condo because she claimed the Condo as her homestead. *See* CP at 428.

Because of these concurrent and intertwined actions (the superior court action on the one hand, and the bankruptcy action on the other) the parties struggled that summer and fall – after Ms. Koehler’s discharge that terminated the bankruptcy stay – to obtain clear authority for a final disposition of the Condo. On July 29, the superior court entered its Order Authorizing Receiver’s Sale of Condominium Unit (the Receiver noted this motion during the pendency of appellant’s bankruptcy stay). CP at 401-02. On August 26, the superior court entered its Order Granting Defendant’s Motion to Reduce Sale Price dated August 26. CP at 627-28. On that same date, the superior court entered its Order Granting Defendant’s Motion to Declare Invalid Plaintiff’s Declaration of

Homestead and to Permit Credit Bidding. CP at 632-34. This order identified for the first time an equitable lien in favor of the Estate of Lawrence that further secured the Judgment (the “Equitable Lien”). CP at 633. Finally, on October 31, the superior court entered its Order Reauthorizing Receiver’s Sale of Condominium Unit (necessitated by the receiver’s prior failure to honor the bankruptcy stay). CP at 630-31.

Meanwhile, the parties appeared before the bankruptcy court on or about September 9 on Ms. Koehler’s motion to avoid the Equitable Lien (which would otherwise defeat her claim of homestead). CP at 516-17. Neither party adequately appreciated the dispositive federal law that requires first a determination of when the lien attached in order to determine whether it is avoidable. *See Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991). The date of attachment is a matter of state law. *Id.* As instructed by the bankruptcy court at the hearing, the parties returned to superior court for a determination of the date of attachment of the Equitable Lien. CP at 516-17.

The superior court considered the issue on November 1, 2011. CP at 635. By order dated November 22, the superior court found that the Equitable Lien attached to the Condo concurrently with Ms. Koehler’s acquisition of her ownership interest. CP at 635-36. Ms. Koehler timely sought reconsideration of this order, which was denied on December 30.

See CP at 637-38. Once confirmed following denial of the request for reconsideration, this superior court order, in turn, allowed the bankruptcy court to determine whether Ms. Koehler was able to avoid the Equitable Lien that would otherwise defeat her claim of homestead in the Condo.

Specifically, pursuant to federal law, a debtor in bankruptcy may avoid a judicial lien that impairs her homestead only where the lien attached after the debtor acquired her interest. *See Farrey*, 500 U.S. at 296 (emphasis added). Accordingly, applying this law to the facts as determined by the superior court in its order of November 22, and as subsequently confirmed on December 30 by the superior court's denial of appellant's motion for reconsideration, the bankruptcy court found on January 19, 2012, that Ms. Koehler was unable to avoid the Equitable Lien and the Condo remained burdened by it.⁴

The Receiver and respondent then consummated the sale of the Condo from the Receiver to the Estate. CP at 590. In doing so, the parties specifically relied upon the superior court's orders, including those orders that resolved the final issue otherwise preventing the potential sale of the Condo (*i.e.*, the order of November 22, which held that the Equitable Lien

⁴ The bankruptcy court issued its memorandum opinion on January 19, 2012. The court then issued its order on January 22. Upon appellant's motion for reconsideration, the bankruptcy court on March 22 amended this order. The Court explicitly made its decision, regarding avoidance of the Judicial Lien, subject to a reversal of the trial court's finding that the lien attached concurrently with the debtor's acquisition of her ownership interest.

attached concurrently with debtor's interest, and the order of December 30, denying appellant's motion for reconsideration), as well as on the bankruptcy court's orders, particularly its decision of January 19 and its order of January 22 (which held that the debtor was unable to avoid the Equitable Lien notwithstanding her assertion of a homestead interest in the Condo). The sale closed on February 3, 2012. CP at 590. The Estate purchased the Condo with full repayment of the balance owed on the purchase money mortgage obtained by Ms. Koehler in 1999, approximately \$65,000, and payment of all costs incurred in the transaction (including the excise tax).⁵ The balance of the court-approved purchase price was paid by credit against the Equitable Lien that attached at the time of Ms. Koehler's acquisition of title and therefore was not avoidable by Ms. Koehler in her bankruptcy action (the judgment itself having been discharged in Ms. Koehler's bankruptcy).

Following the sale, the Receiver returned to the superior court for a final award of his attorney's fees incurred and an order of discharge. *See* CP at 589-91. That motion was granted on March 2, 2012. CP at 639-641. Although not specifically designated in her Notice of Appeal, it is this order from which Ms. Koehler ostensibly appeals (because otherwise her appeal would be untimely on its face).

⁵ The deed by which title was conveyed from the Receiver to the Estate of Lawrence was recorded under King County Recording No. 20120203000189.

At no point prior to the sale did Ms. Koehler appeal or even seek discretionary review of any orders entered by the superior court. As of today, Ms. Koehler retains no ownership interest, or any interest whatsoever, in the Condo. The Condo is owned by the Estate of Lawrence. Ms. Lawrence, as Personal Representative, is in the process of conveying the Condo to the heirs of the Estate, herself and her disabled brother William.

IV. ARGUMENT

This Court should affirm the trial court. As explained in detail below, the trial court did not err. But first, this Court must address two procedural deficiencies that are fatal to this appeal.

A. Appellant failed to timely appeal this matter.

Ms. Koehler's right to appeal accrued upon entry of the Superior Court's Order dated December 30, 2011 (the "Appealable Order"). CP at 637-38. The Appealable Order denied Ms. Koehler's motion for reconsideration of the Superior Court's Order dated November 22, 2011. *Id.* The order of November 22, in turn, determined the date of attachment of the Estate's Equitable Lien. CP at 635-36. Determination of the date of attachment of the Estate's Equitable Lien was the final decision necessary for the sale of the condo. It is undisputed that Ms. Koehler failed to file a notice of appeal in regards to the Appealable Order within 30 days of its

entry. Instead, she sat on her hands until the Condo had been sold before seeking review by this Court.

A litigant has the right to appeal a decision where that decision effectively determines the action and prevents a final judgment from being entered.⁶ The superior court may enter a final order that gives rise to the right to appeal even though the order reserves for future determination an award of attorney's fees. *See* RAP 2.2(a)(1). A litigant must file a notice of appeal within 30 days of entry of the trial court's order that the litigant wants reviewed. RAP 5.2(a). A failure to timely appeal is fatal. RAP 18.8(b); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368 (1993). While a litigant may appeal a subsequent award of attorney's fees, appeal of the order awarding those fees does not bring up for appeal the previous final order or judgment entered in the action. RAP 2.4(b); *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 825 (2007).

Here, the Appealable Order determined this action. Per the terms of the Appealable Order, the Superior Court affirmed its prior determination of the date of attachment of the Equitable Lien. CP at 637-

⁶ RAP 2.2(a)(3), which reads as follows: "[A] party may appeal from only the following superior court decisions: . . . (3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in determines the action and prevents a final judgment or discontinues the action."

38. This in turn was the final determination necessary for the bankruptcy court to conclude that Ms. Koehler was unable to avoid this lien notwithstanding her assertion of a homestead interest in the Condo. And that, in turn, and without further action by the Superior Court, led to the sale of the Condo (pursuant to the Superior Court's Order dated October 31, 2011, reauthorizing the sale of the subject condo by the Receiver). *See* CP at 630-31.

Thus, the Appealable Order affected and indeed resolved a “substantial right” – Ms. Koehler’s homestead interest in the Condo – and “in effect determine[d] the action,” because no further court action was necessary to sell the Condo. Once the Condo was sold, there were no further issues before the superior court, other than paying the Receiver’s fees and discharging him from further obligations. *See* CP at 572. The fact that the Receiver was awarded his fees and costs, and discharged from further obligations, by Order of the Superior Court dated March 2, 2012, does not alter the fact that Ms. Koehler missed her opportunity to appeal the Appealable Order. *See* RAP 5.2(a); CP at 639-41.

Moreover, given entry of the Appealable Order and all preceding orders, there is no basis or reason for entering a final judgment, and the action as a practical matter has been discontinued. There is, quite simply, nothing left to adjudicate and no remaining rights or obligations to reduce

to a final judgment. As a result, the Order of December 30, 2011, gave rise to Ms. Koehler's right to appeal, and she failed to timely appeal it.

That said, Ms. Koehler at least arguably timely appealed the trial court's March 2 order awarding the Receiver his attorney's fees. While she did not identify this order in her Notice, she did attach it to the Notice, and she arguably "amended" her notice with her letter to this Court of April 19 (which, apparently, was not included in the Clerk's Papers). Therefore, this Court should at most allow appeal of the March 2 order only, notwithstanding Ms. Koehler's failure to identify this order in her Notice. But appeal of the March 2 order does not call up any of the prior orders because none of those prior orders prejudicially affected the March 2 order. Quite simply, attorney's fees are a separate and distinct issue. *See* RAP 2.4(b).

Ms. Koehler's authority to the contrary, as set forth in her letter to this Court filed April 19 and presumably to be set forth in her reply, is of no assistance. The Rules explicitly note that a litigant has the right to appeal from a "final order after judgment," defined as "any final order made after judgment that affects a substantial right." RAP 2.2(a)(13). In *Garrett v. Nespelem Consol. Mines, Inc.*, 23 Wn.2d 824 (1945), the appellant failed to appeal from the trial court's order that wound up the receivership and that allowed some but not all of plaintiff's (appellant's)

claims. The Court noted that this order was a “final order” and thus was appealable, but appellant failed to timely do so. *Id.* at 826. At most, this case stands for the proposition that Ms. Koehler has the right to appeal the trial court’s order of March 2 awarding the receiver his fees and discharging him, and clearly she did so in timely fashion (assuming the Court is willing to overlook her failure to identify this particular order in her Notice). But this case does not relieve Ms. Koehler of her obligation to timely appeal from the earlier Appealable Order and its predecessors. And again, because the prior orders did not “prejudicially affect” the order of March 2, timely appeal of the March 2 order does not call up the prior orders from which she failed to timely appeal. *See* RAP 2.4(b).

Similarly, in *Johnson v. Joslyn*, 47 Wash. 531 (1907), the receiver filed his report with the trial court. Based on that report, the trial court entered an order finding that the receiver had no money belonging to the appellant and discharging the receiver. On appeal, the respondent argued that this order was not a “final order made after judgment” and therefore was not appealable. The Appellate Court concluded otherwise (not-so-helpfully stating that the result was so obvious that it did not need to be explained). *Id.* at 533. Once again, this case at most stands for the proposition that Ms. Koehler has the right to appeal from the order of March 2, a result consistent with RAP 2.2(a)(13). But this case does not

support Ms. Koehler's contention that her (at least arguably) timely appeal of the March 2 order brings up for review any of the prior orders entered by the trial court.

The Rules of Appellate Procedure specifically recognize the benefit from "finality of decisions." *See* RAP 1.2(a) and 18.8(b). Here, for reasons unknown, Ms. Koehler sat on her hands and failed to appeal the decisions that ultimately decided this action. Had she timely appealed, the appeal would have been initiated prior to the sale of the Condo. This, in turn, would have put the Estate of Lawrence on notice of the possibility of reversal and the potential for being required to convey the Condo back to Ms. Koehler.

Instead, Ms. Koehler waited for more than 30 days after entry of those orders. She initiated the appeal only after the respondent and the Receiver had acted upon those orders, including payment by the Estate of nearly \$65,000 to satisfy the loan (and mortgage) in Ms. Koehler's name, plus another \$4000 in transaction costs. Ms. Koehler, elderly, retired, and only one year removed from Chapter 7 bankruptcy, surely does not have the money necessary to reimburse the Estate for these substantial costs. There can be no dispute that, if this Court allows the appeal to go forward, the Estate of Lawrence will have been seriously prejudiced by Ms.

Koehler's failure to timely assert her right to challenge the trial court's decisions.

The receiver conveyed title to the Condo to the Estate. CP at 572-73; *see also* King Co. Recording No. 20120203000189. The Estate paid the balance of the debt secured by the Condo. The Estate paid all costs incurred by the transaction. The transaction is complete. All of these events occurred more than 30 days after the final trial court decision that had any bearing on the sale, but before Ms. Koehler filed her Notice of Appeal.⁷ If Ms. Koehler wanted to appeal the court orders pursuant to which the parties took these actions, she should have timely appealed them. Her failure is fatal to this appeal. This Court should so find.

B. Appellant failed to identify any Assignments of Error.

Ms. Koehler's failure is fatal to her appeal. An appellant must provide a "separate and concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). Where the appellant fails to assign error in the appeal, the appeal should be dismissed. *State v. Chaussee*, 77 Wn.App. 803, 809-10 (1995) (citing *State v. Perry*, 120 Wn.2d 200, 202 (1992), and *State v. Fortun*, 94 Wn.2d. 754, 756 (1980)).

⁷ The deed conveying title from the Receiver to the Estate was recorded February 2. Ms. Koehler filed her Notice of Appeal on March 12.

Admittedly, there is a little flexibility in regards to this requirement. In *State v. Olson*, the Supreme Court largely overturned *Fortun* and its progeny as to this issue (a fact not noted by the Court in *Chaussee*). *Olson*, 126 Wn.2d 315, 321 (1995). The Court found instead that dismissal was appropriate only where the appellant not only failed to identify assignments of error, but also failed to present any argument on the issue or provide any legal citation in regards to the issue. *Id.*

And that is the case here. Ms. Koehler's brief is a convoluted mess. While it may argue the alleged errors of the trial court, it does so in a barely readable or understandable manner given the excessive typos, unfinished sentences, confusing headings, etc. While the brief may provide legal citations, it fails to explain the relevance of these citations to the claimed errors of the trial court. Ms. Koehler did not simply omit assignments of error. Rather, she also failed to adequately identify or argue the alleged errors in her brief. This failure renders a complete response by respondent virtually impossible, because ultimately the alleged errors cannot be identified with complete certainty. Given this failure, respondent "is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice. *Olson*, 126 Wn.2d at 321. Accordingly, this Court should dismiss this appeal on this basis. *See id.*

C. The trial court did not abuse its discretion in appointing the Receiver.

Appointment of a receiver is within the trial court's discretion. *MONY Life Ins. Co. v. Cissne Family LLC*, 135 Wn.App. 948, 952 (2006). The trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423 (2006).

In the present matter, the trial court did not abuse its discretion. The trial court specifically found that that a receiver was appropriate for several reasons. CP at 611. The Court's reasoning was reasonable, and it provided tenable grounds for the appointment of the Receiver. *See* RCW 7.60.025(1)(c) and (nn). The court specifically found that appointment was "reasonably necessary" and there were "no other adequate remedies available," CP at 611, thus further satisfying the statutory requirement, RCW 7.60.025(1). And because the appointed Receiver took charge of limited property, it was appropriate for the trial court to appoint a custodial, as opposed to a general, receiver. *See* RCW 7.60.015 (a custodial receiver is appropriate where the receiver will take charge of limited or specific property, or is not given the authority to liquidate property) (emphasis added).

Ms. Koehler makes much of the fact that she initiated an unlawful detainer action that conferred only limited jurisdiction on the trial court. App. Brief at 27. However, the superior court has the authority to convert an unlawful detainer action, which confers limited jurisdiction, to a general civil action, which of course confers general jurisdiction. See *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-46 (1985). “[T]he question of right to possession must have resolved itself before an unlawful detainer can be converted into an ordinary lawsuit.” *Id.* at 47.

In the present matter, the question of right to possession to the Condo was resolved by the trial court following trial on June 16, 2008. CP at 241. Accordingly, the Court had the authority to, and did, convert this action to an “ordinary lawsuit” conferring general jurisdiction on the Court, which in turn allowed the Court to appoint a receiver. If the Court did not convert this action to an ordinary lawsuit, then the Court had no legal basis for appointing the Receiver. Thus, appointment of the Receiver is itself proof that this matter was converted to a general civil action such that the Court had general jurisdiction over the parties. Accordingly, this Court should affirm.

D. The Receiver had the authority to sell the Condo.

“It is beyond dispute that the receiver’s powers, under the court’s control, include the power to dispose of the receivership property.”

Walton v. Severson, 100 Wn.2d 446, 451 (1983) (citing *In re Spokane Savings Bank*, 198 Wash. 665 (1939)); *but see* RCW 7.60.260(1). The receivership statute does not prescribe the manner of any sale, and the court has broad discretion in determining the manner of disposition. *Id.* at 452. A sale of real property by a receiver requires two affirmative actions by the court: (1) the sale must be specifically authorized by order of the court; and (2) the sale must be confirmed by the court after an acceptable purchaser has been found. *Id.* There is an exception, though, to this two part requirement: “If an offer for property in the hands of a receiver is reported to the court and a sale to the purchaser in exact compliance with the offer is authorized, the order is deemed an acceptance of the offer and a confirmation of the sale and no other and further confirmation is necessary.” *Id.* at 453.

In the present matter, the trial court satisfied this requirement. The trial court first authorized the sale of the Condo on July 29, 2011, during the pendency of Ms. Koehler’s bankruptcy stay. CP at 452-53. Thereafter, the Receiver as seller and the Estate of Lawrence as buyer entered into a Purchase and Sale Agreement for the Condo with a purchase price of \$205,000. CP at 455-63. The trial court was specifically informed of this Purchase and Sale Agreement. CP at 403-04. Following an inspection of the Condo, the Receiver and the Estate agreed to reduce

the price by \$1500, and the parties sought the Court's approval for the price reduction. CP at 403-05. The Court granted the requested relief and approved the reduced sale price. CP at 627-28.

Because the Receiver had noted his motion during the pendency of the bankruptcy stay, there was a question about the validity of the Court's order dated July 29, 2011, approving the sale. CP at 516 at n.2. To resolve this issue, the Receiver sought the trial court's re-authorization following Ms. Koehler's discharge in bankruptcy and expiration of her stay. CP at 509-14. Once again, the Court approved the sale. CP at 630-31. Finally, in February of this year, the Receiver informed the trial court of the closed sale and sought reimbursement of costs incurred and an award of fees along with discharge as Receiver. CP at 589-91. And once again, the trial court granted the requested relief. CP at 639-41. There can be no doubt that this sale was authorized and confirmed by the superior court. Accordingly, this Court should affirm.

E. The Estate appropriately purchased the Condo from the Receiver free of Ms. Koehler's asserted homestead interest.

Although far from clear, Ms. Koehler is apparently asserting that the Estate's sole and exclusive remedy as to its judgment against Ms. Koehler was execution on the Condo pursuant to RCW Chapter 6.17. Ms. Koehler further asserts, apparently, that she was wrongfully denied her

homestead interest in the Condo. Ms. Koehler misses the mark in both respects.

1. The Estate was not limited to execution on the Condo.

Ms. Koehler provides no authority for her assertion that the Estate could only execute on the Condo under RCW 6.17. Nothing in that chapter or in case law indicates that execution is the sole remedy available to a judgment creditor or the only means of realizing some value from a judgment.

Moreover, the Estate was a secured creditor given entry of the judgment. *See* RCW 4.56.190; CP at 633. Per the receiver statute, a secured creditor specifically has the right to credit bid against the secured claim. RCW 7.60.260(3). Accordingly, the law did not require the Estate to execute on the judgment. Rather, the law specifically allowed the Estate to purchase the Condo from the Receiver with credit against the balance due under the judgment.⁸

2. The judgment was secured by an equitable lien.

The trial court did not err in finding that the judgment in favor of Mr. Lawrence was secured by an equitable lien on the Condo. As an initial matter, the Estate was legally entitled to challenge the validity of

⁸ More accurately, the Estate was entitled to bid against the amount of the equitable lien that essentially secured the judgment. CP at 632-34. The obligation imposed by the judgment itself was discharged in Ms. Koehler's Chapter 7 bankruptcy.

Ms. Koehler’s homestead claim. “Every homestead created under [RCW Chapter 6.13] is presumed to be valid to the extent of all the property claimed exempt, until the validity thereof is contested in a court of general jurisdiction in the county or district in which the homestead is situated.” RCW 6.13.070(2).

Case law has confirmed that resolution of a disputed homestead claim is appropriate under a broad range of circumstances:

Since the superior courts are courts of record and courts of general jurisdiction, and since the parties have the right, in some form of procedure, to have the controverted question determined, and since the legislature has not directed the procedure by which it shall be determined, it would seem that it could safely be left to the discretion of the trial court[.]

Enyart v. Humble, 17 Wn.App. 181, 184 (1977) (quoting *Traverso v. Cerini*, 146 Wn. 273 (1928)).

In *Enyart*, the Humbles asserted a homestead claim. The Enyarts, judgment creditors, levied execution against the property and disputed the validity of the claim. In denying the Humbles’ motion to quash the sale, the trial court did not rule on the validity of the Humbles’ homestead claim. On appeal, the Court noted:

There is no reason to compel the Humbles to seek an adjudication of their homestead rights in some future action. They timely raised the issue of the validity of the homestead before a court of general jurisdiction in the county in which the property claimed exempt was situated. All necessary

parties were present; it served no useful purpose to defer resolution of the homestead question until an independent action could be commenced, the pleadings settled, and the case brought on for trial. The legislature has provided that homesteads should be identified and protected by the courts; it has expressed no concern as to the procedure to be employed. In the interest of economy and in fairness to the Humbles, the homestead question may properly be, and we believe should be, settled as part of the proceedings supplemental to judgment.

Id. at 184.

In the present matter, all necessary parties were present in the action then pending before the trial court, a court of general jurisdiction in the county where the subject property, the Condo, was located. It would have served no useful purpose whatsoever to have delayed resolution of the homestead claim. Accordingly, the trial court properly determined the validity of Ms. Koehler's homestead claim.

3. The trial court correctly determined the validity of Ms. Koehler's claim of homestead.

Originally, the trial court found two bases for setting aside Ms. Koehler's Declaration of Homestead: (1) she did not assert it in good faith as required; and (2) the Estate was entitled to an equitable lien on the Condo that defeated the Declaration of Homestead. CP at 633. Ultimately, however, only the latter basis was relevant, because the bankruptcy court eventually determined that the Equitable Lien (which attached simultaneously with Ms. Koehler's acquisition of her ownership

interest) defeated her homestead interest and thus the lien could not be avoided in bankruptcy. *See* CP at 516-17.

The trial court was correct in finding that the Estate was entitled to an equitable lien that attached concurrently with Ms. Koehler's acquisition of her ownership interest in the Condo. First and foremost, basic principles of equity required the Equitable Lien. "[E]quity will treat that as done which by agreement is to be done." *Fleishbein v. Thorne*, 193 Wash. 65, 72 (1937). Absent an equitable lien, Ms. Koehler would have avoided entirely her obligations to Mr. Lawrence under their agreement regarding the Condo, a result inconsistent with equity.

Moreover, the Supreme Court has created a non-statutory exemption to the protection otherwise afforded by a homestead declaration. *Christensen v. Christard, Inc.*, 35 Wn.App. 626, 629 (1983) (citing *Webster v. Rodrick*, 64 Wn.2d 814 (1964)). As succinctly stated by the Court, a judgment debtor should not be permitted to use the homestead statute "as a sword to protect a theft," and "the homestead exemption cannot be used as an instrument of fraud and imposition." *Id.* at 816, 818. Accordingly, the Court adopted a rule to be applied where money is fraudulently used for the purchase or improvement of real property:

It is well settled that one who has purchased real property with funds of another, under circumstances which ordinarily would entitle such other person to enforce a

constructive trust in, or an equitable lien against, the property, cannot defeat the right to enforce such trust or lien on the ground that it is homestead property and exempt from the claims of creditors.

Id. at 817-18.

The exact parameters of an equitable lien are open to some interpretation, including the circumstances under which such a lien is appropriate. The Supreme Court has recognized that “there are a number of circumstances where an equitable lien has been and may be an appropriate equitable remedy.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 535 n.11 (2006) (such as resolution of community property issues, or where defendant purchased property with embezzled funds, or where an owner conveyed property in exchange for construction of a building that was not completed). The Court further noted that, as a general rule, an equitable lien is appropriate where the party asserting the lien advanced money to another, at the recipient’s request, to be applied to discharge a legal obligation of the recipient, and which was so applied, but because of a disability of the recipient no valid contract was made for repayment. *Id.* (citing *Falconer v. Stevenson*, 184 Wash. 438, 442 (1935) (emphasis added)).

Nonetheless, the Supreme Court explicitly stated that this general rule is merely a “framework” to be followed by the trial court when determining whether to impose an equitable lien. *Id.* (emphasis added). The Court specifically refused to foreclose “a trial court’s ability to apply this remedy when the particular legal circumstances and equities call for

it.” *Id.* (emphasis added). Lower courts have held that “no particular form is required to give rise to an equitable lien,” except that “the parties must have intended to impress a particular fund or thing with a charge as security for an underlying debt or obligation.” *Kinne v. Kinne*, 27 Wn.App. 158, 162 (1980) (citing *Monegan v. Pacific Nat’l Bank*, 16 Wn.App. 280 (1976)).

In the present matter, there can be no dispute that Ms. Koehler will be unjustly enriched if she is able to retain the Condo for her own use and possession. She has paid zero dollars towards its acquisition and ownership, and all such funds have come from Mr. Lawrence and his surviving family. Ms. Koehler retained title to the Condo, rather than conveying it to Mr. Lawrence, by wrongfully refusing to honor their contractual agreement.

Furthermore, there can be no dispute that Ms. Koehler and Mr. Lawrence essentially used the Condominium to secure Mr. Lawrence’s payment of the funds used to acquire and maintain it such that an equitable lien is appropriate. *See Kinne*, 27 Wn.App. at 162. Specifically, in exchange for the downpayment and an agreement to make all future payments on the mortgage and all other costs of ownership, Ms. Koehler granted Mr. Lawrence an option to purchase the Condo along with a concurrent lease to occupy it, both for 20 years. This arrangement secured

Mr. Lawrence's downpayment of \$57,000, plus his regular monthly payments over the next several years. Under these circumstances, an equitable lien on the Condo in favor of Mr. Lawrence is appropriate, and such a lien will render void Ms. Koehler's declaration of homestead. *Webster*, 64 Wn.2d at 817-18.

Moreover, the whole point of an equitable lien is to compensate the injured party in the absence of a lien at law:

The doctrine of equitable liens would never have come into existence if it were true that one who claims such a lien must first show a lien at law. Equitable liens become necessary on account of the absence of similar remedies at law.

Webster, 64 Wn. 2d 814 at 817 (quotation omitted); *see also N. Comm'l Co. v. Hermann Co.*, 22 Wn.App. 963, 968 n.2 (1979) ("Equity will create a lien where there is no valid lien at law and it is needed to prevent an injustice.").

Webster is a seminal case on the issue of equitable liens and their ability to defeat a claim of homestead. In that case, the defendant embezzled money from the plaintiff and used those funds to build a house that he claimed as a homestead. The plaintiff was awarded judgment in the amount of the embezzled funds. In addition, the trial court imposed an equitable lien on the property to secure and enforce payment of the money judgment. The plaintiff then attempted to execute on the home, which

defendant claimed was exempt as a homestead. The Supreme Court ruled that the homestead exemption was subject to the equitable lien and thus the property was subject to execution. *Id.*

In the present case, Ms. Koehler was attempting to avoid the judgment lien on the property via her bankruptcy action. Absent an equitable lien on the property, she would have likely prevailed. *See* 11 USC § 522(f)(1). If she had prevailed, then the Estate would have had no remaining lien at law on the property to secure repayment of the losses incurred by Ms. Koehler's illegal refusal to sell Mr. Lawrence the property. Rather, Ms. Koehler would have obtained unencumbered fee ownership of the subject property (other than the purchase money mortgage, on which she has made no payments whatsoever) without ever paying a penny towards it. All funds for the purchase other than the purchase money mortgage, and all payments on that mortgage, came from Mr. Lawrence, or his estate, or his family, yet the Estate would have been left with nothing while Ms. Koehler would have had the condo. Equity cannot tolerate such a result.

4. The trial court correctly determined that the equitable lien attached to the Condo concurrently with Ms. Koehler's acquisition of it.

There is little case law directly on point as to when an equitable lien attaches to real property. However, two cases – and simple logic –

provide guidance and indicate that an equitable lien attaches at the time the funds at issue are first applied toward the subject property.

In *Robinson v. Robinson*, 14 Wn.2d 98 (1942), two brothers acquired unimproved land as tenants in common. About 15 years later, in 1929, one brother advanced funds to the other to improve the property with the understanding that the lending brother would be reimbursed by the rental income. With the onset of the Depression, the rental income evaporated and the lending brother was not fully reimbursed for his outlay. In 1938, the borrowing brother died. In the probate proceeding, the borrowing brother's surviving spouse was awarded the borrowing brother's one-half interest in the property in lieu of a homestead. Thereafter, the lending brother filed suit to recover the balance due. In 1942, four years after the surviving spouse acquired a homestead interest in the property, the trial court entered a judgment in favor of the lending brother and imposed an equitable lien on the property to secure the amount due under the judgment.

On appeal, the surviving spouse argued that the award of the property to her in lieu of a homestead in the probate action was *res judicata* as to the lending brother's claim. In affirming the trial court, including imposition of the equitable lien, the Supreme Court noted that the lending brother's "equitable lien had attached prior to the entry of the

order of the probate court awarding an undivided one-half interest in the real property to appellant in lieu of homestead, and was not discharged or affected by such order.” *Id.* at 103. Thus, the equitable lien attached long before entry of the judgment in favor of the lending brother and before the surviving spouse acquired her homestead interest. *See id.* Although not so stated by the Court, presumably the lien attached when the funds were advanced and used to improve the property.

The matter of *Northern Commercial Co.* is also instructive. In that matter, an ex-wife was awarded \$50,000 as part of her property settlement in a dissolution action, payable in monthly installments. To secure this debt, the trial court imposed a lien on property awarded to the husband. The husband defaulted on the agreement by which the property was acquired prior to the dissolution. The seller (*Northern Commercial Co.*) then sued, prevailed with a judgment in its favor, and executed on the property without notice to the ex-wife.

On appeal, the Supreme Court first addressed the manner of interest in favor of the ex-wife that was granted in the divorce decree. *N. Comm'l Co.*, 14 Wn.2d at 967. The Court noted that the interest was not a statutory lien, *i.e.*, not a judgment lien, because the ex-wife failed to record the decree in the county where the property was located. *Id.* at 968.

However, the Court concluded that it was an equitable lien. *Id.* In discussing such a lien, the Court noted:

The equitable lien acts to secure those payments which may become due and owing in the future, while a statutory judgment lien will arise only from the date of the decree, and will only act to secure an amount which is fixed by the court as due and owing from the date of the decree.

Id. (emphasis added). Because the ex-wife had an equitable lien on the property, and because she failed to get notice of the execution, the Court concluded that her interest in the property was unaffected by the execution. *Id.*

Based on these authorities, it is apparent that an equitable lien arises prior to entry of any judgment that it secures. Thus, there is little question that the Equitable Lien arose long before judgment was entered against Ms. Koehler. Needless to say, though, these authorities do not suggest whether the lien attached simultaneously with Ms. Koehler's acquisition of an ownership interest or at some point thereafter but still prior to the Judgment.

Nonetheless, logic dictates that the lien arose when Mr. Lawrence's funds were used to acquire the property. Quite simply, there is no other time or event at which the lien could have attached other than at the time of acquisition when the funds were applied to the property. Of note, other liens that do not require further filing to be perfected attach

when the underlying liability is incurred. *See* RCW 60.04.061 (mechanic's lien attaches at commencement of the labor or delivery of the materials at issue); RCW 60.08.030 (chattel lien attaches at commencement of labor or furnishing of materials). It simply makes no sense whatsoever for the lien to arise at any time other than when the funds were initially applied to the acquisition of the property.

Finally, and as noted above, principles of equity require that the equitable lien attach at the time the funds at issue are first applied to the property. Otherwise, Ms. Koehler will be able to avoid the lien in her bankruptcy action. If that occurs, Ms. Koehler will have absconded with the condo notwithstanding her illegal and wrongful refusal to sell it to Mr. Lawrence. She will have obtained ownership and possession of the condo free of any interest held by the Estate notwithstanding that all funds for acquiring the property came from Mr. Lawrence and she has never paid a penny out-of-pocket towards it. Equity simply cannot tolerate this result. Therefore, this Court should affirm that the Equitable Lien arose and attached to the condo simultaneously with Ms. Koehler's acquisition of her ownership interest in it, and the Equitable Lien fully secures all amounts due under the Judgment.

F. The trial court did not abuse its discretion in substituting the Estate of Lawrence.

A trial court's decision regarding application of the civil rules is

reviewed for an abuse of discretion. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 171 (1999). In the present matter, the trial court did not abuse its discretion when it substituted Blythe Lawrence as Personal Representative of the Estate of Rexford Lawrence as defendant.

The named defendant, Rexford Lawrence, was deceased. CP at 282. Ms. Lawrence was the lawfully-appointed Personal Representative for the Estate of Lawrence. *Id.* Accordingly, substitution was proper. CR 25(a).

There is no dispute that there was a delay in seeking this substitution given that Mr. Lawrence passed away nearly two years ago. However, Mr. Blackmon, defense counsel, had a legitimate concern about incurring additional attorney's fees in the matter, and in light of that concern he did not previously move for substitution.

In any event, any delay is legally irrelevant. CR 25(a) does not provide a time limit but instead notes as follows: "If substitution is not made within the time authorized by law, the action may be dismissed as to the deceased party." CR 25(a). "When the defendant dies, the pertinent time limit is set forth in the probate code, RCW 11.40.110" 3A Wn. Practice, Rule Practice CR 25 (5th ed.). Ms. Koehler may argue that substitution is governed in this matter by RCW 4.20.050, "Action not abated by death or disability if it survives – Substitution." This is

incorrect. Rather, this statute, within RCW Chapter 4.20, “Survival of Actions,” applies where the plaintiff, not the defendant, has died.⁹

Per the probate code, the plaintiff in an action where the defendant dies should move for substitution of the personal representative for the decedent within four months of passing. RCW 11.40.110.¹⁰ But case law has established that use of the word “may” in CR 25(a) “vests the superior court with discretion to substitute the personal representative, even if the substitution is not made within the time authorized by” the probate statute. *Petrarca v. Halligan*, 83 Wn.2d 773, 776 (1974). “Presumably, substitution is permissible at any time if good cause is shown and the parties have not been prejudiced by delay.” 3A Wn. Pract., Rules Practice CR 25 (5th ed.).

In this matter, Mr. Lawrence died. Thus, there was obviously good cause for the substitution.

Moreover, Ms. Koehler has not suffered any prejudice whatsoever by any delay in substituting Ms. Lawrence, although she continues to vociferously argue otherwise. But the “prejudice” that she identifies is simply her attempt to prevail in this action based entirely on a perceived

⁹ 3A Wn. Pract., Rules Practice CR 25 (5th ed.). Of note, this deadline is also discretionary due to the language used in CR 25(a). *Barker v. Mora*, 52 Wn.App. 825 (1988). Thus, even if this statute applies, not RCW 11.40.110, any delay in seeking substitution is still irrelevant.

¹⁰ Of note, Ms. Koehler never sought substitution.

legal technicality. According to Ms. Koehler, she was “prejudiced” when the trial court allowed the action to continue notwithstanding the death of Mr. Lawrence because the action should have been dismissed on this basis. App. Brief at 39-40. But that is not the correct definition of the term.

“Prejudice” means that the litigant has suffered “damage or detriment to his legal rights or claims.” *Hyundai Motor Am. v. Magana*, 141 Wn.App. 495, 516 n.17 (2007), *rev’d on other grounds*, 167 Wn.2d 570 (2009) (citing Black’s Law Dictionary at 1218 (8th ed.2004)). Here, the “delay” in substituting the Estate did not cause any “damage or detriment” to Ms. Koehler’s legal rights or claims. Accordingly, this Court should affirm.

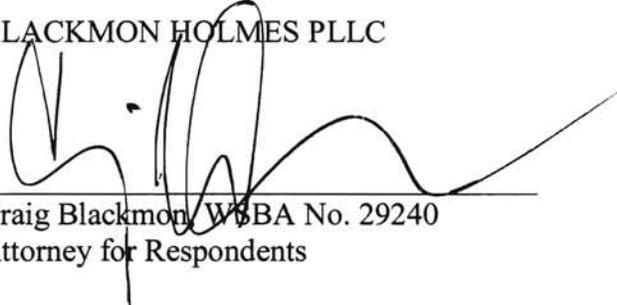
V. CONCLUSION

This litigation began seven years ago when Ms. Koehler unlawfully refused to honor her contractual obligations. In pure self-interest and without regard for her legal obligations, she decided to keep the Condo for her own uses and thus refused to honor her obligation to convey it to Mr. Lawrence. Since that time she has fought a non-stop running battle in the courts – causing only respondent to incur legal fees along the way given her *pro se* status – to keep the Condo for herself and to deny Mr. Lawrence’s heirs from owning the Condo. But Ms. Koehler

has no legal right to the Condo. This Court should affirm so that the parties can put this entire unfortunate, seven-years-and-counting episode behind them.

SIGNED this 7 day of December, 2012.

BLACKMON HOLMES PLLC



Craig Blackmon, WSBA No. 29240
Attorney for Respondents

AFFIDAVIT OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of Washington, that on the below date, I sent the foregoing by .pdf attached to an email addressed as follows (pursuant to prior agreement and longstanding practice of counsel and this *pro se* party), and in addition I sent the foregoing via U.S. Mail, first class postage prepaid to the following address:

Mary Fung Koehler
Maryfung7@yahoo.com
2629 – 11th Ave. E.
Seattle, WA 98102

And, as a courtesy, to:

James Varnell
jimvarnell@zcvbs.com

DATED this 27th day of December, 2012, at Seattle, Washington.



Claire Hartman
Legal Assistant to Craig Blackmon