73495-4

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Division I
State of Washington
73495-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

NIKOLAY BELIKOV, a married individual,

Respondent,

v.

MARYANN HUHS and ROY E. HUHS, JR.,
and the marital community thereof,

Appellants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

As his response to this appeal demonstrates, Belikov, through the trial court, is misapplying Washington receivership law so as to circumvent statutes and constitutional provisions which guarantee the Huhses' right to appeal, judgment lien rights and homestead exemption. The circumstances, bases and nature of Belikov's judgment, as determined by the trial court, are irrelevant to the issues of this appeal. Receivership is designed in part to protect debtor rights, not thwart them.

It is revealing that Belikov, and not the receiver, opposes this appeal.[1] The receiver makes no argument as to how he purportedly is fulfilling his fiduciary duties to the Huhses, and apparently feels such obligations are so irrelevant that he can ignore the Huhses' assertions herein. The focus of this appeal is a judgment debtor's rights after institution of receivership to appeal an underlying judgment and to a homestead exemption. The receiver himself should address these points. Belikov treats the appeal as if it addresses only a judgment creditor's ability to strip a judgment debtor of statutory and constitutional rights by enforcing his judgment through a receivership. The absence of any explanation from the receiver of his purported unbiased actions to preserve

[1] The Receiver merely joins in Belikov's statements. Indeed, as all pleadings filed with the Clerk's Papers demonstrate, Belikov has opposed the Huhses' attempts to enforce their receivership rights since the receivership's institution, with the receiver involving himself to an extremely limited or no extent.

the rights of all of his fiduciaries, including the Huhses, demonstrates that the receivership has been improperly applied and enforced from its inception.

II. ARGUMENT

1. Receiver's Breach of Fiduciary Duty.

Belikov concedes by his silence in his Response Brief, and the receiver concedes by his complete silence, that a receiver, "as the court's agent, and subject to the court's direction,"[2] bears fiduciary duties to "all parties with an interest in the receivership estate, including the insolvent debtor," here, the Huhses.[3] Neither even disputes that the receiver's actions have been solely for Belikov's benefit, at Belikov's behest, and that public policy concerns arise from a trial court's countenance of a powerful judgment creditor thwarting his judgment debtors' rights through misuse of a receivership. The Huhses' "attacks" are not "personal," as Belikov urges,[4] but are the bases of demonstrable trial court error. If a receiver does not bother even to discuss with the judgment debtors whose property he administers a proposed settlement including dismissal of their

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[2] *Mony Life Ins. Co. v. Cissne Family L.L.C.*, 135 Wn. App. 948, 953, 148 P.3d 1065 (2006) citing RCW 7.60.005(10).

[3] *Community Nat. Bank v. Medical Ben. Adm'rs*, LLC, 626 N.W.2d 340, 343-44, 242 Wis.2d 626, 634, 2001 WI App 98, (Wis.App. 2001), citing *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir.1946); *Martin v. Luster,* 85 F.2d 833, 843 (7th Cir. 1936); *Security Pac. Nat'l. Bank v. Geernaert,* 199 Cal.App.3d 1425, 245 Cal.Rptr. 712, 716 (1988).

[4] Response Brief at 30.

appeal, he could not possibly argue he has considered their interests to the extent a fiduciary must.

At issue in this appeal is the trial court's enforcement of its receiver's actions, which resulted in dismissal of the Huhses' underlying appeal of Belikov's judgment ("the Appeal"), and transfer of the Mercer Island Property without consideration of the homestead exemption. The theme of Belikov's response is not that such action was improper and reversible error, but that the trial court's actions were somehow justified under the circumstances. That position is unsustainable both as a matter of law and the record on review.

2. Standard of Review.

Again, a receiver is the trial court's agent. Any errors committed by the receiver, including his dismissal of the Appeal, are attributable to the trial court for all purposes, including determination of standards of review.

This Court reviews all issues presented in this appeal *de novo*. Before the Court are the Huhses' assertions that the trial court erred by failing to enforce their statutory rights in receivership and to appeal; and their constitutional right to a homestead exemption. This Court has ruled

that it will "apply de novo review when interpreting a statute and when applying constitutional rights."[5]

Belikov argues that the Order Authorizing Dismissal of Appeal is reviewed for abuse of discretion.[6] While trial court actions regarding receivership generally are reviewed for abuse of discretion, the trial court's errors in this instance derive from errors of law, and therefore are subject to *de novo* review. The trial court violated the Huhses' statutory and constitutional rights through its receiver agent. This Court must analyze those statutory and constitutional rights *de novo* to determine any proper reversal or other modification of the trial court's errors.

In any event, a trial court's error of law is definitionally an abuse of discretion. The U.S. Supreme Court has summarized the standard of review in these circumstances as follows:

> "[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction", because "[a] district court by definition abuses its discretion when it makes an error of law". ... Accordingly, "[t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions". ... ("We will not find an abuse of discretion unless the district court's factual findings are clearly erroneous or incorrect legal standards were applied"); (court "abuses its discretion

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[5] *Locke v. City of Seattle*, 133 Wn. App. 696, 704, 137 P.3d 52 (2006) *aff'd and remanded*, 162 Wn. 2d 474, 172 P.3d 705 (2007), citing *State v. Manro,* 125 Wn.App. 165, 170, 104 P.3d 708, *review denied,* 155 Wn.2d 1010, 122 P.3d 912 (2005); *State v. Salavea,* 151 Wn.2d 133, 140, 86 P.3d 125 (2004).

[6] Response Brief at 22.

if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence").[7]

Thus, the issues before the Court are subject entirely to a *de novo* review standard.

3. The Trial Court's Factual Conclusions do Not Govern the Huhses' Appellate Rights or the Receiver's Obligations.

Belikov devotes significant attention throughout his response brief to the contents of the trial court's judgment and Order Appointing General Receiver ("the Receivership Order"[8]). He implies that because the trial court ruled the Huhses purportedly committed fraud and other atrocious wrongdoing, they have lost their rights to appeal; equitable treatment in the receivership process; and their constitutionally-guaranteed homestead exemption. Similarly, Belikov implies that because the trial court based its placement of the Huhses into receivership on findings regarding the Huhses' purported avoidance of paying Belikov's judgment, that receivership statutes and other applicable law do not govern the receiver's behavior.

The trial court's factual findings in all of these regards, while disputed as not based on substantial evidence, are wholly improper bases

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[7] *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) citing *Koon v. United States,* 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *Latvian Shipping Co. v. Baltic Shipping Co.,* 99 F.3d 690, 692 (5th Cir.1996); and *Meadowbriar Home for Children, Inc. v. Gunn,* 81 F.3d 521, 535 (5th Cir.1996).

[8] CP 872-886.

for a response to this appeal. A trial court's determinations do not dictate an appellant's rights to appeal, and certainly do not authorize a trial court to dismiss an appeal through its agent.

Similarly, the circumstances of the receiver's appointment do not dictate or impact the Huhses' rights in receivership. In strategizing how to oppose the involuntary receivership, the Huhses had a right to rely on the trial court's enforcement of, and the receiver's compliance with, receivership laws. How they responded to Belikov's motion to place them into receivership does not diminish the governance of receivership statutes, or their rights to appeal and a homestead exemption.

4. Supersedeas.

Similarly, Belikov makes much of the fact the Huhses were unable to post supersedeas, and sought to forestall enforcement based on proposed alternative forms of security they had means to post.[9] However, this process is entirely irrelevant to their right to appeal. As our Supreme Court has held:

> The purpose of a supersedeas bond is to stay further proceedings in the superior court …, and the failure to give such bond simply permits the enforcement of the judgment or decree by execution, attachment, garnishment, Contempt proceedings, or some other appropriate form of process. Failure to supersede a judgment or decree, however, in no

[9] Response Brief at 4-5.

> way affects the right of the appealing party to obtain review of the proceedings which led to such judgment or decree.[10]

"An appellant is under no obligation to supersede a judgment or a decree appealed from. It is a right and a privilege granted, in certain cases under certain conditions, to preserve the fruits of his appeal if he prevails, but it is not something he is obligated to do."[11] "When the unsuperseded judgment is reversed, after execution thereon, the judgment debtors' recourse is provided by RAP 12.8."[12]

Supersedeas and stay of enforcement are concepts that run parallel to the right of appeal itself. Nothing in the law suggests that by attempting to avoid judgment enforcement that the Huhses waived their rights to appeal or homestead. To the contrary, the Huhses had the right to assume they would continue to enjoy these statutory and constitutional rights in making their decisions throughout these proceedings.

5. Fairness of Settlement.

Belikov argues the "settlement" his appointed receiver entered into with him were "fair" to the Huhses,[13] yet another contention that is both irrelevant to this appeal and refuted by the evidence. Neither Belikov nor the trial court through the receiver has the prerogative to determine that

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[10] *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 327, 331, 553 P.2d 442 (1976), citing *Ryan v. Plath*, 18 Wn.2d 839, 855-56, 140 P.2d 968 (1943).
[11] *In re Sims' Estate*, 39 Wn. 2d 288, 297, 235 P.2d 204 (1951).
[12] *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 44, 802 P.2d 1353 (1991).
[13] Response Brief at 7-8, 14, 22-24, 30-32.

dismissal of the Huhses' underlying appeal is "fair," and therefore may be imposed on the Huhses against their will as part of a "settlement." Belikov and the receiver may be entitled to their opinion "…that the Huhses objected to the settlement due to their unrealistic beliefs about the probability of success on appeal and in a potential re-trial ….,"[14] but they are mistaken as a clear matter of law when they argue that "… the Huhses lost the right to control their property, including decision-making authority over their appeal of the judgments against them."[15] Put simply, nothing in the law supports Belikov's argument that the trial court, through its receiver, is the sole arbiter of what constitutes a "fair" settlement for the Huhses. The suggestion disregards precepts of our legal process.

Factually, Belikov's implication that he sacrificed so much to reach a "fair" settlement is unfounded.[16] As the Huhses have no significant assets other than their home, Belikov has never stood anything to gain by way of judgment enforcement other than the Mercer Island Property. Belikov's scheme with his receiver clearly was intended to have the Appeal dismissed, and all of the Huhses' property of any value transferred to Belikov, without Belikov relinquishing any right or advantage he could ever realize. The settlement is anything but "fair," as

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[14] Response Brief at 23.
[15] Response Brief at 14.
[16] Response Brief at 7-8, 30-31.

the Huhses have been deprived of everything, i.e., their home and opportunity to demonstrate the judgment is unjust, without gaining anything.[17]

6. The Trial Court, through the Receiver, did Not Properly Bargain Away the Huhses' Right to Appeal as an Item of Estate Property.

1) Receivership Law does Not Support a Finding that a Defensive Appeal Is an Item of Receivership Estate Property

Belikov cites no basis for inclusion within the definition of receivership estate "property" a judgment debtor's fundamental procedural right that cannot be assigned or sold for value. The absence of any state statute or precedent defining "property" to include a defensive appeal is far more persuasive than the absence of counter authority, as not surprisingly, no judgment creditor or receiver would make such an argument in the absence of specific authority.

RCW 7.60.060(1)(c) lists within the Receiver's powers only:

> The power to assert any rights, claims, or choses in action [of the debtor] … ***if and to the extent that the claims are themselves property within the scope of the appointment or relate to any property***, to maintain in the receiver's name or in the name of

[17] Belikov's negotiated "settlement" with his appointed receiver also is an illegal attempt to avoid tax obligations. The trial court's primary monetary judgment award was to R-Amtech, with Belikov being awarded ownership of R-Amtech and his attorneys' fees. The "settlement" transfers ownership of the Mercer Island Property directly to Belikov, such that he can avoid corporate taxation that would follow R-Amtech's sale of it. As Belikov's attorney fee award is lower than the property's value, the transfer to him amounts to tax fraud.

> [the debtor] ***any action to enforce any right, claim, or chose in action*** … [emphasis added].

The Huhses' appeal of Belikov's judgment might arguably include assertion of "rights," but the Huhses do not make claims of recovery from Belikov in the Appeal, and no asserted rights or claims "are themselves property within the scope of the appointment or relate to any property." The Receivership Order, i.e., the "appointment," makes no mention of defensive appeals as an item of property. *See also* RCW 7.60.060(e), providing "the power to assert rights, claims, or choses in action," but not defenses to claims. As the Supreme Court has held, a "chose in action" is "[a] right to receive or recover a debt, demand, or damages on a cause of action ex contractu, or for a tort connected with contract, but which cannot be made available without recourse to an action."[18]

If the statutes were intended to empower a receiver to force a judgment debtor to relinquish defense of a claim against it, particularly a claim that directly resulted in the receivership itself, they would have so stated. No reasonable interpretation of the language of the Order Appointing Receiver and RCW 7.60.005(9) encompasses a defensive appeal. A receiver's dominion is over the assets of a receivership that have inherent value. It is not over each and every statutory, constitutional

[18] *Conaway v. Co-Operative Home Builders*, 65 Wash. 39, 45, 117 P. 716 (1911), citing Black's Law Dictionary (2d Ed.) p. 198; 32 Cyc. p. 669.

and other right a judgment debtor enjoys. By Belikov's argument, the receiver could enforce a Belikov-proposed settlement precluding the Huhses from exercising their statutory property exemptions in the receivership; opposing any motion Belikov ever makes; or even living in Washington.

2) The Receivership Order

The Huhses do not dispute that the receiver was appointed in accordance with receivership statutes. They do not challenge the Order Appointing Receiver; to the contrary, the Huhses themselves seek to enforce it within the confines of applicable law. Belikov correctly points out that the Huhses, while they opposed receivership, did not oppose the scope of the Receivership Order.[19] The Huhses had no need to oppose the scope of the Receivership Order because they reasonably assumed the receiver would properly comply with it, and that the trial court would properly enforce it, all as dictated by receivership statutes.

Again, the fact a receiver was appointed, even if based on reasons related to the Huhses' conduct, does not negate the governance of receivership statutes and the Receivership Order. At issue is whether the Huhses' defensive appeal constitutes an estate asset, an item of estate property over which the receiver properly assumed control and "bargained

[19] Response Brief at 26.

away." Nothing in Washington law supports this contention, and federal bankruptcy law, to the extent it might be deemed relevant, is distinguishable.

3) *Spencer v. Alki Point Transp. Co.*

Belikov's sole Washington authority on this issue is the 1909 Supreme Court decision in *Spencer v. Alki Point Transp. Co.*,[20] which Belikov cites for the notion that "[t]he court appointing a receiver may authorize him to compromise claims and suits against the estate if best for the interest of all parties concerned."[21] *Spencer* is distinguishable because there, the debt at issue was the subject of a stipulated judgment by the debtor corporation, and was only later challenged during the receivership by two of the debtor corporation's shareholders, the others having agreed to it. It was not appealed; rights to appeal were not at issue; and the debtor entity's wishes were the subject of disagreement among its principals.

The two shareholders who sought to forestall the *Spencer* receiver's compromise argued that the stipulation regarding the judgment debtor's debt was only "for the purpose of this judgment," and therefore was not binding in the receivership as a sum the receiver should pay out. The court disagreed, and enforced the stipulated debt as part of a receivership settlement. In the case at bar, the underlying judgment was

[20] *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 83, 101 P. 509 (1909).
[21] Response Brief at 26.

not stipulated as to liability or amount, and is the subject of ongoing dispute and appeal. At issue in *Spencer* was a corporate debtor which could not speak for itself (the trustee necessarily is its mouthpiece), and whose principals disputed the corporation's rights and interests, resulting in dispute as to the corporation's intentions and "wishes." At bar are individual debtors who can speak for them themselves and whose interests, rights, intentions and wishes are clear and ongoing.

When read in the context of the court's full statement, it is clear *Spencer* supports a determination that the receiver's, and by extension the trial court's, disregard of the Huhses' interests by directing dismissal of the Appeal was improper:

> 'The receiver of an insolvent corporation represents not only the corporation, but also the stockholders and creditors. It is his duty to assert and protect the rights of each of these several classes of persons.' [citation omitted] 'The court appointing a receiver may authorize him to compromise claims and suits against the estate if best for the interest of all parties concerned.' [citation omitted]. This stipulation was entered into with the sanction of the court, to avoid the expense and delay of a reference, and is in the nature of a compromise. For these reasons the appeal of Coleman and Anderson will not be considered.[22]

4) Federal Bankruptcy Law

Without applicable authority for his positions, Belikov turns to foreign bankruptcy court decisions. His cited cases are not persuasive

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[22] *Id.* at 83-84.

because of the fundamental differences between bankruptcy and receivership; the rationale explained in those cases; and the absence of Washington law on the subject.

A federal bankruptcy trustee's authority, tasks and powers far exceed those of a state court receiver. A Chapter 7 bankruptcy, such as the one in *In re Croft,*[23] is a liquidation proceeding undertaken by the debtor with goals of complete discharge and the debtor's "fresh start" thereafter, all at the trustee's direction. Contrary to Belikov's assertion,[24] no such "fresh start" follows a discharge in receivership, and the receivership at hand is at a judgment creditor's instance, the same judgment creditor who is the sole receivership claimant who sought to dismiss the Appeal. The differences in equities are apparent, which is significant given that receivership is an equitable proceeding. *In re Croft* held as follows:

> To determine whether something is property of the bankruptcy estate, a court must look to both state and federal law. Specifically, a debtor's property rights are determined by state law, while federal bankruptcy law applies to establish the extent to which those rights are property of the estate [citations omitted]. The determinative question is whether Croft's interest in appealing a judgment against him constitutes property under Texas law—and is therefore part of the estate—or not.[25]

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[23] 737 F.3d 372 (5th Cir. 2013), cited in the Response Brief at 27-28.
[24] Response Brief at 31.
[25] *Id.* at 374-75, also cited in the Response Brief at 27-28.

The court found the Texas Supreme Court had determined that defensive appeals were indeed bankruptcy estate property under Texas law. There is no comparable Washington authority, and federal law regarding estate property is not at issue. *In re Croft* cites *In re Mozer*[26] for reaching the same conclusion based on the logic that "... even though the judgment underlying the appeal had no value to the estate, the *appeal* from that judgment had value in that it could reduce the debtor's liabilities, and thereby increase the value of the estate."[27] The value of the Huhses' non-exempt estate will be zero regardless of the Appeal's dismissal in favor of settlement with Belikov. As Belikov is the only receivership creditor, the interests of no one else will be served by a forced dismissal diminishing his claim. He will get everything if the Appeal fails or never takes place.

As *In re Croft* specifies, only two other bankruptcy courts have considered whether defensive appeals are property of a bankruptcy estate:

> In *In re Morales,* the Bankruptcy Court for the Northern District of Iowa explicitly rejected the reasoning in *Mozer* and determined that defensive appellate rights were not property under Iowa law. 403 B.R. 629 (Bankr.N.D.Iowa 2009). Iowa Code § 4.1(21) defines personal property to include money, goods, chattels, evidences of debt, and things in action. Things in action, or choses in action, are rights that can be enforced by legal action (e.g., debts or causes of action in tort). [citations omitted]. ...The court held that [t]he nature of the appellate right ... does depend on the nature of the underlying judgment. [citations omitted] It further held that defensive appellate rights

[26] 302 B.R. 892 (C.D. Cal. 2003), also cited in the Response Brief at 27-28.
[27] *In re Croft* at 375-76 (emphasis in the original).

> would not be considered property of the estate, even if they were property under Iowa law, since allowing the trustee to dispose of the debtor's right to appeal an adverse judgment would effectively destroy any right to object to the claim. [citations omitted].[28]

Again, Washington's Supreme Court has defined "chose in action" to mean "the right to receive or recover a debt …," and not to include defense of claims. Thus, Washington clearly is more closely aligned with Iowa. The Nevada Supreme Court has agreed with *In re Morales* outside the bankruptcy context.[29]

7. The "Settlement" Easily Can be Reversed to Return the Parties to their *status quo ante*.

Belikov raises this point prematurely, as is explained in the Huhses' response to his concurrently filed motion to supplement the record with affidavits and evidence the trial court has not considered. Should his motion to supplement the record fail, then this aspect of his response should fail as well.

Again, "[w]hen the unsuperseded judgment is reversed, after execution thereon, the judgment debtors' recourse is provided by RAP 12.8."[30] Here, the Huhses and trial court easily can restore the parties to their equitable positions prior to the Order Authorizing Dismissal of Appeal.

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[28] *Id.* at 376.
[29] *Butwinick v. Hepner*, 291 P.3d 119, 122 (Nev. 2012).
[30] *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 44, 802 P.2d 1353 (1991).

1) Title to the Mercer Island Property

Should this Court reverse the Order Authorizing Dismissal of Appeal, the Huhses could move the trial court to take action consistent with vacation of that order. Reconveyance of ownership of the Mercer Island Property would be a simple matter of Belikov's transferring title back to the Huhses. The fact Belikov has paid maintenance and taxes based on his and the trial court's erroneous applications of law is no basis to conclude that reconveyance is impossible. If anything, Belikov has succeeded in preserving the value of the Huhses' sole asset of value against which he might later enforce his judgment. This would be to his benefit if he ultimately prevails in the underlying Appeal.

2) R-Amtech

The Court's reversal of the Order Authorizing Dismissal of Appeal would have no impact on the Huhses' transfer of ownership of R-Amtech to Belikov, as that transfer was not part of the "settlement" the Huhses seek to vacate by this appeal. The trial court awarded Belikov ownership of R-Amtech as part of its judgment. CP 429. As Belikov's briefing demonstrates,[31] the Huhses transferred R-Amtech's ownership to Belikov in compliance with the judgment. Thus, the Court's reversal of the Order Authorizing Dismissal of the Appeal would have no impact on that

[31] Response Brief at 17-19.

conveyance. Only the Court's reversal of the judgment would require Belikov to transfer R-Amtech's ownership back to the Huhses pending a second trial. If Belikov believes at that time there is a basis for the trial court to refuse to order that reconveyance, he could make that argument at the proper time and before the proper forum.

In any event, the fact Belikov has taken action as R-Amtech's putative owner is no basis for a conclusion that ownership cannot be transferred back to the Huhses. True, R-Amtech, as a discrete legal entity, may have entered into contractual arrangements under Belikov's ownership to which it might remain bound with a retransfer. However, ownership transfer of the company would be no more problematic than in any other circumstance wherein a corporation has conducted business.

3) Other Aspects of Settlement Agreement

Belikov believes the fact the Huhses received back their personal property as part of the settlement renders the settlement irreversible.[32] Notably, the personal property at issue has minimal value, $27,610 based on appraisal. CP 910. As consideration in the satisfaction of Belikov's multimillion dollar verdict, it is negligible. Nothing in the record supports Belikov's contention that the Huhses have "in all likelihood done what they have done before and put it out of the reach of Belikov and the

[32] Response Brief at 19-20.

receiver."[33] Belikov's citation to his counsel's offer of "settlement" to the receiver does nothing to support this contention.

Again citing only his counsel's offer of "settlement" to the receiver, Belikov argues that the Huhses may "keep the proceeds from the sale" of a condominium in Costa Rica "which they have sequestered there."[34] This is a complete misrepresentation and is wholly unsupported by the record. The Huhses have not "sequestered" that condominium's sale proceeds, and the sale was executed before judgment was entered.[35]

Lastly, Belikov urges that the Huhses' dismissal of criminal proceedings in Costa Rica supports a determination that the settlement is irreversible.[36] Nothing in the record suggests reinstitution of those criminal proceedings would be impossible. If reinstitution is indeed impossible, that circumstance would only work to Belikov's advantage. Certainly, Belikov would not argue that the Appeal should not be reinstated because of the inequity of criminal proceedings against him having been irreversibly dismissed.

8. The Underlying Appeal May be Reinstated.

Belikov asserts that this Court has no power or authority to determine that the trial court dismissed the Appeal improperly, and then

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[33] Response Brief at 20.
[34] Response Brief at 19.
[35] In fact, the proceeds of that sale were expended on trial litigation costs.
[36] Response Brief at 20-21.

ensure that the Appeal is reinstated.[37] Apart from its illogic, this position is mistaken, as this Court clearly can take steps pursuant to RAP 2.5 and 12.9 to reinstate the Appeal it dismissed based on authority this Court later rules the receiver did not have.

> RAP 2.5(c)(2) provides as follows:
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> **(c) Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
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> ***
>
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

In the event the Court reverses the Order Authorizing Dismissal of Appeal, it would remand the receivership to the trial court, directing it to enforce reversal of the "settlement's" executed terms. The "law of the case" would change. The Huhses would move this Court pursuant to RAP 2.5(c)(2) to review the propriety of its earlier decision, i.e., the order dismissing appeal on the basis of the Court's determination that the trial court had no power to move this Court, through the receiver, to dismiss the Appeal. Justice certainly would best be served thereby. Our Supreme

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[37] Response Brief at 13-15.

Court has explained that "…the law of the case doctrine does not prevent the court from overruling a previous erroneous decision."[38] As this Court has ruled:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.
>
> Reconsideration of an identical legal issue in a subsequent appeal of the same case will be granted where the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice.
>
> Under the doctrine of "law of the case," as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled." Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.[39]

RAP 12.9(a), entitled **Recall of Mandate or Certificate of Finality**, provides as follows:

(a) To Require Compliance With Decision. The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The

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[38] *First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn. 2d 324, 333, 738 P.2d 263 (1987), citing *Greene v. Rothschild,* 68 Wn.2d 1, 402 P.2d 356, 414 P.2d 1013 (1965).

[39] *Folsom v. Cty. of Spokane*, 111 Wn. 2d 256, 264, 759 P.2d 1196 (1988), citing *First Small Business Co. v. Intercapital Corp.,* 108 Wn.2d 324, 332–33, 738 P.2d 263 (1987); and *Greene v. Rothschild* 68 Wn.2d, 1, 10, 402 P.2d 356 (1965).

question of compliance by the trial court may be raised by motion to recall the mandate, or by initiating a separate review of the lower court decision entered after issuance of the mandate.

The trial court's compliance with this Court's reversal of the Order Authorizing Dismissal of Appeal would require its agent, the receiver, to move this Court to reinstate the Appeal. If he fails to do so, this Court could recall its mandate pursuant to RAP 12.9(a).

9. The Huhses have Not Waived Their Constitutional Homestead Exemption Right.

1) RAP 2.5(a)

Belikov did not reply to or otherwise address in any way the Huhses' homestead claim in trial court proceedings. Thus, all arguments he presents in response to this appeal are barred under RAP 2.5(a), and are unsupported by the record on appeal. "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."[40]

2) Right to Homestead is "Automatic"

Belikov argues that the Huhses "failed to timely raise a right to homestead to the trial court, and they failed to that [sic] establish that their Declaration of Homestead is valid."[41] The Huhses need not do either to enjoy this constitutional right. As this Court has held citing the homestead

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[40] *Smith v. Shannon*, 100 Wn. 2d 26, 37, 666 P.2d 351 (1983) citing *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978) and RAP 2.5(a).

[41] Response Brief at 33.

statute, RCW 6.13.040, "[s]ince 1981, homestead protection is 'automatic' and protects property owners from the time the real property is occupied as a principal residence."[42] A homestead declaration is not at all necessary in these circumstances, RCW 6.13.040 requiring them only in instances wherein "the homestead is unimproved or improved land that is not yet occupied as a homestead" and "if the homestead is a mobile home not yet occupied as a homestead and located on land not owned by the owner of the mobile home." The Huhses filed a homestead declaration in this instance only to have a document to show the trial court of their firm intention to claim homestead.

As our Supreme Court has held:

> Homestead allowance enjoys a high priority under Washington law, as it does in other jurisdictions. [citations omitted] We have noted in past decisions that such award allowances give an absolute right. [citations omitted] ... Absent the most clear and explicit language confirming a voluntary relinquishment of the award as a known right, a waiver will not be found. [citations omitted].[43]

Belikov's argument that the Huhses "waived" this constitutional right disregards the circumstances in which it arises and the "high priority" afforded it by the constitution as enforced by the judiciary. Moreover, equity does not support waiver here. The Huhses' attempts to have this Court accept as adequate supersedeas the title to the Mercer Island

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[42] *Sweet v. O'Leary*, 88 Wn. App. 199, 201, 944 P.2d 414 (1997).
[43] *In re Boston's Estate*, 80 Wn.2d 70, 75, 491 P.2d 1033 (1971).

Property did not prompt Belikov to change his position such that enforcement of the exemption would be inequitable.

Belikov argues the Huhses waived their homestead exemption because at the time they filed the homestead declaration, they "no longer owned the property since they had, through the receiver, transferred it to Belikov …"[44] Again, as filing of a homestead declaration is not a prerequisite of the right to the exemption, it is irrelevant when, or even that, the Huhses filed it. The Huhses had argued to the trial court (without response from Belikov) their entitlement to a homestead exemption in response to the Receiver's Motion for Order to Release and Record Deeds of Trust. CP 1382-83. Only the trial court's granting that motion without regard to the homestead exemption empowered the receiver to transfer the property. In other words, the Huhses could not, and need not, have done anything more than they did.

III. CONCLUSION

Receivership is not a mechanism for powerful judgment creditors to enforce judgments by skirting judgment debtors' constitutional and statutory rights. This appeal results from Belikov's abuse of the receivership process through his appointed receiver. At the heart of it is the receiver's breach of his fiduciary duties to the Huhses by his disregard

[44] Response Brief at 35.

of receivership laws and refusal to consider the Huhses' rights and interests. The trial court erred by enforcing the receiver's actions through the Order Authorizing Dismissal of Appeal. It should be reversed accordingly.

At a minimum, the Court should enforce the Huhses' constitutional right to a homestead exemption. The Huhses did not waive this right by seeking to forestall enforcement by placing title to their home with the trial court's registry as security, or by the timing of their filing of a nonessential homestead declaration. If anything, Belikov and the receiver waived any arguments they might have before this Court by failing to raise them to the trial court.

DATED this 5th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am a legal assistant at Foster Pepper PLLC and that on February 5, 2016, I filed this pleading with the Court of Appeals of the State of Washington and have served this via E-mail service by consent of parties and Receiver:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on February 5, 2016.

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