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No. 35567-1-II
COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

TCAP CORPORATION, f/k/a TRANSAMERICAN CAPITAL CORPORATION,

Respondent,

v.

GEORGE GERVIN and JOYCE GERVIN,

Appellants.

401 GROUP, a Washington limited partnership,

An Interested Party.

REPLY BRIEF OF APPELLANTS

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Appellants George and Joyce Gervin respectfully file this their reply to the brief filed by Respondent TCAP Corporation's self-described assignee, Cadles of Grassy Meadows II, LLC (hereinafter "Cadles").

1. THE SUPERIOR COURT'S HOLDINGS THAT THE WRITS OF EXECUTION COMPLIED WITH WASHINGTON PARTNERSHIP LAW IS WITHIN THE SCOPE OF REVIEW

On November 9, 2006, the superior court denied the Gervins' motion to quash the August 1, 2006 writ of execution, holding, in part, "that the scope of the writ of execution is not overly broad because it complied with the Washington Limited Partnership Act, RCW ch. 25.10." CP at 275. On May 18, 2007, the superior court denied the Gervins' motion to quash the April 6, 2007 writ of execution, holding "that foreclosure is authorized under the Washington Uniform Limited Partnership Act because the foreclosure remedy provided by RCW 25.05.215 supplements the charging order provisions of RCW 25.10.410." CP at 678-679.

Cadles argues that the Gervins are precluded from obtaining review of whether the writs of execution comply with Washington partnership law because, it says, the issues were decided by the superior court in an order entered on October 22, 2004. Brief of Respondent, pp. 16-18.

A party may appeal from a final order of the superior court made after judgment that affects a substantial right. RAP 2.2(a)(13). An order denying a motion to quash a writ of execution is a final order made after judgment which affects a substantial right, and is appealable. *Hewitt v. Root*, 31 Wash. 312, 314, 71 P. 1021 (1903). Therefore, the Gervins have the right to appeal the superior court's orders denying their motions to quash the writs of execution. The notices of appeal were filed within the 30 days permitted under RAP 5.2. CP at 276-278 and CP at 680-697. Therefore, they were timely.

The issues of whether the writs comply with Washington partnership law are within the scope of review. These issues were briefed by both parties in connection with the motions to quash. CP at 39-40, CP at 251-252 and CP at 267-268 (briefing on motion to quash August 1, 2006 writ); and CP at 611-612, CP at 664-669 and CP at 671-673 (briefing on motion to quash April 6, 2007 writ). They were argued by counsel for both parties before the superior court. RP (11/9/2006), p. 6, line 9 – p. 7, line 21, and p. 23, line 15 – p. 26, line 16, and p. 36, line 19 – p. 37, line 23; and RP (5/18/2007), p. 6, line 15 – p. 11, line 6, and p. 12, line 15 – p. 19, line 13. Finally, the superior court's orders, which were prepared and presented by counsel for Cadles, expressly address the issues. CP at 275 and CP at 678-679. Therefore, such issues are within the scope of review

under RAP 2.4(a).

Cadles apparently believes that the superior court's October 22, 2004 order was a final judgment. Brief of Respondent, pp. 16-17 (citing RAP 2.2(a)(1) and *Kemmer v. Keiski*, 116 Wn.App. 924, 932, 68 P.3d 1138 (Div. 2 2003) (applying RAP 2.2(a)(1))). It was not. The final judgment in this matter was entered on October 16, 1996, when the judgment rendered by the Texas state court was filed with the clerk of the superior court for Pierce County. RCW 6.36.025(1) (a foreign judgment filed with the clerk of a superior court of this state is treated as, and has the same effect as, a judgment of a superior court of this state).

Kemmer holds that a final *judgment* that resolves all then-pending claims, and from which no timely appeal was taken, "directly precludes all further proceedings in the same case, except proceedings to clarify or enforce." *Kemmer v. Keiski*, 116 Wn.App. at 937 (internal quotation marks omitted). In the present matter, the Gervins do not appeal from the 1996 final judgment, but from post-judgment orders. Nothing in *Kemmer* even remotely suggests that the 1996 final judgment precludes the Gervins from obtaining review of post-judgment orders.

There is nothing in the record to support Cadles' implicit claim that the superior court, in entering its October 22, 2004 order, either considered or disposed of issues concerning the writs' of execution

compliance with Washington partnership law. Brief of Respondent, p. 17. The order did specify that any sale of George Gervin's interest in the 401 Group be "at public sale in the same manner as personal property is sold on execution, pursuant to RCW 6.32.085." CP at 6-7. As discussed below, sales under RCW 6.32.085 must comply with Title 25 RCW. In denying the Gervins' motions to quash the writs of execution, the superior court decided that the writs were in compliance with Title 25. The Gervins now seek review of the decisions denying their motions to quash because, among other reasons, they believe that the superior court erred in holding that the writs comply with Title 25.

Even if the superior court had decided these issues in connection with the October 22, 2004 order, review of that order would be proper.

> The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling made, before the appellate court accepts review.

RAP 2.4(b). Here, both requirements are met.

First, prejudice is shown if "the order appealed from would not have happened but for the first order." *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). Clearly, a writ of execution would not have issued on August 1, 2006 or April 6, 2007 had the superior court not directed its issuance in

the October 22, 2004 order, and there would have been no motions to quash the writs. In other words, the orders denying the motions to quash would not have happened but for the order directing that a writ of execution be issued.

Review of the present appeals was "accepted" by this Court upon the timely filing of the notices of appeal on November 9, 2006 and May 21, 2007. RAP 6.1. The second requirement under RAP 2.4(6) is met because the undesignated 2004 order occurred before this Court accepted review of these appeals. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d at 378.

2. WASHINGTON LAW DOES NOT AUTHORIZE FORECLOSURE ON A LIMITED PARTNERSHIP INTEREST

In denying the motion to quash the August 1, 2006 writ of execution, the superior court held that the writ of execution complied with the Washington Uniform Limited Partnership Act (WULPA). CP at 275. In denying the motion to quash the April 6, 2007 writ, the superior court held that the foreclosure remedy under the Washington Revised Uniform Partnership Act (WRUPA) supplements the charging order provisions of WULPA. CP at 678-679. Cadles argues that foreclosure of a limited partnership interest is authorized by "Washington's Partnership Act, and RCW 6.32.085". Brief of Respondent, p. 18. Cadles is mistaken.

a. A charging order under RCW 6.32.085 is subject to the limitations on charging orders under Title 25 RCW.

Cadles argues that "[b]oth Washington's Partnership Act,[1] and RCW 6.32.085 authorize the foreclosure sale of George Gervin's partnership interest." Brief of Respondent, p. 18. It appears that Cadles takes the position that RCW 6.32.085 provides independent, stand-alone authority for entry of a charging order. Brief of Respondent, p. 25 ("First, as noted, RCW 6.32.085 does specifically provide for the sheriff's sale of a limited partnership interest."). To the extent Cadles makes such an argument, it is incorrect. A charging order under RCW 6.32.085 may be entered only "to the extent permitted by Title 25 RCW". RCW 6.32.085. Therefore, it is necessary to turn to Title 25 RCW in order to determine the scope of the charging order, and whether the writs of execution issued pursuant to the charging order are overly broad and should have been quashed.

b. WULPA does not authorize foreclosure on a partnership interest.

The charging order entered in this case attaches to "the interest of

[1] As mentioned above, Washington has two statutes governing partnerships: WRUPA (general partnerships) and WULPA (limited partnerships). Cadles' discussion of this issue throughout pages 18 through 31 of its brief indicates that it is referring to WRUPA. As the Gervins discuss below, WRUPA's foreclosure remedy does not apply to interests in a limited partnership; and, even if it did apply, it does not authorize foreclosure on a partner's non-transferable interests.

defendant George Gervin in 401 Group Limited Partnership ...." CP at 4. Limited partnerships are governed by WULPA. RCW 25.10.670(1). WULPA includes a specific provision that authorizes entry of a charging order with respect to an interest in a limited partnership:

> On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This chapter does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

RCW 25.10.410.

Cadles acknowledges that this provision "describes the rights of a creditor" of a person with a partnership interest in a limited partnership. Brief of Respondent, p. 22. Any discussion of the law applicable to charging orders with respect to limited partnerships must be guided by an appropriate understanding of RCW 25.10.410.

This is a matter of first impression in Washington;[2] and, although the statute is modeled on the Uniform Limited Partnership Act, there has been little discussion of it by courts in other states. One case that has examined the statutory language is *Givens v. National Loan Investors,*

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[2] The only court decision citing RCW 25.10.410 offers little of value to the present case. In *Guenther v. Fariss*, 66 Wn.App. 691, 833 P.2d 417 (Div. 3 1992), the court of appeals observed that "percentage of each partner's interest in the partnership determines the amount accessible by the partnership to pay judgment creditors of individual partners. *See* RCW 25.10.410." *Id.* at 698.

L.P., 724 So.2d 610 (Fla. Dist. Ct. App. 1998). In *Givens*, the court examined Fla. Stat. § 620.153 (1997), which is identical to RCW 25.10.410.[3] The court held that the statute does not authorize judicial foreclosure of an interest in a limited partnership:

> The straightforward language of the statute confers upon a judgment creditor the right to charge the limited partner's interest with payment of the unsatisfied amount of the judgment. The statute further provides that to the extent so charged the judgment creditor has "*only* the rights of an assignee of the partnership interest." Because the statute says that a judgment creditor has only the rights of an assignee of the partnership interest, it necessarily follows that the creditor may not resort to judicial foreclosure of the partnership interest. Nothing in the Revised Uniform Limited Partnership Act authorizes foreclosure of the charged interest and foreclosure is inconsistent with the statute's limitations upon the creditor's remedies.

Id. at 611 (emphasis by the court).

Cadles admits that the courts that have considered the question have "recognized that the ULPA does not expressly provide for the foreclosure sale of a limited partnership interest." Brief of Respondent, p. 27. *Givens* is consistent with the cases relied upon by Cadles insofar as it concludes that Florida's corollary to RCW 25.10.410 does not authorize foreclosure of an interest in a limited partnership. Where Cadles departs from *Givens* is that Cadles would nevertheless import the foreclosure

[3] The only difference in the language is that where RCW 25.10.410 refers to "This chapter", the Florida statute uses the phrase "This act".

remedy from the Revised Uniform Partnership Act into the Uniform Limited Partnership Act. This issue is discussed in the following part of this reply brief.

Under a charging order, "the judgment creditor has only the rights of an assignee of the partnership interest." RCW 25.10.410. An assignee is entitled "to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned." RCW 25.10.400(1)(c). In other words, the rights of an assignee are merely economic rights.

Cadles confuses the nature of a charging order, which invests the judgment creditor with the rights of an assignee, and an actual assignment under which a person becomes an assignee. A distinction must be drawn between a judgment creditor who is limited to the rights of an assignee, and a person who actually is an assignee. It has been held that even where a partners' economic interest in the partnership is sold, that sale is not an assignment of the partnership interest, and does not effect a sale of the partners' non-economic interests in the partnership. *Tupper v. Kroc*, 88 Nev. 146, 154, 494 P.2d 1275, 1280 (Nev. 1972). Therefore, Cadles is wrong when it says that a partner who is subject to a charging order ceases to be a partner or to have any rights or powers of a partner. Brief of

Respondents, p. 22.

c. WULPA does not import WRUPA's foreclosure remedy.

The cases relied upon by Cadles all conclude that the Uniform Limited Partnership Act imports the foreclosure remedy available under the Uniform Partnership Act. Brief of Respondent, pp. 28-30. However, on January 1, 1999, WRUPA replaced the Uniform Partnership Act in Washington. Laws of 1998, ch. 103. One of the few significant differences between the two versions of the uniform act is that the revised law, now in effect in Washington, omits a provision that previously linked the general partnership statute to the limited partnership statute. That omission, which Cadles fails to discuss, is significant to this case.

The predecessor statute to WRUPA "appl[ied] to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith." Former RCW 25.04.060(3) (1955), repealed by Laws of 1998, ch. 103, § 1308(6). WRUPA contains no similar provision.

The decisions upon which Cadles relies are from the courts in states that had not, at the time of the decisions, adopted the Revised Uniform Partnership Act.[4] Therefore, they applied the prior statutory

[4] The Gervins previously have discussed each of these cases at length, distinguishing them from the facts of this case, and will not repeat that discussion here. Brief of Appellants, pp. 12-14. Cadles' citation to an article published in the ABA's July/August 2004 issue of Probate and Property adds little to the analysis, as it relies upon the same outdated cases as does Cadles. Moreover, that article is primarily concerned with the

provision making general partnership law applicable to limited partnerships "except insofar as ... inconsistent herewith." Since Washington has repealed the statute applying not-inconsistent provisions of general partnership law to limited partnerships, the linkage, if any, must be found elsewhere.[5]

The only provision that links the two statutes is in WULPA, which provides: "In any case not provided for in this chapter, the provisions of the Washington revised uniform partnership act, or its successor statute, govern." RCW 25.10.660. Therefore, the standard for determining whether a provision of WRUPA is imported to WULPA is whether the WRUPA provision relates to a case not provided for in WULPA.

WULPA, which includes RCW 25.10.410, expressly provides for a creditor's remedies with respect to a debtor's interest in a limited partnership. True, the remedies provided for under RCW 25.10.410 are not identical to those under RCW 25.05.215. As Cadles admits, they do not include a foreclosure remedy. Brief of Respondent, p. 27. However, that would not justify the conclusion that WULPA does not provide for a creditor's remedies. To hold otherwise, would imply that WULPA

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effect of the newly revised Uniform Limited Partnership Act (2001) on charging orders. Washington has not adopted the 2001 version of the Uniform Limited Partnership Act.

[5] Cadles appears to believe that Washington continues to follow the old Uniform Partnership Act. Brief of Respondent, p. 27. As discussed above, this has not been true since January 1, 1999.

imports every WRUPA provision that is not identical to WULPA. If that were the legislature's intent, it easily could have said so.

One of the cases discussed by Cadles concludes that the Uniform Limited Partnership Act does not provide for a creditor's remedies because, in the case it was considering, "a charging order alone would never divert enough money to Baybank to satisfy even the accruing interest on the judgment debt." *Baybank v. Catamount Construction, Inc.*, 141 N.H. 780, 784, 693 A.2d 1163, 1166 (N.H. 1997). Therefore, it held that "the legislature intended that reference be made to the UPA for the means of enforcing the creditor's rights in the charged partnership interest." *Id.* The court also concluded that the foreclosure remedy was imported by virtue of the Uniform Partnership Act's not-inconsistent provision. *Id.*[6] Interestingly, Cadles relies upon the court's analysis regarding consistency, but not the seemingly more relevant discussion of cases not provided for. Brief of Respondents, pp. 28-29.

Clearly, the *Baybank* not provided for analysis is simply result-oriented decisionmaking. As discussed above, WULPA does provide for creditors' remedies against a debtor's interest in a limited partnership. If creditors believe those remedies need to be enhanced, they may lobby the

[6] To this day, New Hampshire remains one of the minority of states that retains the old Uniform Partnership Act, including the provision importing not-inconsistent provisions of the law into the limited partnership law.

legislature to amend the statute. Indeed, the revisions to the Uniform Limited Partnership Act adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) would add foreclosure to those remedies available to a creditor of a partner in a limited partnership. Revised Uniform Limited Partnership Act § 703(b) (2001). Washington has not adopted these revisions.

d. Foreclosure under WRUPA is limited to a partner's transferable interest in the partnership.

Even if the superior court were correct in its conclusion that WRUPA's foreclosure remedy supplements WULPA's charging area provision, CP at 678-679, Cadles is mistaken in its conclusion that WRUPA "authorize[s] the foreclosure sale of George Gervin's *partnership interest*." Brief of Respondents, p. 18 (emphasis added). At most, WRUPA authorizes the sale of a partner's *transferable interest* in the partnership – which is, by statutory definition, a subset of the partnership interest.

WRUPA expressly provides that "[a] charging order constitutes a lien on the judgment debtor's *transferable interest* in the partnership." RCW 25.05.215(2) (emphasis added). The foreclosure remedy under WRUPA is limited to the "interest subject to the charging order", that is, the judgment debtor's transferable interest. *Id.* Such transferable interest

is limited to "the partner's share of the profits and losses of the partnership and the partner's right to receive distributions." RCW 25.05.205. The transferable interest is a subset of the partner's "partnership interest," which "means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights." RCW 25.05.005(9).

The writs of execution issued on August 1, 2006 and April 6, 2007 both direct the Pierce County sheriff to sell "[a]ll past and future distributions owed to George Gervin by the 401 Group by virtue of his partnership interest including accrued distributions and interest currently held by Pan Pacific Properties, property manager for the 401 Group ...." CP at 19-20 and CP at 561-562. In other words, they direct the sheriff to sell George Gervin's transferable interest in the partnership. However, the writs of execution go beyond this. Notwithstanding that the statutory authority to foreclose on a partnership interest under RCW 25.05.215 is limited to the partner's transferable interest, the writs of execution direct the sheriff to sell "George Gervin's entire limited partnership interest in the 401 Group ...." CP at 19 and CP at 561. This includes "[a]ll rights and claims of any kind and nature past and future of George Gervin based upon or arising from or in connection with the partnership agreement (and any amendments) of the 401 Group; and ... [a]ll claims of George Gervin

against the 401 Group and all its past and future partners, principals, agents, successors and assigns." CP at 20 and CP at 562. Thus, the writs of execution direct the sheriff to sell George Gervin's "management and other rights", which are separate and distinct from his transferable rights. RCW 25.05.005(9).

Cadles attempts to justify the blatantly overly broad language of the writs of execution with red herrings concerning whether George Gervin holds a limited partnership interest or a general partnership interest, the procedural stance of appeals by the Gervins and by Cadles with respect to related litigation in the U.S. Circuit Court of Appeals for the Fifth Circuit, and the fact that it does not have a copy of an optional certificate evidencing George Gervin's partnership interest. Brief of Respondents, pp. 19-21. Because of these circumstances, says Cadles, "the writ of execution generally describes George Gervin's entire interest in the 401 Group." Brief of Respondents, p. 21. Notwithstanding Cadles remarkable conclusion that "[t]his description is consistent with Washington's laws governing limited partnerships", *id.*, the above discussion demonstrates the contrary.

As counsel for the Gervins pointed out to the superior court, this is not of mere academic interest to the Gervins:

The – there was a partnership interest, 45 percent interest,

> that was sold, I believe, in the year 2003, without Mr. Gervin having been given the right of first refusal on that. He is interested in exercising that right, and that is a dispute that is – that he has with the – with that purchaser of that interest. And so his right of first refusal is a very real and practical interest that, if his entire interest in the partnership were sold, he would lose it because that's one of his interests.

RP (11/9/2006), p. 7, lines 1-11. Therefore, as the Gervins argued to the superior court, both writs of execution were overly broad and should be quashed because they direct the sheriff to sell George Gervin's entire partnership interest, not merely his transferable interest. CP at 39-40 and CP at 611-612.

Whether the charging order invests the judgment creditor with the rights of an assignee, or authorizes a sale of the judgment debtor's transferable interest in the partnership, Cadles is wrong when it declares that the result is that the entire partnership interest is gone. Brief of Respondent, p. 24. The partnership interest consists of economic rights (i.e., transferable interest/assignee's rights) and non-economic rights (e.g., management rights, voting powers, rights-of-first-refusal). Although Cadles seeks to obtain more than George Gervins' economic rights, Washington partnership law does not allow it to do so.

3. THE LEGISLATURE HAS PROVIDED THE EXCLUSIVE MEANS FOR MEASURING OR EXTENDING THE LIFE OF A JUDGMENT LIEN

Cadles confuses the difference between entry of a foreign judgment and commencement of the judgment lien on George Gervin's interest in the 401 Group. Brief of Respondents, pp. 31-36.

Cadles argues that the judgment was entered in the superior court on December 6, 1996. Brief of Respondent, p. 35. This was the date the court entered the charging order. CP at 4-5. In this case, the foreign judgment was entered when it was filed with the clerk on October 16, 1996. CP at 1-3. Although it appears that a lien does not attach to a partnership interest until entry of the charging order, RCW 25.05.215(2), the extent of the lifespan of the lien is measured from the entry of the judgment, not the creation of the lien. *Hazel v. Van Beek*, 135 Wn.2d 45, 54, 954 P.2d 1301 (1998).

More significantly, Cadles argues that the judgment lien expires ten years after it is filed. Brief of Respondent, p. 35. It is true that, as a general proposition, a judgment lien has a life of ten years. RCW 4.56.190 and RCW 6.17.020(1). However, in 1994 and 2002, the legislature amended the statute. Laws of 1994, ch. 189, §§ 1-3 and Laws of 2002, ch. 261, § 1. Under these amendments, the legislature provided

the exclusive exceptions to the ten-year lifespan of a judgment lien. "If the Legislature intended for tolling, it could have provided for it ...." *Hazel v. Van Beek*, 135 Wn.2d at 64. Neither of these amendments were in force in 1993, when the lien at issue in *Hazel* expired This may explain why the *Hazel* court gave a nod to the continuing vitality of *Hensen*. Today, however, that vitality must be considered much in doubt. It should be noted that the two Washington cases cited by Cadles both predate this legislation by about two decades, and the cited out-of-state cases do not deal with any statutory provision similar to current Washington law.

4. AN EXPIRED JUDGMENT LIEN MAY NOT BE REVIVED

a. The life of a judgment lien is governed by statute, not equity.

Cadles' argues that equitable principles apply to the enforcement of a judgment lien. Brief of Respondents, p. 36, citing *King County v. Seawest Investment Associates, LLC*, ___ Wn.App. ____ , 170 P.3d 53 (Div. 1 2007). However, a judgment lien is a statutory lien, not an equitable lien. *Hazel v. Van Beek*, 135 Wn.2d at 60. "Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates." *Rhoad v. McLean Trucking Company, Inc.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) (quoting *Dep't of Labor & Indus. v. Dillon*, 28 Wn.App. 853, 855, 626 P.2d 1004 (Div. 1 1981)).

Seawest Investment concerned a lien for attorneys fees, not a

there was no statutory procedure for enforcing the lien insofar as it charged the underlying judgment for payment of the attorney's fee, and allowed the trial court to rely upon equity for such enforcement. *Id.* at 172.

Cadles also refers to *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006). Brief of Respondent, p. 36. In *Sorenson*, the Supreme Court declined to impose an equitable lien against real property pledged as collateral for loans.[8] *Id.* at 532. No judgment lien was involved.

For all Cadles' discussion of equity, there is but one case in which equity has been invoked with respect to the lifespan of a judgment lien. In *Hensen v. Peter*, 95 Wash. 628, 164 P. 512 (1917), the Supreme Court extended the lifespan of a judgment lien that had expired during the time its enforcement was prevented by an injunction that was subsequently dissolved. As discussed in the next part of this reply brief, Cadles misinterprets *Hensen*, which is not controlling given the facts of this case.

[8] The right to an equitable lien arises when "a party at the request of another advances him money to be applied and which is applied to the discharge of a legal obligation of that other, but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for its repayment." *Sorenson v. Pyeatt.* at 533 (quoting *Falconer v. Stevenson*, 184 Wash. 438, 442, 51 P.2d 618 (1935)).

judgment lien. Its facts are inapplicable to the present case. In *Seawest Investment*, a fee dispute arose between a law firm and its former client after the conclusion of an eminent domain proceeding in which the client had been awarded a judgment for just compensation. The law firm asserted a lien over the condemnation judgment.[7] The trial court found that the parties had entered into a binding written fee agreement and that the law firm's fees were reasonable. Therefore, it ordered the fees to be paid out of the judgment, which was in the registry of the court. *King County v. Seawest Investment Associates, LLC*, 170 P.3d at 55. The court of appeals found that the attorney lien statute's summary procedures for enforcement of the lien do not apply to the lien upon a judgment. *Id.* at 57. In the absence of a statutory means of enforcing the lien with respect to the judgment, the court of appeals held that the trial court has equitable powers of enforcement. *Id.* at 58.

As Cadles indicates in its brief, the *Seawest Investment* decision cites *Price v. Chambers*, 148 Wash. 170, 268 P. 143 (1928). Brief of Respondent, p. 36. That case likewise involved an attorney's lien over the judgment obtained on behalf of a former client. It also emphasized that

[7] An attorney's fee lien over a judgment obtained on behalf of a client is not a judgment lien, such as the present case involves. In the latter case, a lien is asserted against property owned by the debtor in order to enforce the creditor's rights under the judgment. In the former case, a lien is asserted against the judgment to the extent of the value of the attorney's services in the action in which the judgment was obtained.

b. *Hensen* does not authorize the superior court to revive a judgment lien that expired at a time when no legal barrier prevented its enforcement.

Cadles does not address the issues raised in the Gervin's supplemental brief. Briefly stated, the Gervins argued that the superior court's March 30, 2007 decision was error because it revived a judgment lien that had expired at a time when there was no legal barrier preventing its enforcement. Supplemental Brief of Appellants, pp. 1-21. Cadles cites no case, from Washington or out-of-state, in which a court revived a judgment lien that expired when nothing prevented its enforcement. In this reply brief, the Gervins merely observe that Cadles' silence on this core issue speaks loudly to the fact that the Supreme Court has been clear. Where the judgment lien expires at a time when no injunctive relief prevents the judgment creditor from enforcing the judgment, the creditor's rights are not prejudiced and *Hensen* does not apply. *Hazel v. Van Beek*, 135 Wn.2d at 63; *see also*, *Weyerhaeuser Pulp Employees Fed. Credit Union v. Damewood*, 11 Wn.App. 12, 16-17, 521 P.2d 953 (Div. 2 1974).

c. The Gervins have not engaged in meritless litigation.

Cadles' arguments for the application of *Hensen* apply to the superior court's November 9, 2006 decision. At that time, a federal court order was in effect that prevented Cadles from enforcing the judgment lien

before the expiration of the lifespan of the judgment. CP at 72-73.

Cadles misrepresents the superior court's findings. The superior court never "found that the Gervins engaged in continuous meritless litigation that has prevented Cadles' and its predecessors from enforcing the TCAP lien." Brief of Respondent, p. 40. Cadles appears to believe that such a finding is implied by its rather laborious three-page recitation of the superior court's factual findings. The Gervins disagree. Even if those findings did allow such an inference, substantial evidence does not exist to support the inference.

The Gervins filed for bankruptcy in 1997 and 1998, and an order of discharge was granted on August 18, 1998. CP at 637-638 and RP (11/9/2006), p. 12, lines 13-25. During the pendency of the bankruptcy proceedings, an automatic stay was in effect, which, of course, did not remain after discharge. 11 U.S.C. § 362(c). Six years passed after the discharge in bankruptcy before September 24, 2004, when Joyce Gervin obtained an injunction from the bankruptcy court preventing Cadles from executing on her share of the partnership interest. CP at 639 and RP (11/9/2006), p. 13, lines 1-9. Shortly thereafter, on November 18, 2004, the bankruptcy court granted George Gervin's motion for preliminary injunctive relief as to his share of the partnership interest; however, this injunction was dissolved on May 18, 2005. CP at 639 and RP

(11/9/2006), p. 13, lines 10-23. Cadles waited another year before obtaining a writ of execution. CP 17-20 and RP (11/9/2006), p. 13, line 24 – p. 14, line 1. Even then, Cadles failed to complete the sale, and the Pierce County sheriff returned the writ "because despite repeated requests the plaintiff's attorney did not provide the fees or information necessary." CP at 13 and RP (11/9/2006), p. 14, lines 2-5.[9]

The preceding paragraph provides the complete history of injunctive relief sought and obtained by the Gervins prior to the September 27, 2006 order of the U.S. District Court. Despite Cadles' efforts to suggest otherwise, the superior court denied the Gervin's motion to quash the writ of execution "due to what this Court sees as abuse of process and prejudice during the *current stay*." CP at 641 (emphasis added). The only stay "current" at that time was the stay issued on September 27, 2006. Moreover, it would be contrary to the law of this state, as declared by the Supreme Court, to toll the lifespan of the lien due to a bankruptcy stay that was lifted in August 1998 (more than 8 years before the lien expired) or injunctive relief that dissolved in May 2005 (17 months before the lien expired). *Hazel v. Van Beek*, 135 Wn.2d at 63. Indeed, every case relied upon by *Hensen* involved injunctions that

[9] Counsel for Cadles objected to the Gervins' counsel's characterization of the sheriff's return on the writ. RP (11/9/2006), p. 14, lines 6-13. The plain words from the sheriff's return, quoted in the text above, supports the characterization given by Gervins' counsel.

"prevented the creditors from meeting the deadline." *Hazel v. Van Beek*, 135 Wn.2d at 62.

CONCLUSION

Cadles did not act with diligence to protect its interests. No action by the Gervins prevented it from enforcing the judgment when the last stay expired on February 5, 2007. Instead, Cadles sat on its hands, assuming that the sheriff, or the court, or someone would take care of matters.

Cadles' arguments in its brief opposing the Gervins' appeal are unconvincing. Its analysis of whether the writs of execution complied with Washington partnership law glosses over the lack of foreclosure authority under WULPA, which governs limited partnerships. It ignores the fact that WRUPA, the general partnership statute, to the extent it applies, only allows foreclosure of a transferable interest (i.e., economic interest) in the partnership. It fails to address the legislation enacted in 1994 and 2002 providing the exclusive means for extending the life of a judgment lien.

Perhaps most significant of all is Cadles' complete failure to address the arguments in the Gervins' supplemental brief. Briefly stated, in their supplemental brief the Gervins argued that whether or not *Hensen* is controlling on its particular facts, there is no justification for extending

its application to a case where, at the time a previously tolled judgment lien expired, no injunctive relief prevented its enforcement. Under these circumstances, the words of this Court are particularly appropriate: "[T]he judgment died a natural death and the resuscitative force was too weak to breathe new life into it." *Weyerhaeuser Pulp Employees Fed. Credit Union v. Damewood*, 11 Wn.App. at 16.

DATED this 19th day of December, 2007.

THE GILLETT LAW FIRM

Michael B. Gillett
Attorney for Appellants

APPENDIX A
SELECTED STATUTORY PROVISIONS[10]

Former RCW 25.04.060(3) [Repealed by Laws of 1998, ch. 103, § 1308]

This chapter shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith.

RCW 25.05.005(9)

"Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights.

RCW 25.10.670(1)

Except as provided in subsections (1) and (2) of this section, the provisions of this title shall apply to all existing limited partnerships formed after June 6, 1945, under any prior statute of this state providing for the formation of limited partnerships, except to the extent provisions of this title are inconsistent with provisions of the certificate or partnership agreement of such existing limited partnerships, which partnership provisions were applicable to such limited partnerships as of January 1, 1982, and which partnership provisions would have been valid under any such applicable prior statutes. Insofar as the provisions of this title are substantially the same as statutory provisions repealed by this title and relate to the same subject matter, such provisions shall be construed as restatements and continuations, and not as new enactments. Neither the enactment of this title nor the amendment of this title nor the repeal of the prior title shall take away or impair any liability or cause of action existing or accrued by or against any limited partnership or its partners.

Revised Uniform Limited Partnership Act § 703(b) (2001) [Not adopted in Washington]
(b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

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[10] See the Gervins' brief and supplemental brief for additional provisions cited herein.

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Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I am the attorney-of-record for Appellants George Gervin and Joyce Gervin in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Reply Brief of Appellants, via ABC Legal Services:

Attorney for Respondent:
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SIGNED this 19th day of December, 2007 at Seattle, Washington.

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