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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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AHMAD ABDEL-WAHED,

Petitioner,

and

NANCY A. GASS,

Respondent.

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PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Ahmad Abdel-Wahed asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

**B. COURT OF APPEALS DECISION**

Ahmad Abdel-Wahed seeks review of the Court of Appeals' decision, filed on October 27, 2014, its Order Denying Motion for Reconsideration, filed on December 9, 2014, and its award of attorney fees, entered on December 15, 2014. A copy of the decision is in the Appendix at pages A-1 through A- 9. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages A-10. A copy of its award of attorney fees is in the Appendix at pages A-11.

**C. ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err in creating a new nonstatutory exception to the constitutional protections of the Homestead Act?

2. Did the Court of Appeals err in in creating a new nonstatutory exception to the constitutional protections of the Homestead Act and upholding the imposition of a constructive trust on exempt proceeds, *sua sponte*, in a declaratory judgment



proceeding after declaring that none of the alleged exceptions had been established, as a matter of law?

3. Did the Court of Appeals err in awarding attorney fees to the Respondent, pursuant to RCW 26.09.140, without requiring compliance with RAP 18.1(c), without determining the Respondent's need, the Petitioner's ability to pay, or the merits of the appeal?

#### **D. STATEMENT OF THE CASE**

In their dissolution proceeding, Abdel-Wahed was awarded his separate property, the home the parties had purchased in 2000, a car, and portions of certain investment accounts. Gass was awarded a car and certain investment accounts.<sup>1</sup> CP 274-300.

While the awards of community property were of equal value, there is no evidence that one party's award was in exchange for or in consideration of the other party's award, or that the awards were "offsetting"(as the Court of Appeals asserts in its decision, p.1).

No judgment or lien was created by the Decree of Dissolution.

In the fall of 2010, shortly after the Decree was entered on August 24, 2010, Abdel-Wahed became seriously ill. CP 148-149. He began having syncopal episodes, in which he would lose consciousness for hours at a time. In the winter and early part of

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<sup>1</sup> For ease of consideration, the parties shall be referred to by their last names. No disrespect is intended.

2011, he continued passing out and was hospitalized. He became unable to work. In the fall of 2012, he was hospitalized again with pseudomembranous colitis and pancreatitis. He was found to have developed acute renal failure with greater than 50% impairment of kidney function. CP 149.

He has been on an indefinite unpaid medical leave from his job at Microsoft ever since. He has remained very ill, and has only been able to work sporadically. CP 374.

Following the entry of the Decree of Dissolution, Gass delayed transferring the monies from the investment accounts awarded to her for a considerable period of time. During that delay, stock values declined and stock options expired. By the time Gass sought to obtain these monies, these investment accounts had lost substantial value due to market forces.<sup>2</sup> CP 374.

In the meantime, Abdel-Wahed used some of the funds in the accounts which had been awarded to Gass to meet his living expenses. CP 374. However, there is **no** evidence that he used any of the funds which had been awarded to Gass to pay his mortgage or any other expense associated with his homestead.

When Gass discovered that Abel-Wahed had taken funds

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<sup>2</sup> See footnote 1 of Appellant's Opening Brief.

awarded to her, she obtained an Order on Show Cause re Contempt/ Judgment by default, on August 8, 2012, totaling \$190,318.35 for the amounts the Decree had awarded her from these accounts, unpaid maintenance, interest, and attorney fees. CP 352-356.

Gass did not record her judgment, so it did not become a lien against Abel-Wahed's homestead property.<sup>3</sup>

Gass then obtained an order forcibly removing Abdel-Wahed from his home on September 14, 2012. CP 5. Abdel-Wahed filed a Declaration of Homestead on September 28, 2012, CP 2, even though he had had an automatic homestead on this property from the time it became his home in June of 2000. RCW 6.13.040(1).

Gass then obtained an order from the Court on October 9, 2012, to list and subsequently to sell Abdel-Wahed's home. CP 2.

The home sold on November 30, 2012. From the net sale proceeds of \$175,074.08, CP 93, Abdel-Wahed paid his unpaid maintenance obligation to Gass. CP 375, 412.

Gass then filed a Complaint for Declaratory and Other Relief seeking a judgment declaring that the Abdel-Wahed's homestead exemption did not bar the execution of her judgment

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<sup>3</sup> *Mahalko v. Arctic Trading Co.*, 99 Wash.2d 30, 659 P.2d 502 (1983), *overruled on other grounds by Felton v. Citizens Fed. Sav. & Loan Ass'n*, 101 Wash.2d 416, 424, 679 P.2d 928 (1984); RCW 6.13.090.

against the proceeds of the sale of his homestead, on the grounds that the homestead exemption is not available against debts arising from obligations to pay maintenance, pursuant to RCW 6.13.080(4), (even though the maintenance obligation had already been paid); or judgments obtained on vendor's liens, pursuant to RCW 6.13.080(1)<sup>4</sup>. CP 1-3.

On cross-motions for summary judgment, CP 8-119; 131-146; 148-149; 153-159; 211-267; 305-412, the Honorable Dean Lum found, as a matter of law, "that no vendor's lien exists because the plaintiff [Gass] is not a purchaser of the property, and no owelty lien<sup>5</sup> exists because the original Decree did not explicitly include language imposing such a lien". CP 202. The court also denied Gass' Motion to Modify Property Division in Decree, pursuant to CR 60, CP 160-182, filed shortly before the summary judgment hearing. CP 97-198.

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<sup>4</sup> RCW 6.13.080 provides in pertinent part:

The homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained:

(1) On debts secured by mechanic's, laborer's, construction, maritime, automobile repair, materialmen's or vendor's liens *arising out of and against the particular property claimed as a homestead*. (emphasis added).

<sup>5</sup> A lien awarded in a dissolution proceeding to equalize distribution of jointly held or community property is an owelty lien. In *In Re Stone*, 119 B.R. 222, 230-231 (Bkrcty. E.D. Wash. 1990); *Hartley v. Liberty Park Assocs.*, 54 Wash.App. 434, 438, 774 P.2d 40, 42 (1989).

No appeal was taken from these rulings.

Nonetheless, even though such relief was not requested in Gass' Complaint, the superior court, *sua sponte*, imposed a constructive trust on the remaining net sale proceeds in the amount of those funds "awarded to plaintiff in the original Decree, consisting of \$50,400 in maintenance (which has now been paid) and \$96,760.35 for the investment assets that were not transferred to the plaintiff". CP 201.

The lower court based its ruling on its conclusion that "the defendant intentionally and in bad faith "looted" the investment accounts which were supposed to be transferred to plaintiff as part of the Decree...[and] that the Homestead Statute exemption cannot be used to facilitate unjust enrichment or fraud, and the court in equity may impose a constructive trust." CP 201.

To uphold the court below, Division I created a new unrequested nonstatutory exception to the Homestead Act:

Where a party has wrongfully obtained funds belonging to another and there is a sufficient connection between the wrongfully obtained funds and the homestead property, a court may impose the equitable remedy of a constructive trust on proceeds received from the sale of that property.

Division I also awarded the Respondent her attorney fees and

costs, pursuant to RCW 26.09.140, even though neither party filed the Financial Affidavit, required by RAP 18.1(c). In making this award, Division I made no determination regarding Gass' need or Abdel-Wahed's ability to pay, or the merits of the appeal.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**1. The Court Of Appeals Erred By Creating A New Nonstatutory Exception To The Constitutional Protections Of The Homestead Act.**

Article 19, section 1 of the Washington State Constitution states:

The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

In *In re Poli's Estate*, 27 Wash.2d 670, 674, 179 P.2d 704

(1947), this Court held:

The right of homestead under our constitution and the statute enacted pursuant thereto is not a mere privilege or exemption of such an estate as the holder has in the land, but is an absolute right intended to secure and protect the homesteader and his dependents in the enjoyment of a domicile.

As this Court explained in *In re Dependency of Schermer*, 161

Wash.2d 927, 953, 169 P.3d 452 (2007):

The homestead act "implements the policy that each citizen have a home 'where [the] family may be sheltered and live beyond the reach of financial misfortune.'" [citations omitted]. The act is favored in law and courts construe it liberally so it may achieve

its purpose of protecting family homes.

In *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d 219, 227-228, 758 P.2d 494 (1998), this Court held that a “homestead cannot be sold to satisfy a judgment lien which does not qualify as one of the statutory exceptions to the homestead exemption listed in RCW 6.13.080”, or the one nonstatutory exception created in *Webster v. Rodrick*, 64 Wn.2d 814, 819, 394 P.2d 689 (1964). The homestead is “a species of land tenure exempt from execution and forced sale in all but the enumerated circumstances.” *City of Algona v. Sharp*, 30 Wn. App. 837, 843, 638 P.2d 627 (1982), *review denied*, 109 Wn.2d 1009 (1987).

The superior court found that none of the exceptions specified in RCW 6.13.080 apply here, as a matter of law. CP 202. No appeal was taken from these rulings. Thus, these rulings are now the law of the case, are not subject to review, and cannot be re-litigated. *State v. Hubbard*, 103 Wash.2d 570, 574, 693 P.2d 718 (1985).

The only nonstatutory exception to the Homestead Act was created in *Webster v. Rodrick, supra*, when this Court reversed an order denying plaintiff's motion to declare defendants' homestead declaration invalid where the evidence showed that the defendant

had purchased and improved the property in question with funds embezzled from the plaintiff. That exception was not pled. CP 1-3.

Even so, in *Webster v. Rodrick*, 64 Wn.2d at 816-817, this Court was careful to distinguish its holding from the factual situation found here, where the wrongfully obtained funds had not been used to purchase the homestead property, even though those funds unjustly enriched the defendant:

We are aware of *Brown v. Manos*, 140 Wash. 525, 250 P. 36 (1926) (not cited by plaintiff). Therein plaintiff secured a judgment against defendant for the wrongful and fraudulent use of partnership funds. Although defendant's homestead exemption was upheld, the decision is not apposite because there was no showing that the person claiming the homestead had purchased the property with funds stolen from the judgment creditor. Further, the record indicates that the property had been purchased by defendant long before the facts constituting the judgment creditor's cause of action arose.

Likewise here, there was no showing---nor could there be---that Abdel-Wahed purchased or improved his homestead property with funds stolen from Gass. The "property had been purchased by defendant long before the facts constituting the judgment creditor's cause of action arose." *Id.* Abdel-Wahed acquired his homestead automatically when it was purchased in June of 2000. RCW 6.13.040. Gass' judgment(s) are based on



events which happened, or did not happen, until after the home had been awarded to Abdel-Wahed in the Decree as his separate property----namely, improper transfers of money from various accounts, unpaid maintenance, interest and attorney fees.

Since *Webster v. Rodrick, supra*, our courts have uniformly held that courts should not read any additional exceptions into the Homestead Act not contained in the statutory list, and that any further exceptions should be made *only* by the legislature.<sup>6</sup>

Yet, disregarding any semblance of judicial deference, Division I created an entirely new and expansive exception in direct conflict with *Webster v. Rodrick*, 64 Wash.2d at 818–819, *Brown v. Manos, supra*, and their progeny, that the homestead exemption is unavailable *only* if “the homestead claimant acquires the funds *used to purchase* the homestead by fraud or theft.”<sup>7</sup> Abdel-Wahed did not.

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<sup>6</sup> *Christensen v. Christgard, Inc.*, 35 Wash.App.626, 631, 668 P.2d 1301(1983)(“If mere “wrongful” conduct is to remove the protections afforded by RCW 6.12.090, this determination should be made by the Legislature rather than the courts.”); *City of Algona v. Sharp*, 30 Wash. App. at 842 (“The legislature has listed several types of liens which may be executed against a homestead.” Assessment liens” are not among them. The maxim “expressio unius est exclusio alterius” is the law in Washington, barring a clearly contrary legislative intent.”); See also, *In re Cunningham*, 163 B.R. 593, 595 (Bkrtcy. W.D.Wash. 1994)(“Based on the cases of *Algona v. Sharp* and *Pinebrook Homeowners Association v. Owen*, [48 Wash. App. 424, 739 P.2d 110 (1987)] this Court should not read into the homestead statute any exceptions that are not contained in the statutory list.”).  
**See also, Washington Constitution Article XIX, § 1**

<sup>7</sup> See eg. *Casterline v. Roberts*, 168 Wash. App. 376, 386, 284 P.3d 743(2012); *Pinebrook Homeowners Ass'n v. Owen*, 48 Wash.App. at 430; *Christensen v. Christgard, Inc.*, 35 Wash. App. at 629; *Dunham v. Tabb*, 27 Wash.App. 862, 867, 621 P.2d 179 (1980).

There is no legal authority which permitted Division I to create a new exception to the protections of the Homestead Act whenever “a party has wrongfully obtained funds belonging to another and there is a *sufficient connection*”--- whatever that might mean ---“between the wrongfully obtained funds and the homestead property”, which would then permit a court, acting *sua sponte*, to “impose the equitable remedy of a constructive trust on proceeds received from the sale of that property.”

If Division I’s holding is that there is a “sufficient connection” whenever the homestead property is awarded to one spouse as that spouse’s separate property during the course of a dissolution proceeding, as it suggests (Decision, pp. 8-9), then its ruling is in direct conflict with the holding of Division III in *Baker v. Baker*, 149 Wash. App. 208, 202 P.3d 983 (2009). In *Baker v. Baker*, 149 Wash. App. at 210, on facts like those found here, the court awarded Mr. Baker certain real property as his separate property, and Mrs. Baker a \$2,000,000 judgment, with interest to be paid in \$20,000 monthly installments. When Mr. Baker failed to make these payments, Mrs. Baker obtained a judgment on the delinquent amounts and sought a writ of execution on the property which had been awarded to Mr. Baker. In affirming the lower court’s refusal to

permit Mrs. Baker from executing her judgment against Mr. Baker's homestead, the Court in *Baker v. Baker*, 149 Wash. App. at 212 held:

In view of the public policy involved in our homestead statutes, the sanctity with which the legislature has attempted to surround and protect homestead rights, and the guidance provided by our Supreme Court and other state courts, the parcels that surround Mr. Baker's residence are exempt under Washington's homestead act. The trial court correctly concluded likewise.

If Division I's holding is that there is a "sufficient connection" between the wrongfully obtained funds and the homestead when such funds are used to make "mortgage payments on the home" (Decision, p. 9),<sup>8</sup> then it is both legally and factually incorrect.

While Abdel-Wahed admitted that he "used investment account funds to meet his living expenses", CP 374, there is *no* evidence that he used any of these funds to pay the "mortgage payments on the home", or for any other expense associated with his homestead, or that the purloined funds had been co-mingled with the funds he used to pay these expenses.

Division I just got its facts wrong.

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<sup>8</sup> According to Division I's expansive new nonstatutory exception to the Homestead Act, apparently *any* connection between the wrongfully obtained funds and the homestead would eliminate all constitutional protections for the entire amount of any wrongfully obtained funds, regardless of how nominal the amount used to pay a mortgage may have been. But in this case no funds were so used.

As this Court explained in *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, 111 Wn.2d at 229-230:

The persistent theme of our homestead case law is that "[h]omestead statutes are enacted as a matter of public policy in the interest of humanity and thus are favored in the law and are accorded a liberal construction." *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981); See Also, *First Nat'l Bank v. Tiffany*, 40 Wn.2d 193, 202, 242 P.2d 169(1952) (homestead statutes do not protect the rights of creditors; rather they are in derogation of such rights)....

Division I's ruling is in direct conflict with the cases cited, and the evidence in this case. This Court should accept review.

**2. The Lower Court Lacked Jurisdiction Or Authority To Create A New Exception To The Homestead Act Where No Such Relief Had Been Requested And/Or To Impose A Constructive Trust, Sua Sponte, In A Declaratory Judgment Proceeding.**

Jurisdiction exists because of a constitutional or statutory provision. Issues regarding the lower court's jurisdiction may be raised for the first time on appeal. *State v. WWJ Corp.*, 138 Wash.2d 595, 600-601, 980 P.2d 1257(1999); RAP 2.5(a).

An action under the Uniform Declaratory Judgments Act (UDJA) is a statutory proceeding. RCW 7.24.010<sup>9</sup>. Accordingly,

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<sup>9</sup> 7.24.010. Authority of courts to render

Courts of record within their respective jurisdictions shall have power to declare

“the jurisdiction and authority of the courts are prescribed by the applicable legislative enactment”...and “the court does not have any power that cannot be inferred from a broad interpretation of the act in question.” *Arneson v. Arneson*, 38 Wash.2d 99, 100-101, 227 P.2d 1016 (1951).

The Uniform Declaratory Judgments Act (UDJA) *only* grants the court “the power to declare rights, status, and other legal relations...”. It is the appropriate method to determine questions of construction, or the validity of a statute or ordinance. RCW 7.24.020; *Nollette v. Christianson*, 115 Wash.2d 594, 598, 800 P.2d 359 (1990); *Cary v. Mason County*, 132 Wash.App. 495, 501, 132 P.3d 157 (2006). It does not give the court authority to fashion relief beyond that declaration regardless of “whether or not further relief is or could be claimed.” Thus, in *Peoples Park and Amusement Ass’n v. Anrooney*, 200 Wash. 51, 59, 193 P.2d 362(1939), this Court held:

The purpose of the Declaratory Judgment Act is to declare rights rather than to execute them. It is not within contemplation of the act that in the construction and interpretation of an instrument, such as that now before us, that the court should make a declaration whether the law is that the

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rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

tenant is liable for waste and the contract forfeited because of the breach of some implied duty or whether the law is that the contract may be forfeited for default in payment of rent required under one of the covenants of the contract.

And so, in *Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wash. App. 365, 374-375, 198 P.3d 1033 (2008), Division II held that the Uniform Declaratory Judgments Act (UDJA) grants courts the general power to declare rights, status, and other legal relations, but does not grant courts the authority to determine their administration or application.

Similarly, in *City of Tacoma v. City of Bonney Lake*, 173 Wash.2d 584, 595, 269 P.3d 1017 (2012), this Court held that once the lower court had declared the rights, status, and other legal relations between the parties to certain franchise agreements by finding that those agreements required the City of Tacoma to provide and to maintain the hydrants which were dispositive of the issues presented by the declaratory judgment act, the lower court properly refused to determine who was responsible for the ongoing costs and maintenance of those hydrants.

Likewise here, once the superior court “declared the rights, status, and other legal relations between the parties”; namely, that that Gass did not have either a vendor's lien or an owelty lien, as a

matter of law, CP 202, it had no further authority to create a new exception to the Homestead Act or to then impose a constructive trust on these otherwise exempt net sale proceeds, *sua sponte*.

Moreover, in this case, Gass never asked the court to create a new exception to the Homestead Act or to impose a constructive trust on the net sale proceeds from Abdel-Wahed's homestead in her Complaint. Nor did she allege "unjust enrichment". The lower court lacked the authority to grant relief which had never been requested in the Complaint on grounds which had never even been alleged.<sup>10</sup> Such a judgment is void. *In re Marriage of Hardt*, 39 Wn.App. 493, 494-496, 693 P.2d 1386 (1985).

Nonetheless, Division I maintains that the lower court still had jurisdiction to create a new exception to the Homestead Act and to impose a constructive trust merely because Gass asked the court in her Complaint to grant "such other and further relief as the Court finds just and equitable." Opinion, p. 5.

No legal authority supports Division I's holding. In *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003), this Court

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<sup>10</sup> A request to impose a constructive trust raised for the first time in the Plaintiff's Cross-Motion for Summary Judgment, CP 25-26, does not provide sufficient notice of the plaintiff's claim. *MacLean v. City of Bellingham*, 41 Wash.App. 700, 703-704, 705 P.2d 1232(1985), *reversed on other grounds*, 475 U.S. 1105, 106 S.Ct. 1509 (1986). Nor can such a request increase the jurisdictional limits of the UDJA.

held only that “district courts may issue mutual protection orders even in the absence of a petition requesting that relief because “[A]uthority to issue such orders can be found both in the state constitution and the applicable statute.”

While a court has subject matter jurisdiction to declare the “rights, status and other legal relations” between parties in a declaratory judgment proceeding, or to impose a constructive trust in a different, but appropriate proceeding, *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818(2011), no authority is found in the state constitution or in RCW 7.24.010 which would permit it to create a new unrequested nonstatutory exception to the Homestead Act, or to impose a constructive trust in a declaratory judgment action, *sua sponte*. *Arneson v. Arneson*, 38 Wash.2d at 100-101. “In other words, where no [such] relief was contemplated by the statute, the court did not have jurisdiction to grant such relief.” *Buecking v. Buecking*, 179 Wn.2d 438, 450, 316 P.3d 999 (2013).

In this case, once the superior court declared the “rights, status and other legal relations” between these parties; namely, that none of Gass’ alleged exceptions to the Homestead Act were applicable, as a matter of law, CP 202, it had no additional authority to create a new exception to the Homestead Act and to then impose



a constructive trust on these otherwise exempt net sale proceeds, *sua sponte*, merely because Gass had requested that she be granted “such other and further relief as the Court finds just and equitable”.

Such a request for relief does not expand the statutory authority or jurisdiction of the court.

This Court should accept review.

**3. Division I Erred In Awarding Attorney Fees, Pursuant to RCW 26.09.140, Without Considering The Parties’ Financial Resources Or The Merit of The Appeal.**

RCW 26.09.140 gives a court discretion to “order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.”

In exercising that discretion, the court is required to consider the arguable merit of the issues on appeal and the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay. *In re Marriage of Muhammad*, 153 Wash.2d 795, 807, 108 P.3d 779 (2005).

RCW 26.09.140 requires the requesting party to show her need and the other's ability to pay. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). RAP 18.1(c) states in part:

In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party *must* serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument....

*In re Marriage of Hoseth*, 115 Wn.App. 563, 575, 63 P.3d 64, *review denied*, 150 Wn.2d 1011 (2003). Since neither party served or filed such a financial affidavit, Division I should not have considered such a request. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 154-155, 859 P.2d 1210(1993)(strict compliance required); *But see, Buecking v. Buecking*, 179 Wn.2d at 455.

Abdel-Wahed has been gravely ill and unable to work since the fall of 2012. Division I's refusal and/or failure to even consider his ability to pay attorney fees is error. *In re Marriage of Steadman*, 63 Wash. App. 523, 529-530, 821 P.2d 59(1991).

Nor did Division I consider the arguable merits of his appeal. The fact that Division I decided to make new law by creating an expansive new nonstatutory exception to the Homestead Act, and by upholding the imposition of a constructive trust--- neither of which had been alleged or requested in the Plaintiff's Complaint--- did not render his appeal without merit.

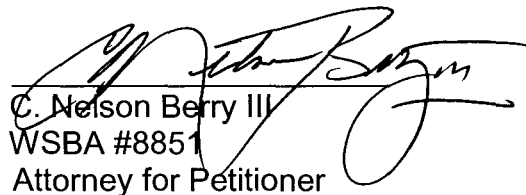
This Court should accept review.

**F. CONCLUSION**

This is not the way the law is supposed to work.

For each of the reasons set forth in RAP 13.4(b), this Court should accept review. This Court should reverse Division I and hold that the courts below erred in creating a new unrequested nonstatutory exception to the protections of the Homestead Act and by imposing a constructive trust on the remaining exempt proceeds from the sale of Abdel-Wahed's homestead, *sua sponte*, in a declaratory judgment proceeding, after finding that none of the alleged exceptions applied, as a matter of law. Division I also erred in awarding reasonable attorney fees to Gass, pursuant to RCW 26.09.140, without requiring compliance with RAP 18.1(c), and without making any determination of Gass' need, Abdel-Wahed's ability to pay, or the merits of the appeal. The remaining sale proceeds from Abdel-Wahed's homestead are exempt. Gass may collect the balance of her judgment against his non-exempt assets.

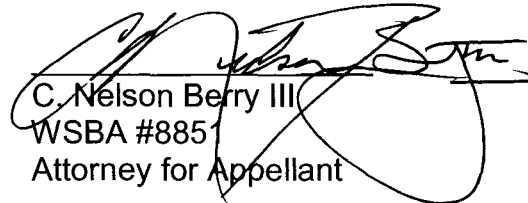
Respectfully submitted this 5th day of January, 2015.

  
C. Nelson Berry III  
WSBA #8851  
Attorney for Petitioner

**Certificate of Service**

I certify that on the 5th day of January, 2015, I mailed a copy of the foregoing Petition for Review to the attorney for Nancy A. Gass, by first class mail, postage prepaid, to the following address:

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PO Box 1041  
Carnation, Washington 98014

  
C. Nelson Berry III  
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# **Appendix**

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of	)	
	)	
NANCY A. GASS,	)	
	)	No. 71007-9-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
AHMAD ABDEL-WAHED,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 27, 2014
_____	)	

BECKER, J. — The homestead statute exemption cannot be used to facilitate unjust enrichment. Where a party has wrongfully obtained funds belonging to another and there is a sufficient connection between the wrongfully obtained funds and the homestead property, a court may impose the equitable remedy of a constructive trust on proceeds received from the sale of that property.

The parties to this declaratory judgment action, Nancy Gass and Ahmad Abdel-Wahed, were previously married. They separated in September 2009. A decree dividing their marital assets was entered on August 24, 2010, confirming a binding arbitration award. Each party was to receive an equal share of the community assets as valued by the arbitrator. The marital home was awarded to Abdel-Wahed. Gass's offsetting award was to come from specified investment

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accounts held in Abdel-Wahed's name. Abdel-Wahed was ordered to pay spousal maintenance.

Abdel-Wahed continued to live in the house. He did not make spousal maintenance payments. And he did not transfer funds to Gass.

The trial court issued an order and judgment of contempt against Abdel-Wahed for failing to pay spousal maintenance and transfer assets as required by the decree, despite having the ability to do so. Judgment was entered in the amount of \$190,318.35 on August 8, 2012. This amount included \$50,400.00 in past-due spousal maintenance. It also included \$96,760.35 which should have been transferred to Gass from the investment accounts. The remainder of the judgment was for interest, attorney fees, and costs. The judgment ordered that the marital home be sold and authorized Gass to sell it under court supervision.

Gass obtained an order forcibly removing Abdel-Wahed from the home on September 14, 2012. The home was sold on November 28, 2012. The sale netted \$175,074.08 in proceeds. Pursuant to an agreement between the parties, Gass received \$50,400.00 from the sale proceeds to cover the past-due spousal maintenance payments.

Abdel-Wahed refused to agree to let Gass receive any of the remainder of the sale proceeds towards satisfying the balance of her judgment. He asserted the protection of the homestead statute. Abdel-Wahed claims that he had an automatic homestead on the property from the time he began living there years before the dissolution. Also, he recorded a homestead declaration on September 28, 2012, to protect that interest.

Gass instituted this declaratory judgment action to obtain an order awarding the remaining sale proceeds to her. Upon cross-motions for summary judgment, the court issued an order on September 18, 2013. The order granted Gass's motion in part, declaring she was entitled to receive from the remaining sale proceeds the sum that, under the decree, should have been transferred to her from the investment accounts. To that extent, the court imposed a constructive trust over the sale proceeds. The court recognized that Abdel-Wahed also owed Gass the interest, attorney fees, and costs itemized in the judgment of August 8, 2012, but the court was not certain of its legal authority to impose a constructive trust on those obligations as they were not specifically mentioned in the dissolution decree. Accordingly, the order provided that Gass would be permitted to withdraw \$96,760.35 from the residence sale proceeds that had been deposited with the court.

Abdel-Wahed appeals. He challenges the court's authority to impose a constructive trust in these circumstances.

This court reviews orders granting summary judgment de novo and all inferences must be drawn in favor of the nonmoving party. Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

#### JURISDICTION AND STATUTORY AUTHORITY

Abdel-Wahed first argues that the order of summary judgment is void for want of jurisdiction because Gass's complaint for declaratory relief did not specifically request that the trial court impose a constructive trust. Abdel-Wahed claims that the absence of a request for the specific relief granted makes the



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judgment void under In re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985).

In Hardt, a decree of marriage dissolution was entered ordering the husband to pay child support despite the parties having stipulated in their joint petition that an order of child support was not requested. Five years after the decree was entered, the former husband obtained a judgment vacating the child support obligation. The vacation was affirmed on appeal under CR 60(b)(11). The court concluded that the entry of a judgment that did not conform to the parties' stipulation was the type of irregularity allowing vacation of an order that was not appealable for error of law. Here, the petition was not stipulated.

A court has subject matter jurisdiction when it has authority to adjudicate the type of controversy involved in an action. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). There can be no doubt that a case in which a declaratory judgment or a constructive trust is sought is among the types of cases a superior court has the power to decide. The trial court did not lack subject matter jurisdiction, and the judgment is not void.

Abdel-Wahed restates the argument in his reply brief as a lack of statutory authority. He contends that the authority granted by the declaratory judgment statute does not include the authority to fashion equitable relief such as a constructive trust. He did not make this argument below in response to Gass's motion for summary judgment and has not identified any rationale which allows him to raise it for the first time on appeal.

In any event, the cases Abdel-Wahed cites are not on point. He cites Bainbridge Citizens United v. Dep't of Natural Res., 147 Wn. App. 365, 374-75, 198 P.3d 1033 (2008), and City of Tacoma v. City of Bonney Lake, 173 Wn.2d 584, 595, 269 P.3d 1017 (2012). In Bainbridge Citizens, the appellants sought to use a declaratory judgment action as a vehicle to make a state agency enforce certain regulations in a manner that the appellants desired. The court stated that this would be an improper use of our declaratory judgment statutes. "Declaratory judgments are not meant to compel government agencies to enforce laws. If the UDJA [Uniform Declaratory Judgments Act] allowed otherwise, the negative implications would be endless. Courts would be forced to supervise administrative agencies, a function we have long found contrary to the judiciary's proper role." Bainbridge Citizens, 147 Wn. App. at 375. Nothing in Bainbridge Citizens suggests the trial court lacked authority to impose a constructive trust as a remedy after declaring that Gass's right to be paid from the sale proceeds was not barred by Abdel-Wahed's homestead declaration. Abdel-Wahed's reliance on City of Tacoma is equally misplaced. In that opinion, our Supreme Court simply recognized that courts err by dismissing a complaint with prejudice without declaring the rights of the parties when declaratory relief is sought. City of Tacoma, 173 Wn.2d at 595.

Gass's complaint sought declaratory relief, and it also asked the court to grant "such other and further relief as the Court finds just and equitable." While the complaint did not specifically ask for imposition of a constructive trust, Gass's cross motion for summary judgment fully explained her theory that the proceeds

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from the sale of the home were subject to a constructive trust to prevent Abdel-Wahed's unjust enrichment.

We conclude the court did not lack jurisdiction or authority to impose a constructive trust.

#### EFFECT OF HOMESTEAD EXEMPTION

Abdel-Wahed contends the trial court improperly disregarded his homestead exemption.

A homestead is "real or personal property that the owner uses as a residence." RCW 6.13.010(1). A homestead is exempt from execution on judgments up to a specified amount. RCW 6.13.070(1). That amount is presently \$125,000. RCW 6.13.030. A judgment against the owner of the homestead becomes a lien on the value of the homestead property in excess of the homestead exemption from the time it is recorded. RCW 6.13.090; Wilson Sporting Goods Co. v. Pedersen, 76 Wn. App. 300, 304-06, 886 P.2d 203 (1994).

Abdel-Wahed contends that Gass is barred from recovering against the homestead sale proceeds because she did not record any of her judgments concerning the home and therefore did not create a lien. This argument is without merit. The trial court's decision to impose a constructive trust was not based on a finding that Gass had a lien under RCW 6.13.090. The trial court's decision was based on a record showing that "the defendant intentionally and in bad faith 'looted' the investment accounts which were supposed to be transferred to plaintiff as part of the Decree, and was unjustly enriched by doing so." Clerk's

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Papers at 207 (Order on Cross Motions for Summary Judgment, September 18, 2013).

As stated by the trial court in its order, "it is well established that the Homestead Statute exemption cannot be used to facilitate unjust enrichment or fraud, and the court in equity may impose a constructive trust." The court cited Webster v. Rodrick, 64 Wn.2d 814, 394 P.2d 689 (1964), to support this proposition. Webster recognizes a nonstatutory exemption that "allows an equitable lien to be imposed against a homestead when the homestead claimant acquires the funds to purchase the homestead by fraud or theft." Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish, 111 Wn.2d 219, 229-30, 758 P.2d 494 (1988).

In Webster, an employer sued to recover funds embezzled by his bookkeeper. The employer obtained a money judgment against the bookkeeper individually and her marital community for the sum embezzled, as well as a decree imposing an equitable lien upon the defendants' property, including their residence. The employer attempted to have the residence sold to satisfy the judgment. The defendants claimed protection under the homestead statute, and the trial court denied the employer's motion to declare the homestead exemption invalid.

Our Supreme Court reversed and observed that the homestead exemption, while enjoying a favorable position in law, is intended for use as a shield to protect the homesteader. "We find no decision in this jurisdiction where the court has permitted the judgment debtor to use the statutes as a sword to

protect a theft." Webster, 64 Wn.2d at 816. Nor can they be used "as an instrument of fraud or imposition." Webster, 64 Wn.2d at 818. The court concluded that the homestead statutes did not protect the defendants from the equitable lien.

Webster allows an equitable lien to be imposed against a homestead when the homestead claimant acquires the funds to purchase the homestead by fraud or theft or other wrongful conduct. Pinebrook Homowners Ass'n v. Owen, 48 Wn. App. 424, 430, 739 P.2d 110, review denied, 109 Wn.2d 1009 (1987); see also Casterline v. Roberts, 168 Wn. App. 376, 386-87, 284 P.3d 743 (2012). The imposition of an equitable lien against homestead property requires a showing that the wrongfully obtained funds are traceable in some way to the homestead property or connected with its use or obtained by intentional culpability such as fraud. See Christensen v. Christgard, Inc., 35 Wn. App. 626, 630-31, 668 P.2d 1301, review denied, 100 Wn.2d 1032 (1983). In Webster, the court took pains to recite the evidence that the embezzled funds were "used to purchase and improve the property in question." Webster, 64 Wn.2d at 819. Abdel-Wahed argues that Webster does not apply here because the funds he wrongfully took from the investment accounts were not used to purchase or improve the residence and were not obtained by fraud.

The record shows a clear connection between the wrongfully obtained funds and the property claimed as an exempt homestead. The dissolution decree gave Abdel-Wahed sole ownership of the home in which he now claims homestead protection. He was held in contempt for failing to comply with an

No. 71007-9-1/9

order to transfer money to Gass from the investment accounts to equalize the distribution of marital assets. This was intentionally culpable conduct. In effect, Abdel-Wahed is attempting to use the homestead exemption to avoid paying for the home. Also, his motion for summary judgment admits that he directly used investment account funds to meet his living expenses, which included mortgage payments on the home. Under these circumstances, the wrongfully obtained funds are sufficiently connected to the homestead. The trial court appropriately relied on Webster as authority to impose the constructive trust.

Gass requests attorney fees on appeal under RCW 26.09.140. The request is granted. An award of attorney fees under the statute is proper if the present litigation is a "continuation of the original dissolution action." Seals v. Seals, 22 Wn. App. 652, 657, 590 P.2d 1301 (1979). This is especially true when the losing party's conduct constitutes bad faith. Seals, 22 Wn. App. at 658.

Affirmed. Attorney fees on appeal are awarded to Gass.

WE CONCUR:

Trickey, J.

Becker, J.

Leach, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In the Matter of the Marriage of	)	
NANCY A. GASS,	)	No. 71007-9-1
	)	
Respondent,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
v.	)	
AHMAD ABDEL-WAHED,	)	
	)	
Appellant.	)	
<hr/>		

Appellant, Ahmad Abdel-Wahed, has filed a motion for reconsideration of the opinion filed on October 27, 2014. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 9<sup>th</sup> day of December, 2014.

FOR THE COURT:

Becker, J.  
Judge

FILED  
COURT OF APPEALS DIV.  
STATE OF WASHINGTON  
2014 DEC -9 PM 1:58  
A-88

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*

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December 16, 2014

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CASE #: 71007-9-I  
Nancy A. Gass, Resp. vs. Ahmad Abdel-Wahed, App.

Counsel:

The following notation ruling by Commissioner Mary S. Neel of the Court was entered on December 15, 2014:

Respondent Nancy Gass is awarded attorney fees on appeal of \$10,760.00 (\$10,675.00 + \$85.00), and Title 14 costs of \$133.75. Her request for attorney fees she incurred in the trial court must be directed to the trial court.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

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