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COURT OF APPEALS
DIVISION II

2014 DEC 18 PM 1:13

STATE OF WASHINGTON

BY 
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CASE NO. 46738-1-II

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

AIKEN, ST. LOUIS & SILJEG, P.S.,

Appellant,

vs.

JENNIFER LINTH,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
CAUSE NO. 12-2-00972-7

BRIEF OF APPELLANT

AIKEN, ST. LOUIS & SILJEG, P.S.

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I. INTRODUCTION

This brief is filed on behalf of the appellant Aiken St. Louis & Siljeg, P.S. (hereafter the “Aiken Firm”). The Aiken Firm filed a motion seeking enforcement of its statutory attorney’s lien rights pursuant to RCW 60.40 et seq. This appeal follows from the Superior Court’s ruling on the motion denying it in part and granting it in part.

The Aiken Firm provided legal services to Jennifer Linth and Carolyn Linth in a complicated trust dispute involving multiple parties. The Aiken Firm rendered the services from 2001 until 2005 when a settlement was reached. The Aiken Firm continued to provide services from 2005 to 2009 related to the performance of the settlement agreement.

The Linths were the major beneficiaries of the settlement. The agreement provides for the sale of a 58.8 acre parcel of real estate and distribution of the settlement proceeds to the competing claimants in satisfaction of their claims. Under the settlement agreement, the Linths would receive the greatest share of the sale proceeds.

The Trust had a firm offer on the property in 2007 for \$3.7 million. It did not close, but the offer is representative of the value of the property. In addition, the Trust sold a conservation easement to the North Olympic Land Trust for \$200,000.00. Thus, the potential benefits to the Linths from the settlement agreement were (1) the greatest share of an estimated \$3.9 million, less selling costs and taxes; (2) the right to live on the property rent-free pending sale (a right that has in fact been exercised for

the last 13 years); and (3) an option to purchase a Carve-Out Parcel on the property (with the cost of creating the parcel paid for by the Trust).

The unpaid legal fees and advanced costs owing to the Aiken Firm to produce this result is \$198,965.99, plus interest, for the 7 years of work on the dispute from 2002 to 2009. The Trustee (Jennifer Linth) is not making any effort to sell the property pursuant to the settlement. The sale of the property is necessary to generate the funds necessary to pay for the legal services and satisfy the lien. Accordingly, the Aiken Firm brought a lien enforcement action.

The Superior Court ruled that the lien statute does not give an attorney the right to active enforcement of the settlement agreement the same as the client has. Rather, according to the ruling, the statutory lien is passive in nature. The attorney must stand by and wait for proceeds to come into possession of the client. According to this ruling, the lien only attaches to proceeds in the possession of the client. Thus, if no proceeds are ever received by the client, then the attorney has no lien and can do nothing to enforce the agreement to compel performance of the agreement so as to generate sale proceeds.

The effect of the ruling is to nullify an attorney's statutory lien. A "lien" on proceeds in the possession of the client is no lien at all. The client's assets are always reachable in a collection action on the debt. The purpose of the lien remedy is to provide an option for collection from another source alternative to suing the client.

II. ASSIGNMENTS OF ERROR

The Superior Court erred in finding as follows:

1. “The lien extends [only] to any monetary sum received in the trust action that comes into Jennifer Linth’s possession pursuant to RCW 60.40.010(5).” (CP 098)
2. “RCW 60.40.010(2) does not grant the Aiken Firm the authority to remove Jennifer Linth as trustee, appoint a new trustee or compel the sale of the trust’s Green Point Property.” (CP 099)
3. “The total amount of attorney fees owed is a contested factual issue requiring a hearing or trial for determination.” (CP 099)

The Superior Court erred in entering the following ruling:

1. “The Aiken Firm’s motion to enforce their lien rights by removing Jennifer Linth as trustee, appointing a new trustee and compelling the sale of the trust’s Green Point Property is denied.” (CP 099)
2. Denying by Memorandum Opinion and Order the Motion for Reconsideration. (CP 027-030).

III. ISSUES PRESENTED

1. RCW 60.40.010(1)(d) provides that an attorney has a lien “[u]pon an action . . . and its proceeds” The first issue is whether the lien only extends to “proceeds in possession of the client” (as the Superior

Court ruled) notwithstanding the express statutory language that the lien extends to the “action **and** to its proceeds” without regard to who possess the proceeds or whether they have been paid or are payable?

2. RCW 60.40.010(2) provides that “[a]ttorneys have the same right and power over actions to enforce their liens under subsection (1)(d) . . . as their clients have for the amount due thereon to them.” The second issue is whether this statute gives the Aiken Firm the same right to enforce the settlement agreement as the client has?

3. The third issue is whether the exercise of the right pursuant to RCW 60.40.010(2) authorizes the Aiken Firm to seek appointment of a new trustee who will perform the settlement agreement and create “proceeds” for distribution pursuant to the agreement?

4. The fourth issue is whether there is any genuine fact issue over the amount of the lien given that the lien amount is a sum certain approved by Ms. Linth and given that she has waived her interest in the settlement.

IV. STATEMENT OF THE FACTS

A. Underlying Trust Dispute and Parties.

In 2001, Jennifer Linth and Carolyn Linth retained the Aiken Firm to provide legal representation to resolve a trust and estate dispute involving the Evelyn M. Plant Trust and Estate. (CP 326) Evelyn Plant

died on January 1, 2001. (CP 346) She had created a trust in July 2000 and transferred into trust her real property, bank accounts, investment account and automobiles. (CP 112-137) A major asset of the Trust was a 58.8 acre parcel of real property overlooking the Straits of Juan De Fuca known as the “Green Point Property.” (CP 116); (CP 614-623)

Ms. Plant sought to amend the Trust months before her death. (CP 139-142) The amendment was incomplete at the time of her death (it was missing Exhibit 1). She signed the amendment before Exhibit 1 was complete. (CP 140-141) The amendment is dated August 22, 2000. (CP 139)

The amendment purported to disinherit Crista Ministries by amending paragraph 5.12. (CP 139-142) Crista Ministries had fallen out of favor with Ms. Plant for reasons that are irrelevant to the appeal. The amendment also purported to give an interest in the Green Point Property to a Foundation to be established by Ms. Plant pursuant to a plan “attached as Exhibit 1” and subject to a life estate in favor of Jennifer Linth and Carolyn Linth. (CP 139-140)

At the time of Ms. Plant’s death, she had not formed the Foundation. (CP 147-151) She also had not clearly prepared a final plan for the Foundation (i.e., Exhibit 1), although a plan or concept had been under discussion prior to her death. (CP 147-151) However, no formal plan was ever attached as Exhibit 1 to the trust amendment. (CP 139-142) She unexpectedly died before it could be completed.

Carolyn Linth (now deceased) was a friend of Ms. Plant. Jennifer Linth was Carolyn's daughter. Jennifer was unrelated to Ms. Plant, but provided home care to Ms. Plant, lived with her and drove for Ms. Plant on her various errands. Jennifer was not otherwise employed except to donate her services to Ms. Plant and others.

The gift of the Green Point Property to the unformed Foundation was subject to a right “[f]or a period of time measured by the life of trustor’s friends, Carolyn Linth . . . and her daughter, Jennifer Middents Linth . . . to occupy trustor’s residence at Green Point, free of any costs, subject to the Foundation plan.” (CP 140) Elsewhere, in the amendment it refers to the right to occupy the residence as a “life estate.” (CP 140) The amendment also provided that the deed to the Foundation should provide for a conservation easement to maintain the property as an ecological preserve or wildlife refuge. (CP 140-141) The trust provided that the residuary estate, not otherwise gifted, was to be distributed to various charitable beneficiaries. (CP 119-120)

Crista Ministries took the position that the amendment was invalid for indefiniteness because the Foundation was not formed and there was no plan for the Foundation attached to the amendment. (CP 162); (CP 346) They also contended that the Linths exercised undue influence over Ms. Plant to disinherit Crista. Crista sought enforcement of the trust in their favor without the amendment.

The Linths took the position that the amendment was valid and did not fail for indefiniteness. (CP 150-151) The Foundation plan could be

supplied by extrinsic evidence. (CP 150-151) Further, that the Linths were entitled to a life estate. (CP 150-151). Other parties disputed the entitlement to a “life estate”, contending the intent was not a property interest but a privilege to reside on the premises in exchange for services.

The various charitable beneficiaries took the position that the amendment was invalid such that the Linths should receive nothing. (CP 345-346) Furthermore, the trust as originally drafted should not be enforced because Ms. Plant did not intend for Crista Ministries to receive anything either. As a result, everything should go to the residuary beneficiaries and Crista and the Linths should receive nothing.

A lawsuit for determination of the Linth’s beneficiary interest in the Evelyn M. Plant Trust was filed in November 2001 in Clallam County Superior Court entitled *Linth v. Doran*, Clallam County Superior Court Cause No. 01-2-00918-7. (CP 346) The other interested parties contesting entitlement against the Linths were Crista Ministries, Inc., and the charitable beneficiaries namely: Hospice of Clallam County, Healthy Families of Clallam County, Operation Uplift Cancer Support, World Healing Center Church, Inc., Trinity Broadcasting Network, Inc., Christian Broadcasting Network, Inc. and Samaritan’s Purse. (CP 345) The State of Washington, Office of the Attorney General, was joined in the lawsuit to represent the public interest connected with the charitable beneficiaries. (CP 345) The North Olympic Land Trust intervened in the lawsuit to pursue a conservation easement to a part of the property. (CP 384)

B. 2002 Failed Mediation and Subsequent Settlement Effort Between 2002 and May 2005.

Court Commissioner William Knebes¹ observed that the “case begs for a creative solution” and urged the parties to make their best effort to resolve the matter. (CP 328) The Aiken firm took the lead role in the effort to settle the controversy on behalf of the Linths.² (CP 326-327) Mediation failed in June 2002, but the parties’ discussions laid the groundwork for a settlement involving the sale of the Green Point property, and other real estate, and distribution of the sale proceeds among the competing beneficiaries. (CP 335)

In June 2002, following the failed mediation, Jennifer Linth wrote her several attorneys stating that she recognized the necessity of working out a cash settlement for the value of the disputed life estate. “While it is obviously not the first choice, it is more desirable than some of the other options.” (CP 281-282); (CP 287-288) Later, as that settlement work was unfolding with the on-going commitment of substantial time and effort, Ms. Linth wrote that “please know that you will be rewarded for your work when the settlement is reached and the property sold.” (CP 282) After approximately three years of negotiations, the parties finally reached agreement and everyone (except the North Olympic Land Trust) signed a

¹ All of the Clallam County Superior Court judges recused themselves.

² Joining in the legal effort on behalf of the Linths was the Seattle law firm of Riddell Williams and later the Seattle firm of Tousley Brain Stephens. (CP 282); (CP 334-335)

Nonjudicial Dispute Resolution Agreement resolving all issues between them in May 2005. (CP 344-401)

The NJDRA, the version in May 2005, provided an option to the North Olympic Land Trust (“NOLT”) to purchase a conservation easement on a portion of the property. (CP 350-351) NOLT objected that the terms of the option were not satisfactory to it. (CP 327) At the hearing for court approval of the NJDRA in May 2005, the Clallam County Superior Court declined to approve the NJDRA over NOLT’s objection. The Court sent the parties back for further negotiations with NOLT to resolve this remaining dispute. (CP 283)

C. Further Settlement Work Between May 2005 and October 2005.

The parties conducted further negotiations with NOLT, between May 2005 and September 2005. (CP 327) An agreement finally was reached with NOLT. (CP 327) The parties signed an Amended NJDRA effective September 21, 2005. (CP 344-401) Another court hearing for approval of the NJDRA was scheduled for October 13, 2005. (CP 327) Ms. Linth attended with her counsel. (CP 383) No one presented any objection to the settlement. The Clallam County Superior Court approved the NJDRA on October 13, 2005. (CP 403-405)

D. Performance of the Settlement Agreement.

The NJDRA, as amended, provides for the sale of the Green Point Property and distribution of the sale proceeds to the various beneficiaries. (CP 347) It provides that, after payment of selling costs, taxes, and unpaid

trust administration expenses, that the sale proceeds shall be distributed as follows: (a) \$600,000.00 to Jennifer and Carolyn Linth; (b) \$160,000.00 to Crista Ministries; (c) \$100,000.00 to the residuary beneficiaries; (d) \$100,000.00 to Jennifer and Carolyn Linth to reimburse their payment of past legal bills they paid with a \$100,000.00 cash bequest from the Trust; and, (e) remaining proceeds split between the Linths and the residuary beneficiaries with the Linths receiving 65% of the surplus and the residuary beneficiaries receiving 35%. (CP 353-356) Ms. Linth was entitled to live at Green Point rent-free until it sold. (CP 356-357) She also was given an option to purchase a “Carve-out Parcel” at Green Point. (CP 348-350)

Pursuant to the NJDRA, Glen Smith was appointed Successor Trustee. (CP 351) Mr. Smith was Jennifer Linth’s brother-in-law. He had the responsibility to perform the NJDRA. He arranged for appraisals of the property and the sale of the conservation easement to NOLT. Ms. Linth exercised her option on a Carve-Out Parcel on the property for her to own as her individual property. Following her exercise of this option, Mr. Smith expended trust monies to create the Carve-Out Parcel as a separate legal parcel for her.

In 2007, Mr. Smith received a firm offer for Green Point from the Trust for Public Lands in the amount of \$3.7 million. (CP 329) In October 2006, expecting the sale to close, the Aiken Firm served Glen Smith with a notice of attorney’s lien on sale proceeds distributable to

Jennifer and Carolyn Linth. (CP 329); (CP 410-551) Ms. Linth approved the lien, and expressed thanks for the continuing help. (CP 554)³

In May 2007, Mr. Smith distributed \$29,999.45 to Jennifer Linth as an advance (because of financial need) on her distribution from sale proceeds. (CP 610) He first consulted with his attorney Craig Ritchie about whether he could make the distribution given the attorney liens. (CP 610-611) Mr. Ritchie advised Mr. Smith that based on an existing firm offer on Green Point for \$3.7 million; it was highly unlikely there would be insufficient assets to satisfy the attorney liens. (CP 611) Mr. Ritchie assured counsel “that they are going to be paid in the future for any legitimate liens.” (CP 611)

Glen Smith resigned as the Successor Trustee in 2008, when the sale of Green Point fell through in part because of Ms. Linth’s objections to the buyer for the property. (CP 330); (CP 179) Jennifer Linth was appointed as the successor trustee, at her request, in July 2008. (CP 330) She produced no other buyers or offers, although in May and in August, 2009, she reported that she was continuing with the effort to market and sell the property. (CP 613-627) She continued to live at Green Point rent-free.

³ The Notice of Lien was updated with an Amended Notice of Lien on March 13, 2008. (CP 556-608)

E. Motion to Vacate and Legal Malpractice Action Against Carl Gay.

In September 2009, Ms. Linth unexpectedly brought a motion to vacate the NJDRA.⁴ (CP 330) As a result, the Aiken Firm withdrew from further representation of her. *Id.* She withdrew the motion, but then re-noted it in April 2010. *Id.* The Clallam County Superior Court denied her motion in July 2010. *Id.* She appealed. *Id.* The appeal is pending under Court of Appeals Case No. 412853.

Also, in 2009, Ms. Linth filed a legal malpractice action against Attorney Carl Gay alleging negligence in the preparation of the trust instrument that resulted in the trust dispute following Ms. Plant's death in 2001. (CP 331) She alleged that Attorney Gay's negligence damaged her by the legal expense she incurred (to the Aiken Firm and others) to resolve the dispute. *Id.* Her action was dismissed with prejudice on summary judgment in 2013 on the basis that Attorney Gay had no duty to her as a potential beneficiary of the trust. *Id.* Her appeal is pending under Court of Appeals Case No. 452502.

F. The Lien Enforcement Action.

⁴ This motion to vacate came 4 years after the court approved settlement. At this time, there also had been substantial past performance. NOLT had accepted and paid for a conservation easement. Ms. Linth accepted approximately \$30,000.00 as an advance on her share of sale proceeds. She also had accepted the benefit of living rent-free at Green Point where she still lives almost 10 years after the settlement. The motion also came after Ms. Linth had assumed the position of Trustee in 2008 and assumed the responsibility to perform the settlement agreement.

The Aiken Firm brought the lien enforcement action in 2012. (CP 637) Jennifer and Carolyn Linth had agreed to pay Aiken, St. Louis & Siljeg, P.S., for their legal services on a monthly basis at the regular hourly rates charged by the attorneys assigned to their case. (CP 327) The Linths paid \$56,785.78 from July 17, 2001 to June 21, 2002. (CP 327-328) She was able to make these payments from a \$100,000.00 cash bequest as a trust gift from Ms. Plant at her death. (CP 115) In June 2002, mediation had failed, and the Linths were without sufficient funds to cover the legal expense of ongoing litigation. (CP 328)

The Aiken Firm agreed to continue to provide legal services on the same terms except that payment would be deferred until a settlement was reached and the property sold. (CP 328) The Aiken Firm continued with the work, from June 2002 to October 2005, to produce the settlement described above. (CP 328) Following settlement, the Aiken Firm continued to provide legal services to Jennifer Linth, until 2009, related to the performance of the settlement agreement. (CP 328-329)

The following chart summarizes the unpaid fees and costs by year:

<u>YEAR</u>	<u>FEES & COSTS</u>
2002	\$ 27,290.99
2003	\$ 57,329.50
2004	\$ 37,861.00
2005	\$ 60,075.00
2006	\$ 4,225.00
2007	\$ 9,007.00

2008	\$ 2,568.00
2009	<u>\$ 609.50</u>
TOTAL	\$198,965.99

(CP 328); (CP 646-647) The time and effort that went into this work is described in the declaration of counsel. (CP 333-341); (CP 290-292) Costs advanced are approximately \$7,500.00 (included within the above total). (CP 328) The above total is exclusive of interest. The average billing rate was \$225.00 per hour. (CP 328-329) Jennifer Linth was provided with monthly statements throughout the period of representation detailing the services rendered by task and time spent on each task. (CP 329); (CP 413-607)

Following the filing of this lien action, Ms. Linth wrote in November 2012 to assure Mr. Olson and the Aiken Firm that she “would reward you for your job.” She asked for patience and to “have faith in your own hard fought effort” (CP 331); (CP 283-284); (CP 297) Still, in 2014, Green Point remains unsold. (CP 284) Ms. Linth, in her capacity as trustee, is not to the Aiken Firm’s knowledge marketing or attempting to sell the property. She continues to live at Green Point rent-free taking advantage of that settlement term. Despite her assurances of payment, she is not outwardly making any arrangements to pay the Aiken Firm or the other law firms that represented her.

The issue regarding the Aiken Firms’ statutory lien rights and remedies came before the Clallam County Superior Court for hearing on April 11, 2014 pursuant to motion practice. (CP 271-272) The Aiken

Firm sought a decision declaring that it had valid lien rights in an undisputed amount and that it had standing by statute to enforce the NJDRA. (CP 628-636) Enforcement of the NJDRA meant appointing another trustee who will perform its terms, sell Green Point and provide the funds necessary to satisfy the lien rights. The Honorable Erik Rohrer heard argument from counsel and reserved ruling. (CP 271-272)

Judge Rohrer ruled by written memorandum opinion and order dated June 31 (sic), 2014 and filed on July 1, 2014. (CP 88-99) RCW 60.40.010(1)(d) provides that an attorney has a lien “[u]pon an action . . . and its proceeds” Judge Rohrer ruled that, notwithstanding the statutory language extending the lien to the “action” and “its proceeds,” he construes the statute as limiting the lien to the “proceeds in possession of the client.” (CP 93) Therefore, according to his statutory construction, the lien only extends “to any monetary sum received in the related trust action that comes into Ms. Linth’s possession.” (CP 93); (CP 98)

RCW 60.40.010(2) provides that “[a]ttorneys have the same right and power over actions to enforce their liens under subsection (1)(d) . . . as their clients have for the amount due thereon to them.” The Aiken Firm argued that this statute gives it the same right as Ms. Linth has to enforce the settlement agreement (the NJDRA). (CP 634) This includes the right to a change in trustee who will sell the Green Point property and create the settlement “proceeds” to fund the distributions under the agreement. (CP 634)

Judge Rohrer ruled that the statute is ambiguous. (CP 95-98) He looked to legislative history and *Smith v. Moran, Windes & Wong*, 145 Wn. App. 459, 187 P.3d 275 (2008). Based on these resources, he ruled that the purpose of the statute “is to recognize an attorney’s property interest in his or her client’s case in order to avoid double federal income taxation.” (CP 96) He reasoned that there is nothing in the legislative history to suggest a broader purpose or a grant of greater attorney authority. (CP 96) He concluded that the right given by the statute is not operative except as necessary “to avoid double taxation.” (CP 96) Therefore, because this case does not involve income tax issues, the Aiken Firm had no ownership interest in the action and could not take action to enforce its lien.

In conclusion, Judge Rohrer ruled that the Aiken Firm has a valid attorney’s lien for compensation on the related trust action. (CP 98) The lien arises by operation of law pursuant to RCW 60.40.010(1)(d). *Id.* The lien extends only to monetary sums received in the trust action that Jennifer Linth receives. *Id.* The Aiken Firm has a “continuing lien” on any proceeds received by Ms. Linth. *Id.*

Jennifer Linth received \$29,999.45 in the trust action as an advance on her distribution. (CP 99) The Aiken Firm’s “continuing lien” attaches to those proceeds if any remaining in her possession. *Id.* The total amount of attorney fees is a contested factual issue. *Id.* The Aiken Firm does not have the statutory authority to remove the Trustee or compel the sale of Green Point. *Id.*

The effect of the ruling was to nullify the Aiken Firm's statutory lien rights. According to the ruling, the Aiken Firm cannot compel enforcement of the settlement agreement to create the funds necessary to satisfy the lien. According to the ruling, all that the statute authorizes is a passive "continuing lien" in future proceeds whenever they come into existence and are received by Ms. Linth.

The Aiken Firm moved for reconsideration on July 8, 2014. (CP 40-87) Judge Rohrer asked for a response. He denied the motion for reconsideration on August 27, 2014. (CP 27-30) The Notice of Appeal was filed on September 25, 2014. (CP 005-006).

V. ARGUMENT

A. Lien Rights Extend to the Action and Its Proceeds.

The reasoning behind Judge Rohrer's conclusion that the lien extends only to proceeds in the possession of the client is not clear from his opinion. His opinion on this point, at page 6 (CP 093), is cryptic. His citation is to *Ferguson Firm, PLLC v. Teller & Associates*, 178 Wn. App. 622, 632, 316 P.3d 509 (2013), RCW 60.40.010(1)(d) and RCW 60.40.010(5).

Judge Rohrer cites subsection (5) for the conclusion that the lien only extends to proceeds that come into Ms. Linth's possession. This conclusion misreads that subsection. Subsection 5 states "proceeds" that come into Ms. Linth's possession do not remain "proceeds" unless they are "identifiable cash proceeds" as defined by the Uniform Commercial

Code, RCW 62A.9A-315(b)(2). If the cash is commingled and if it cannot be traced, then it is not “identifiable cash proceeds.” Subsection (5) is not a limitation on the scope of the lien under subsection (1)(d); rather, it is a limitation on the lien against “proceeds” once delivered to the client.

The *Ferguson* case does not support Judge Rohrer’s conclusion either. In *Ferguson*, a settlement of an employment discrimination case produced an entitlement to a contingent fee of \$530,107.58. Three law firms disputed how the fee should be allocated or shared among them. Ferguson began the representation of the clients. Ferguson engaged Teller to jointly represent the clients. The clients accepted the settlement offer while being represented solely by Teller. Teller and Ferguson disputed how the fee should be allocated between them.

Ferguson hired Waid to represent her in the fee dispute with Teller. Waid was to be paid from the proceeds recovered by Ferguson in the fee dispute. The full amount of the contingent fee -- \$530,107.58 – was paid into the court registry. Ferguson terminated Waid’s employment. Waid filed an attorney’s lien for \$78,350.85 in connection with his representation of Ferguson.

The lower court ordered that Teller was entitled to 50% of the contingent fee held in the court registry and Ferguson was entitled to the other 50%. The court ordered that \$179,351.59 of Ferguson’s 50% share would remain in the registry pending resolution of Waid’s lien. The remaining amount, \$85,702.20, would be disbursed to Ferguson.

Ferguson appealed. She also moved in the lower court to have Waid's lien set aside. The lower court granted her motion and ordered that \$78,350.85 be disbursed to her plus interest. The basis for the ruling was that the contingent fee held in the registry was not "proceeds" received by Ferguson due to Waid's services.

Waid appealed. Waid argued that the funds disbursed to Ferguson from working on the underlying employment discrimination case constitute "proceeds" as to which his lien attaches. The Court of Appeals agreed. "The plain language of the statute establishes that 'any monetary sum received in the action' constitutes 'proceeds.' Ferguson received a monetary sum and, therefore, received 'proceeds' to which the lien attaches." *Id.* at 632.

The case lends no support to Judge Rohrer's conclusion that the lien statute only applies to proceeds received by the client in the action. True, the lien does extend to proceeds received in the action. But it also extends to the "action" and the right to receive proceeds not yet paid. The facts in the *Ferguson* case did not involve lien enforcement "upon the action" to reach "proceeds" payable pursuant to the settlement.

Ferguson lends support to the Aiken Firm's argument. In *Ferguson*, the court stated that the "goal of statutory interpretation is to discern and carry out legislative intent. . . . Absent ambiguity, a statute's meaning is derived from the language of the statute and we must give effect to that plain meaning as an expression of legislative intent." *Id.* at 631.

The opinion goes on to observe that the statute expressly provides that the lien attaches to an “action.” It attaches to the action “and” to its proceeds. It is superior to all other liens. It is not affected by settlement of the parties until satisfied in full.

These points are supported by clear, express statutory language. *First*, as stated above, the statutory attorney’s lien expressly extends “upon an action” and upon “its proceeds.” RCW 60.40.010(1)(d). Pursuant to RCW 60.40.010(1)(d), the Aiken firm has a lien for its compensation “[u]pon an action . . . 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 performed under a special agreement, for the sum due under such agreement; . . .” The lien attaches automatically “upon the action” and “its proceeds after commencement thereof . . .” RCW 60.40.010(1)(d). There is no ambiguity requiring statutory construction.

The lien arises by operation of law. *Smith v. Moran, Windes & Wong, PLLC, supra* 145 Wn. App. at 466. “The lien attached to this action and any proceeds of the action, specifically settlement funds.” *Id.* at 466. “That lien is superior to all other liens. It is not affected by settlement of the parties until the lien is satisfied in full.” *Id.* at 466-67. See also RCW 60.40.010(4).⁵ The lien does not require any affirmative

⁵ The cited statute states: “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.”

acts other than commencing the lawsuit. *Id.* at 470. No formal notice of lien “is required by subsection (1)(d), establishing a lien against an action and its proceeds.” *Id.*

In 2004, the Washington legislature enacted the subject amendments to “track Oregon law.” *Senate Bill Report SB6270* (copy attached in the appendix) (CP 050). The legislature sought to establish a “property right” in the action for the attorney that could not be extinguished except by payment of the attorney and that the attorney’s lien was superior to all other liens. *Id.* The attorney, under Washington law, has “a legal right or interest . . . *in the money payable to the client as a settlement . . .*” *House Bill Report ESSB6270* at 5 (copy attached in the appendix) (CP 053-054) (emphasis added). “Attorneys have the same property rights and power to enforce their liens as their clients for the monetary amount due to them in an action or a judgment.” *Bill Analysis by Judicial Committee* (quote from summary of bill) (CP 059) (copy attached).

In *Potter v. Schlessor Co.*, 63 P.3d 1172 (Ore. 2003), the defendant argued that the attorney’s lien only attaches to “proceeds.” Therefore, the defendant contended that the attorney could **not** bring the lien action

because the “proceeds” were in the possession of the client.⁶ The Oregon Supreme Court rejected the defendant’s argument. The Oregon Supreme Court pointed out that under the statute the lien attaches to **both** the action and the proceeds. The statute protects the lien against extinguishment by a party to the action or any other party. “*The lien is a charge on the action and the parties to the action cannot extinguish or affect the attorney’s lien by any means*” *Potter, supra* 63 P.3d at 1174-75 (emphasis added). The attorney may seek enforcement of the lien “to the extent of the action’s value” regardless of whether the proceeds have been paid or who has the proceeds if paid. *Id.*

The lien extends to the “action” and extends to amounts payable pursuant to the settlement of the action or any judgment entered in the action. The lien over the action and over any judgment is for the “amounts due thereon.” RCW 60.40.010(2). The attorney’s lien assures that amounts due from the action are paid to the attorney in satisfaction of the lien rather than to the client.

An attorney’s lien rights by express statutory language do not extend only to “proceeds” – i.e., identifiable cash proceeds -- in the client’s possession. The lien extends to the “action” and to any

⁶ While, the defendant’s argument in *Potter* was erroneous, it at least had some logic behind it given the limited lien rights as to proceeds in possession of the client. Proceeds in possession of the client that are commingled and not identifiable cash proceeds are not “proceeds.” RCW 60.40.010(5). Ironically, in this case, notwithstanding this statute providing that proceeds received and commingled by the client are not “proceeds”, Judge Rohrer reasoned the lien only extends to proceeds in possession of the client without discussion of commingling.

“proceeds” regardless of who has them or whether they have been paid yet. The purpose of the lien would be defeated if it were otherwise. An attorney’s lien rights to secure payment would be a meaningless right if it was so limited as to only extend to sums in the client’s possession that remained “identifiable cash proceeds.”

B. The Attorney Has the Same Right as The Client to Enforce the Settlement Agreement.

Pursuant to RCW 60.40.010(2), “[a]ttorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section . . . as their clients have for the amount due thereon to them.” Jennifer Linth, as a beneficiary of the trust and a party to the NJDRA, has the right to enforce the NJDRA, compel the sale of the Green Point property, and seek removal of any Trustee as necessary to secure her right to a distribution of sale proceeds. The Aiken Firm has the same right and power, pursuant to the above statute, to enforce their lien rights.

Furthermore, “[t]he lien created by subsection (1)(d) of this section is not affected by settlement between the parties to this action until the lien of the attorney for fees based thereon is satisfied.” *Id.* Thus, the Aiken Firm’s lien rights are unaffected by any action of Ms. Linth or other parties that waive, settle or extinguish their rights under the NJDRA.⁷ The Aiken Firm’s lien rights are unaffected until the lien is satisfied.

⁷ Ms. Linth waived and extinguished her rights in the settlement agreement. (CP 104-106); (CP 108-110). The Aiken Firm cautioned her counsel, at that time, that if she did so it did not affect the Aiken Firm’s lien rights. (CP 283-284); (CP 294). She went ahead and waived her rights knowing it did not affect the lien rights.

Despite this express statutory language, the lower court interpreted the statute as “[not] granting the attorney authority to do anything within the client’s power to enforce the attorney’s lien.” (CP 096) The Court reached its conclusion based on legislative history and the decision in *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008). (CP 096) The lower court’s construction of the statute was that the attorney’s authority granted by RCW 60.40.010(2) does not exist except as necessary to establish an ownership interest in the action to avoid double taxation of wage recoveries. (CP 096)

There is nothing in the statute or the legislative history to support this limitation on this statutory lien of general application. A primary purpose of the 2004 legislative amendments to RCW 60.40 *et seq.* was to make it clear in any case that the attorney has a *property or ownership* right or interest in the action *the same as the client*. See Legislative History in Appendix. (CP 050-067). The 2004 amendments were a reaction to the Ninth Circuit opinion in a civil rights case, decided under Oregon law, entitled *Banaitis v. Commissioner of Internal Revenue Service*, 340 F.3d 1074 (9th Cir. 2003). (CP 050) The *Banaitis* decision and the legislative history are described in *Smith v. Moran, Windes & Wong*, 145 Wn. App. 459, 468 n.23, 187 P.3d 275 (2008) (the purpose of the amendments is to recognize the attorney’s property interest in the action).

In *Banaitis* (a discrimination case involving loss of wages), the Ninth Circuit reasoned that how state law defines an attorney’s rights in

the action determines whether the client's recovery for attorney fees should be included in the client's gross income (along with the recovered wages) for income tax purposes. *Banaitis*, *supra* 340 F.3d at 1081. In *Banaitis*, the Ninth Circuit explained that it had decided an earlier case (the "*Coady* case") involving the same issue under Alaska law. *Id.* "Under Alaska law, attorneys do not have a superior lien or ownership interest in the cause of action." *Id.* The relevant Alaska statute does not "grant attorneys any right and power over the suits, judgments, or decrees of their clients." *Id.* Accordingly, because the attorney does not have ownership or property rights in the action under Alaska law, the attorney fees paid on the client's behalf should be included in the client's gross income or so the Ninth Circuit reasoned in *Coady* decided under Alaska law.

The *Banaitis* court then compared Alaska law to Alabama law (reported in a decision from another Circuit) and noted that a different result from *Coady* is dictated when the state law "(1) invested attorneys with a 'lien superior to all liens but tax liens' in suits, judgments, and decrees for money, (2) mandated that 'no person shall be at liberty to satisfy said suit, judgment or decree, until the lien or claim of the attorney for his fees is fully satisfied,' and (3) determined that attorneys at law shall have *the same right and power over said suits, judgments and decrees to enforce their liens, as their clients had or may have for the amount due thereon to them.*" *Id.* at 1082 (emphasis added). The *Banaitis* court

observed that Oregon law “mirrors” Alabama law and was unlike Alaska law described in *Coady*. *Id.*

Oregon law, like Alabama law, provides “that attorneys shall have ‘the same right and power over actions . . . to enforce their liens as clients have for the amount of judgment due thereon to them.’” *Id.* The *Banaitis* court cited to the Oregon Supreme Court decision in *Potter v. Schlessler Co.*, *supra* 63 P.3d 1172, for the proposition that “Oregon law vests attorneys with property interests that cannot be extinguished or discharged by the parties to the action except by payment to the attorney” *Id.* Thus, because Oregon law vested the attorney with an ownership or property interest in the action (the same as the client) for the amount due, the recovery for attorney fees was not taxable to the client.

In 2004, the Washington legislature enacted the subject amendments to “track Oregon law.” *Senate Bill Report SB6270* (copy attached in appendix) (CP 050). The legislature sought to establish a “property right” in the action for the attorney that could not be extinguished except by payment of the attorney and that the attorney’s lien was superior to all other liens. *Id.* The attorney, under Washington law, has “a legal right or interest . . . in the money payable to the client as a settlement” *House Bill Report ESSB6270* at 5 (copy attached in appendix) (emphasis added) (CP 054). “Attorneys have the same property rights and power to enforce their liens as their clients for the monetary amount due to them in an action or a judgment.” *Bill Analysis by Judicial*

Committee (quote from summary of bill) (copy attached in appendix) (CP 059).

Washington law “tracks” Oregon law; and, Oregon law “mirrors” Alabama law. The lien is on the action or suit, and the attorney has the same power “to enforce their liens as their clients for the monetary amount due to them in an action or a judgment.” The 2004 amendments sought to clarify that under Washington law the attorney has the same ownership or property interest in the action as is provided under either Oregon or Alabama law.

The tax issues on recoveries in employment or wage cases pre-dating 2004 are no longer relevant due to changes in tax laws since 2004, and due to the United States Supreme Court decision in *Commissioner of Internal Revenue v. Banks*, 125 S. Ct. 826 (2005). In the *Banks* case, the United States Supreme Court ruled that state law is not controlling on the taxation issue. The Supreme Court ruled, under federal law, that when a litigant’s recovery includes lost income, the income includes the portion of the recovery paid to the attorney as a contingent fee. *Banks, supra* 125 S.Ct. at 430. The Supreme Court decision reverses *Banaitis. Id.* at 439.

However, the Supreme Court observed that the American Jobs Creation Act of 2004 moots the issue for subsequent tax years. This Act allows a taxpayer to deduct attorney fees and costs from gross income in an action involving unlawful discrimination. *Id.* at 433. The point of this subsequent history is that due to changes in tax laws the tax issues pre-dating 2004 no longer exist. None of this is too relevant to the

construction of the express language in RCW 60.40.010(2). The statute creates an ownership interest for the attorney of general application unrelated to tax issues.

The attorney's ownership interest in the action is not rescinded *sub silentio* by post-2004 changes in federal tax laws which are the implication from Judge Rohrer's misunderstanding of the law. The property rights established by Washington statute for the benefit and protection of attorneys apply without exception or qualification. There is no limitation in the statute to particular cases or particular issues. The statutory rights are a rule of general application.

The lower court also cited to *Smith v. Moran, Windes & Wong*, *supra* at 145 Wn. App. 459. *Smith* does not support the lower court's ruling. In *Smith*, as explained above, the Court of Appeals stated that the legislative history was clear in creating a property interest on behalf of the attorney in the action. *Smith, supra* 145 Wn. App. at 468. That property right or interest of the attorney is expressly established by statute without limitation except as stated in the statutes. The amendments broadly state the attorney's lien rights applicable in any case. It is not special legislation applicable only to employment cases implicating tax issues. As stated in *Smith*, "[t]hese [statutory] provisions reinforce rather than diminish the nature and importance of the property interest of the attorney's lien *in the action and its proceeds.*" *Id.* at 469.

Simply stated, the attorney explicitly, in any case, has the same authority and the same rights as the client to enforce liens for the monetary

amount due in the action. The Aiken Firm has the statutory right to enforce the NJDRA insofar as necessary to protect its lien rights. This includes the right to seek a change of trustee for reasonable cause and to compel a sale of the property to provide the settlement funds necessary to satisfy the lien.

C. The Amount of the Lien is Beyond Reasonable Controversy.

The amount of the lien is fixed as a sum certain and established by agreement. Ms. Linth received and paid the Aiken Firm's bills until approximately June 2002. (CP 327-328) At that point, Ms. Linth explained she had insufficient funds to make any further payment. The Aiken Firm explained it would not abandon her. It would continue to work at the settlement and defer payment until the settlement was reached, the property sold and proceeds distributed to pay the legal expense. (CP 327-328).

As the settlement work was unfolding, with the on-going commitment of substantial time and effort, Ms. Linth wrote the Aiken Firm that "please know that you will be rewarded for your work when the settlement is reached and the property sold." (CP 282).

The Aiken Firm continued to send Ms. Linth detailed monthly invoices itemized by task and time spent on work performed every month. The voluminous invoices are part of the record. (CP 409-608). A ledger is provided summarizing the billing history. (CP 407-408). Ms. Linth did not object to any bill throughout the performance of the work from June

2002 to October 2005 when the settlement was finally approved by the court. (CP 282). She continued to request further legal assistance post-October 2005 on details related to the performance of the settlement agreement. (CP 328).

A sale of Green Point appeared imminent in 2006. The Aiken Firm gave Glen Smith, the Trustee at that time, written Notice of a Lien for unpaid fees and costs, plus interest, for services rendered through August 31, 2006. (CP 410-554). The amount of the lien was \$245,823.35 inclusive of interest. (CP 411).

The Aiken Firm sent the Notice of Lien to Ms. Linth in October 2006, when it was served on the Trustee who was Glen Smith at that time. (CP 329) Ms. Linth acknowledged it and thanked counsel for their continuing help. (CP 329); (CP 554). She requested that the Aiken Firm contact her other lawyers and have them file liens as well. (CP 554).

Following receipt of these liens, she also wrote to Trustee Smith, referencing letters from each of her attorneys regarding their liens. (CP 144). She supported payment and sought Mr. Smith's assistance in making the trust and estate whole after paying the expenses necessary to resolve the dispute. (CP 144). She advised Trustee Smith that it "is important to note, per Notice of Lien for Attorney's Fees from Attorney Olson to you dated October 30, 2006, that 'lien(s) will be supplemented for additional charges subsequent to August 31, 2006 through the date' of the closing and final satisfaction of the settlement of the Estate and Trust and any subsequent actions. Itemized invoices should be attached

pursuant to paragraph 3(g) of the Nonjudicial Dispute Resolution Agreement.” The Aiken Firm amended its notice of lien in March 2008, to cover the period from August 31, 2006 to February 28, 2008. (CP 556-608).

Ms. Linth acknowledged her obligation to pay for the past legal services in multiple ways. First, she received and accepted the monthly invoices for years without any objection. The Restatement (Second) of Contracts § 282(1) (1981) explains that “[a] party’s retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.” *Sunnyside Valley Irrigation District v. Roza Irrigation District*, 124 Wn.2d 312, 315, 877 P.2d 1283 (1994). “. . . [I]t is an admission by each party of the facts asserted and a promise by the debtor to pay the sum indicated.” *Id.*

Second, she acknowledged the obligation after the settlement was reached and most of the legal work complete. “. . . [A]ny acknowledgment of the obligation necessarily implies an agreement to pay, unless something in the acknowledgment requires a contrary conclusion.” *Fetty v. Wenger*, 110 Wn. App. 598, 602, 36 P.3d 1123 (2001). She expressly (and in writing) acknowledged the Notice of Lien, dated October 30, 2006, and requested assistance in securing liens from the other attorneys. (CP 554). Her messages and letters do not indicate any intention not to pay. (CP 554); (CP 144). Third, she accepts the amount as evidence of damages or loss to her and the trust or estate in her communication to the Trustee. (CP 144). Ms. Linth also asserted the fees

as damages in her malpractice action against Carl Gay. (CP 146-167). There are repeated promises of payment and acknowledgement of the debt.

As of August 20, 2012, Ms. Linth voluntarily waived and extinguished her rights under the settlement agreement. (CP 104-106); (CP 108-110). Because she waived or extinguished her interest in the settlement, she is unaffected by the payment of the lien claim because it is only payable out of amounts distributable to her from the settlement which she has disclaimed. She has no protectable interest in the issue. She has no standing because if the requested relief is granted, she has no protectable interest that is affected. *Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 469 n.11, ___ P.3d ___ (2014). Individuals who have elected to opt out of a settlement are not parties and have no standing. *Aguirre v. AT&T Wireless*, 109 Wn. App. 80, 85, 33 P.2d 1110 (2001). Other parties are unaffected by payment of the lien claim because it is not payable out of their distributable share.

D. Appointment of New Trustee to Execute the Settlement Agreement.

Ms. Linth is acting as Successor Trustee, but she is not performing the settlement agreement and is unwilling to perform her fiduciary duties owed to the parties who have a remaining interest in the settlement agreement.

“A trustee owes beneficiaries the ‘highest degree of good faith, loyalty and integrity’”. *Casterline v. Roberts*, 168 Wn. App. 376, 383,

284 P.3d 743 (2012). The Aiken Firm has the enforcement right under the lien statute to demand a change in the trustee given that Ms. Linth declines to carry out the agreement. The Aiken Firm has the same beneficial rights and powers over the action as Ms. Linth does. Ms. Linth cannot act as Trustee because she has personal conflicts that make it impossible for her to perform to that high degree of loyalty and faithfulness required of a fiduciary. It is undisputed that she has declined to act; she has even gone so far as to move to vacate the agreement.

“Any beneficiary of a trust . . . may petition the superior court . . . for the appointment or change of a trustee under the procedures provided in RCW 11.96A.080 through 11.96A.200: . . . for any . . . reasonable cause.” RCW 11.98.039(3)(d). Reasonable cause may include a breach of the trustee’s fiduciary duty or an unwillingness to perform. *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996). “A court has a ‘wide latitude of discretion’ to remove the trustee, ‘when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries.” *In re Estate of Cooper*, 81 Wn. App. 79, 94-95, 913 P.2d 393 (1996).

Even if the Court were to find a fact issue over the amount of the lien, the Aiken Firm is entitled to negotiate the fact issue with a disinterested and qualified trustee who is loyal and faithful to the performance of the settlement agreement. The trustee’s duty includes the power and authority to compromise the claim. RCW 11.98.070(11). A

settlement with the trustee avoids unnecessary hearings or further extended litigation.

The lien statute is designed to protect fees earned by counsel payable out of an award or settlement. *King County v. Seawest Inv. Assocs.*, 141 Wn. App. 304, 313, 170 P.3d 53 (2007) citing *United States v. Moulton & Powell*, 188 F.2d 865, 867-68 (9th Cir.1951). “A proceeding to enforce a lien is an equitable proceeding.” *Id.* at 314. The Court has broad discretion in fashioning an equitable remedy. *Id.*

Ms. Linth cannot act impartially as trustee. Moreover, she has indisputably breached her fiduciary duties by neglecting the settlement and willfully failing to perform it. A change of trustee is necessary to bring these issues to an end in a professional and responsible manner without further extended delay and expense.

VI. CONCLUSION

This Court should reverse and remand. The remand should provide instruction to the lower court that the lien extends to the action and to amounts payable out of the settlement pursuant to RCW 60.40.010(1)(d). Further, that the Aiken Firm has the same right as Ms. Linth to enforce the settlement agreement pursuant to RCW 60.40.010(2). Additionally, the Aiken Firm’s rights are unaffected by Ms. Linth’s waiver or settlement of her rights pursuant to RCW 60.40.010(4). The Notice of Lien, dated in October 2006 and approved by Ms. Linth, establishes an undisputed amount owing through August 31, 2006 in the amount of \$245,823.35 inclusive of interest through August 31, 2006. Any

additional amount for services rendered, cost or interest after that date presents fact issues for the lower court to resolve. The trustee should be removed and replaced by an impartial trustee who will carry out the settlement agreement.

Dated this 17 day of December, 2014.

AIKEN, ST. LOUIS & SILJEG, P.S.

By 
William A. Olson, WSBA 09588
Attorneys for Aiken, St. Louis &
Siljeg, P.S.

APPENDIX

SENATE BILL REPORT
SB 6270

As Reported By Senate Committee On:
Judiciary, January 22, 2004

Title: An act relating to attorneys' liens.

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: Senators Esser, Haugen, Sheahan and Kline.

Brief History:

Committee Activity: Judiciary: 1/21/04, 1/22/04 [DPS, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 6270 be substituted therefor, and the substitute bill do pass.

Signed by Senators Esser, Vice Chair; Hargrove, Haugen, Johnson, Kline, Roach and Thibaudeau.

Minority Report: Do not pass.

Signed by Senator Brandland.

Staff: Aldo Melchiori (786-7439)

Background: In Washington, prevailing plaintiffs in civil rights employment cases must pay federal income tax on the entire amount of the settlement or judgment, including any amounts awarded for attorney's fees. The attorney also pays federal income taxes on the same fees when the attorney receives them. The Court of Appeals of Washington found that adverse tax consequences caused by including attorney's fees as taxable income to the plaintiff, in an employment discrimination case, were part of the actual damages to be awarded in the case. *Blaney v. Ass'n of Workers*, 114 Wn.App. 80, 55 P.3d 1208 (2002).

The United States Court of Appeals for the Ninth Circuit found that the question of whether attorney's fees paid under a contingent fee agreement are includable in the plaintiff's gross income is answered by a two part test: (1) how state law defines the attorney's rights in the action and (2) how federal tax law operates. The rationale of the test is that a party cannot escape tax liability through the assignment of not yet received income to another person. The court found that Oregon statutes conferred a property right in the court action that could not be extinguished except by payment of the attorney and that the attorney's lien was superior to all other liens. Because of these unique features in Oregon law, the court found that attorney fees were not includable in the plaintiff's gross income. *Banaitis v. Commissioner of Internal Revenue*, 340 F.3d 1074 (2003).

Washington attorneys have liens for compensation on judgments to the extent of the value of their services. The priority of an attorney's lien is determined at the time it is claimed. Liens, against the same judgment, that are filed prior to the time the attorney files have priority over the attorney's lien.

Summary of Substitute Bill: An attorney has a lien upon the action and its proceeds to the extent of the value of the services performed by the attorney in that action. "Proceeds" are limited to monetary sums received in the action, so the lien is not enforceable against real or personal property. The attorney's lien is superior to all other liens upon the judgment. The Legislature expresses its purpose of making attorney's fees taxable solely to the attorney and its intention that the court will apply the statute retroactively.

Child support liens are exempt from the statute.

Substitute Bill Compared to Original Bill: It is clarified that child support liens are exempt from the bill.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill tracks Oregon law which has been found sufficient to prevent the double taxation of the attorney's fee portion of judgments. Current law drives up the cost of settlement without any benefit to either of the parties.

Testimony Against: None.

Testified: PRO: Vincent Lombardi, attorney; David Strubaugh, attorney.

SENATE BILL REPORT ESSB 6270

As Passed Senate, February 13, 2004

Title: An act relating to attorneys' liens.

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline).

Brief History:

Committee Activity: Judiciary: 1/21/04, 1/22/04 [DPS, DNP].

Passed Senate: 2/13/04, 47-1.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 6270 be substituted therefor, and the substitute bill do pass.

Signed by Senators Esser, Vice Chair; Hargrove, Haugen, Johnson, Kline, Roach and Thibaudeau.

Minority Report: Do not pass.

Signed by Senator Brandland.

Staff: Aldo Melchiori (786-7439)

Background: In Washington, prevailing plaintiffs in civil rights employment cases must pay federal income tax on the entire amount of the settlement or judgment, including any amounts awarded for attorney's fees. The attorney also pays federal income taxes on the same fees when the attorney receives them. The Court of Appeals of Washington found that adverse tax consequences caused by including attorney's fees as taxable income to the plaintiff, in an employment discrimination case, were part of the actual damages to be awarded in the case. *Blaney v. Ass'n of Workers*, 114 Wn.App. 80, 55 P.3d 1208 (2002).

The United States Court of Appeals for the Ninth Circuit found that the question of whether attorney's fees paid under a contingent fee agreement are includable in the plaintiff's gross income is answered by a two part test: (1) how state law defines the attorney's rights in the action and (2) how federal tax law operates. The rationale of the test is that a party cannot escape tax liability through the assignment of not yet received income to another person. The court found that Oregon statutes conferred a property right in the court action that could not be extinguished except by payment of the attorney and that the attorney's lien was superior to all other liens. Because of these unique features in Oregon law, the court found that attorney fees were not includable in the plaintiff's gross income. *Banaitis v. Commissioner of Internal Revenue*, 340 F.3d 1074 (2003).

Washington attorneys have liens for compensation on judgments to the extent of the value of their services. The priority of an attorney's lien is determined at the time it is claimed. Liens, against the same judgment, that are filed prior to the time the attorney files have priority over the attorney's lien.

Summary of Bill: An attorney has a lien upon the action and its proceeds to the extent of the value of the services performed by the attorney in that action. "Proceeds" are limited to monetary sums received in the action, so the lien is not enforceable against real or personal property. The attorney's lien is superior to all other liens upon the judgment, subject to the rights of secured parties under the Uniform Commercial Code. The Legislature expresses its purpose of making attorney's fees taxable solely to the attorney and its intention that the court will apply the statute retroactively.

Child support liens are exempt from the statute.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill tracks Oregon law which has been found sufficient to prevent the double taxation of

the attorney's fee portion of judgments. Current law drives up the cost of settlement without any benefit to either of the parties.

Testimony Against: None.

Testified: PRO: Vincent Lombardi, attorney; David Strubaugh, attorney.

FINAL BILL REPORT ESSB 6270

C 73 L 04

Synopsis as Enacted

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline).

Senate Committee on Judiciary

House Committee on Judiciary

Background: In Washington, prevailing plaintiffs in civil rights employment cases must pay federal income tax on the entire amount of the settlement or judgment, including any amounts awarded for attorney's fees. The attorney also pays federal income taxes on the same fees when the attorney receives them. The Court of Appeals of Washington found that adverse tax consequences caused by including attorney's fees as taxable income to the plaintiff, in an employment discrimination case, were part of the actual damages to be awarded in the case. *Blaney v. Ass'n of Workers*, 114 Wn.App. 80, 55 P.3d 1208 (2002).

The United States Court of Appeals for the Ninth Circuit found that the question of whether attorney's fees paid under a contingent fee agreement are includable in the plaintiff's gross income is answered by a two part test: (1) how state law defines the attorney's rights in the action and (2) how federal tax law operates. The rationale of the test is that a party cannot escape tax liability through the assignment of not yet received income to another person. Washington attorneys have liens for compensation on judgments to the extent of the value of their services. The priority of an attorney's lien is determined at the time it is claimed. Liens, against the same judgment, that are filed prior to the time the attorney files have priority over the attorney's lien.

Summary: An attorney has a lien upon the action and its proceeds to the extent of the value of the services performed by the attorney in that action. "Proceeds" are limited to monetary sums received in the action, so the lien is not enforceable against real or personal property. The attorney's lien is superior to all other liens upon the judgment, subject to the rights of secured parties under the Uniform Commercial Code. The Legislature expresses its purpose of making attorney's fees taxable solely to the attorney and its intention that the court will apply the statute retroactively. Child support liens are exempt from the statute.

Votes on Final Passage:

Senate 47 1

House 87 9

Effective: June 10, 2004

HOUSE BILL REPORT ESSB 6270

As Reported by House Committee On:
Judiciary

Title: An act relating to attorneys' liens.

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline).

Brief History:

Committee Activity:

Judiciary: 2/24/04, 2/26/04 [DP].

Brief Summary of Engrossed Substitute Bill

- Ends double taxation on attorneys' fees obtained through judgments and settlements in employment discrimination cases and other types of civil suits.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative McMahan, Assistant Ranking Minority Member.

Staff: Sarah Shirey (786-5793); Trudes Hutcheson (786-7384).

Background:

In Washington, successful plaintiffs must pay income tax on attorneys' fees awarded as compensation for claims arising from non-physical injuries, such as employment discrimination. Because these fees are not specifically excluded from "income" as it is defined in the Federal Tax Code, the majority of courts, like Washington, require plaintiffs to include these attorneys' fees in their gross income for federal tax purposes. However, several of the circuit courts have recently created an exception. These exceptions involve contingency-fee cases in which the relevant state attorneys' lien statute explicitly vests an attorney with a property right in the plaintiff's claim.

In August of 2003, the Ninth Circuit held that state law determines whether plaintiffs must include attorneys' fees awarded in employment discrimination cases as part of their gross income for federal tax purposes. The Court read Oregon's attorney lien statute as not including attorneys' fees as part of a plaintiff's gross income, because Oregon's statute gives the plaintiff's attorney a property interest in the action or judgment and this interest is superior to all others. On the other hand, the Ninth Circuit has found that Alaska's statute forces a plaintiff to include awarded fees when reporting his or her gross income to the IRS. The Court's decision turned on the fact that Alaska's statute gives an attorney a contractual interest, rather than a property interest, in an action.

The Ninth Circuit has not considered Washington's attorneys' lien statute. However, it has been the practice in Washington to include attorneys' fees as part of a plaintiff's gross income. This practice has significantly impacted a recent case before the Washington Appellate

Court, *Blaney v. International Assoc. of Machinists*. There the court ordered the defendant to pay the taxes incurred by the plaintiff as a consequence of the judgement in addition to the award. This substantially increased the damages. The case is now pending before the Washington Supreme Court.

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Summary of Bill:

An attorney has a lien for his or her compensation on the monetary sum received in an action before final judgment once the action has been commenced. The amount of the lien may be up to the value of any services performed by the attorney in the action, or the amount due under any special agreement.

Attorneys have the same property rights and power to enforce their liens as their clients for the monetary amount due to them in an action or a judgment. The attorneys' lien on both actions and judgments is superior to all other liens except child support. The attorneys' liens on actions is not affected by settlement between the parties to the action until the attorneys' lien for fees is paid in full.

Proceeds are defined as the monetary sum received in an action. The definition is limited to identifiable cash proceeds in accordance with the Uniform Commercial Code.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: This legislation is a way to end the double taxation paid by successful plaintiffs in some civil suits. The bill only addresses a federal tax issue, and will not have any effect on Washington state taxes. Attorneys should pay taxes on the attorney's fees they are awarded in a successful suit. However, the taxes need not be paid twice. Plaintiffs should not pay taxes on these fees, as they never see this money. There are cases in which this double taxation has resulted in a plaintiff owing more in income tax than he or she actually received in compensation. In addition, double taxation has a bad impact on business in the state, as it forces employers to pay additional damages, and it acts as an impediment to settlement.

Testimony Against: None.

Persons Testifying: Andrea Brenneke, Center for Changing Workforce and Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.

**HOUSE BILL REPORT
ESSB 6270**

As Passed House:

March 3, 2004

Title: An act relating to attorneys' liens.

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: By Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline).

Brief History:

Committee Activity:

Judiciary: 2/24/04, 2/26/04 [DP].

Floor Activity:

Passed House: 3/3/04, 87-9.

Brief Summary of Engrossed Substitute Bill

- Ends double taxation on attorneys' fees obtained through judgments and settlements in employment discrimination cases and other types of civil suits.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative McMahan, Assistant Ranking Minority Member.

Staff: Sarah Shirey (786-5793); Trudes Hutcheson (786-7384).

Background:

In Washington, successful plaintiffs must pay income tax on attorneys' fees awarded as compensation for claims arising from non-physical injuries, such as employment discrimination. Because these fees are not specifically excluded from "income" as it is defined in the Federal Tax Code, the majority of courts, like Washington, require plaintiffs to include these attorneys' fees in their gross income for federal tax purposes. However, several of the circuit courts have recently created an exception. These exceptions involve contingency-fee cases in which the relevant state attorneys' lien statute explicitly vests an attorney with a property right in the plaintiff's claim.

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Proceeds are defined as the monetary sum received in an action. The definition is limited to identifiable cash proceeds in accordance with the Uniform Commercial Code.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: This legislation is a way to end the double taxation paid by successful plaintiffs in some civil suits. The bill only addresses a federal tax issue, and will not have any effect on Washington state taxes. Attorneys should pay taxes on the attorney's fees they are awarded in a successful suit. However, the taxes need not be paid twice. Plaintiffs should not pay taxes on these fees, as they never see this money. There are cases in which this double taxation has resulted in a plaintiff owing more in income tax than he or she actually received in compensation. In addition, double taxation has a bad impact on business in the state, as it forces employers to pay additional damages, and it acts as an impediment to settlement.

Testimony Against: None.

Persons Testifying: Andrea Brenneke, Center for Changing Workforce and Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE BILL REPORT

ESSB 6270

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Majority Report: Do pass. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative McMahan, Assistant Ranking Minority Member.

Staff: Sarah Shirey (786-5793); Trudes Hutcheson (786-7384).

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Summary of Bill:

An attorney has a lien for his or her compensation on the monetary sum received in an action before final judgment once the action has been commenced. The amount of the lien may be up to the value of any services performed by the attorney in the action, or the amount due under any special agreement. Attorneys have the same property rights and power to enforce their liens as their clients for the monetary amount due to them in an action or a judgment. The attorneys' lien on both actions and judgments is superior to all other liens except child support. The attorneys' liens on actions is not affected by settlement between the parties to the action until the attorneys' lien for fees is paid in full. Proceeds are defined as the monetary sum received in an action. The definition is limited to identifiable cash proceeds in accordance with the Uniform Commercial Code.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

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Testimony Against: None.

Persons Testifying: Andrea Brenneke, Center for Changing Workforce and Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.

Washington State
House of Representatives
Office of Program Research

**BILL
ANALYSIS**

Judiciary Committee

ESSB 6270

Title: An act relating to attorneys' liens.

Brief Description: Revising provisions relating to attorneys' liens.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline):

Brief Summary of Engrossed Substitute Bill

- Ends double taxation on attorneys' fees obtained through judgments and settlements in employment discrimination cases and other types of civil suits.

Hearing Date: 2/24/04

Staff: Sarah Shirey (786-5793); Trudes Hutcheson (786-7384).

Background:

In Washington, successful plaintiffs must pay income tax on attorneys' fees awarded as compensation for claims arising from non-physical injuries, such as employment discrimination. Because these fees are not specifically excluded from "income" as it is defined in the Federal Tax Code, the majority of courts, like Washington, require plaintiffs to include these attorneys' fees in their gross income for federal tax purposes. However, several of the circuit courts have recently created an exception. These exceptions involve contingency-fee cases in which the relevant state attorneys' lien statute explicitly vests an attorney with a property right in the plaintiff's claim.

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Summary of Bill:

An attorney has a lien for his or her compensation on the monetary sum received in an action before final judgement once the action has been commenced. The amount of the lien may be up to the value of any services performed by the attorney in the action, or the amount due under any special agreement.

Attorneys have the same property rights and power to enforce their liens as their clients for the monetary amount due to them in an action or a judgment. The attorneys' lien on both actions and judgments is superior to all other liens except child support. The attorneys' liens on actions is not affected by settlement between the parties to the action until the attorneys' lien for fees is paid in full.

Proceeds are defined as the monetary sum received in an action. The definition is limited to identifiable cash proceeds in accordance with the Uniform Commercial Code.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

ENGROSSED SUBSTITUTE SENATE BILL 6270

58th Legislature
2004 Regular Session

Passed by the Senate February 13, 2004
YEAS 47 NAYS 1

CERTIFICATE

President of the Senate
Passed by the House March 3, 2004
YEAS 87 NAYS 9

I, Milton H. Doumit, Jr., Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE SENATE BILL 6270 as passed by the Senate and the House of Representatives on the dates hereon set forth.

Speaker of the House of Representatives

Secretary

Approved

FILED

**Secretary of State
State of Washington**

Governor of the State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 6270

Passed Legislature - 2004 Regular Session
State of Washington 58th Legislature 2004 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline)

READ FIRST TIME 01/23/04.

AN ACT Relating to attorneys' liens; amending RCW 60.40.010; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1** 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.

Sec. 2 RCW 60.40.010 and Code 1881 s 3286 are each amended to read as follows:

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

~~((1))~~ (a) Upon the papers of ~~((his))~~ the client, which have come into ~~((his))~~ the attorney's possession in the course of his or her professional employment;

~~((2))~~ (b) Upon money in ~~((his))~~ the attorney's hands belonging to ~~((his))~~ the client;

~~((3))~~ (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;

~~((4))~~ (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))~~ (e) Upon a judgment to the extent of the value of any services performed by ~~((him))~~ 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.

--- END ---

SUBSTITUTE SENATE BILL 6270

State of Washington

58th Legislature

2004 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators Esser, Haugen, Sheahan and Kline)

READ FIRST TIME 01/23/04.

AN ACT Relating to attorneys' liens; amending RCW 60.40.010; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1 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.

Sec. 2 RCW 60.40.010 and Code 1881 s 3286 are each amended to read as follows:

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

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~~((3))~~ (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;

~~((4))~~ (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 ~~((him))~~ 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.

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

--- END ---

SENATE BILL 6270

State of Washington

58th Legislature

2004 Regular Session

By Senators Esser, Haugen, Sheahan and Kline

Read first time 01/15/2004. Referred to Committee on Judiciary.

AN ACT Relating to attorneys' liens; amending RCW 60.40.010; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1 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.

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(5) For the purposes of this section, "proceeds" means any monetary sum received in the action.

--- END ---

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 18 PM 1:11

STATE OF WASHINGTON

BY _____
DEPUTY

CASE NO. 46738-1-II

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

AIKEN, ST. LOUIS & SILJEG. P.S.,

Appellant,

vs.

JENNIFER LINTH,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
CAUSE NO. 12-2-00972-7

CERTIFICATE OF SERVICE

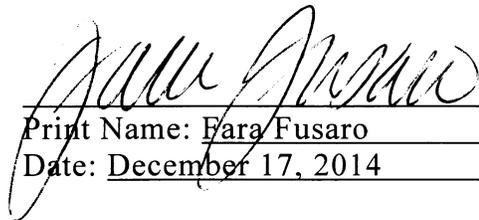
AIKEN, ST. LOUIS & SILJEG, P.S.

By: WILLIAM A. OLSON
1200 Norton Building
801 Second Avenue
Seattle, WA 98104
(206) 624-2650

ORIGINAL

I certify, under penalty of perjury under the laws of the State of Washington, that on the date noted below, I sent by e-mail and first class mail, postage prepaid, copies of Brief of Appellant, Appendix and Certificate of Service to:

Jennifer Linth
868 Gehrke Rd.
Port Angeles, WA 98362
Email:
seagreenpoint@earthlink.net



Print Name: Fara Fusaro

Date: December 17, 2014