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BY RONALD R. CARPENTER  
No. ~~87455-7~~

SUPREME COURT  
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A., a national association,

Respondent,  
v.

KENNETH TREIGER,  
a married person as to his separate estate,

Appellant,

J'AMY LYN OWENS, an unmarried person, SHULKIN, HUTTON,  
INC., P.S. a Washington professional service corporation; and  
EDMUND JOHN WOOD,

Defendants.

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REPLY BRIEF OF APPELLANT

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SMITH GOODFRIEND, P.S.

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## I. INTRODUCTION

The law of the case doctrine binds the parties and the trial court on remand to the decision in a prior appeal. *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, \_\_\_ Wn.2d \_\_\_, ¶ 13, 295 P.3d 231, 235 (Feb. 14, 2013) (*Humphrey (II)*), after remand from *Humphrey Industries, Ltd. v. Clay St. Associates, LLC*, 170 Wn.2d 495, 508, ¶ 24, 242 P.3d 846 (2010) (*Humphrey (I)*). The trial court violated the law of the case by granting the Bank priority to the Maplewood proceeds over Treiger and entering a judgment for the Bank that was effectively the same as that reversed in *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 266 P.3d 211 (2011). In this second appeal, the Court should remand with specific directions that Treiger satisfy his lien against the proceeds before, and free from any claim by, the Bank.

## II. REPLY ARGUMENT

### A. **The Trial Court's Discretion On Remand Was Limited To Action Consistent With The Supreme Court Mandate.** (Reply to Resp. Br. 25-26, 28-30)

Using the Bank's terms (Resp. Br. 28), the Supreme Court issued a "specific direction remand" in its mandate, holding that the Supplemental Decree of Dissolution "entitles Kenneth Treiger to one-half of the proceeds of the Maplewood property before

satisfaction of Bank of America's lien." (Opening Br. Appendix A ¶ 24) The Supreme Court's decision that Treiger's claim had priority over the Bank became the "law of the case," and the trial court was bound on remand to enter a judgment for Treiger to half the Maplewood proceeds free of the Bank's claim. *See Humphrey (II)*, 295 P.3d at 235, ¶ 13 ("the parties, the trial court, and this court are bound by the holdings of this court on a prior appeal until such time as they are authoritatively overruled") (citations omitted). Under the law of the case, the trial court could not, as it did here, allow the Bank to take from the proceeds before Treiger's claim was satisfied.

The Supreme Court in *Humphrey (II)* confirmed that a trial court has no discretion on remand to act in a manner that is not "consistent" with the appellate court's decision. There, the trial court had previously ordered appellant Humphrey to pay attorney fees based on the trial court's finding that Humphrey acted arbitrarily, vexatiously, and not in good faith. The trial court also denied Humphrey's request for attorney fees against respondent Clay under the LLC Act, finding that Clay substantially complied with the Act and that an award of fees was not warranted. The Supreme Court reversed both attorney fee orders and held that "given the circumstances of this case, the record does not establish

that Humphrey's actions were arbitrary, vexatious, and not in good faith." *Humphrey (I)*, 170 Wn.2d at 508, ¶ 24. The Supreme Court also held that Clay had not substantially complied with the LLC Act, and the trial court could award attorney fees under the Act to Humphrey. The Supreme Court then "remand[ed] for reconsideration of the attorney fee award." *Humphrey (I)*, 170 Wn.2d at 498, ¶ 2.

On remand, the trial court awarded Humphrey some attorney fees, based on the Supreme Court's determination that Clay had not substantially complied with the LLC Act. However, the trial court also reinstated a portion of the attorney fee award against Humphrey that had been vacated by the Supreme Court, on the grounds that there was "significant other evidence" in the record that supported its earlier finding that Humphrey had acted arbitrarily. On Humphrey's second appeal, the Supreme Court reversed once again, holding that the trial court had no authority to reinstate an award of attorney fees that it had previously vacated, and that in doing so the trial court had violated the law of the case. *Humphrey (II)*, 295 P.3d at 236, ¶ 16.

The trial court likewise violated the law of the case here. The trial court had no authority on remand to effectively grant the Bank



priority over Treiger in the Maplewood proceeds contrary to the Supreme Court's determination that because "the Supplemental Decree [awarding Treiger an equitable lien against the proceeds] was entered and recorded prior to the Bank's prejudgment writ of attachment, Treiger's lien has priority." (Opening Br. Appendix A, ¶ 19) Just as in *Humphrey (II)*, the trial court could not look for other bases to make the same decision that had been reversed by the Supreme Court. See also *National Bank of Washington v. Equity Investors*, 83 Wn.2d 435, 442-43, 518 P.2d 1072 (1974) (App. Br. 13-14) (the trial court on remand could not "thwart the direction" of the Supreme Court by granting one party priority to proceeds that the appellate court held should be paid to another party first), *appeal after remand*, 86 Wn.2d 545, 546 P.2d 440 (1976).

The Bank claims that the Court's direction "remand[ing] this case to the superior court for further proceedings consistent with this opinion" was an "exercise of discretion remand" that somehow allowed the trial court to ignore the Supreme Court's decision granting Treiger's claim priority over the Bank's. (Resp. Br. 25-26, citing *Marriage of Rockwell*, 157 Wn. App. 449, 238 P.3d 1184 (2010), *appeal after remand*, 168 Wn. App. 1047 (2012), *rev.*

*denied*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Feb. 6, 2013)) But the mandate, and the Supreme Court’s direction on remand, was not so broad as to allow the trial court to enter an order that had the practical effect of reinstating the judgment the Supreme Court had reversed. Instead, any discretion that the trial court had on remand was limited and required it to take only actions that were “consistent” with the Supreme Court’s decision.

*Marriage of Rockwell* holds nothing different. In the appeal of the trial court’s order on remand in that case, Division One held that while the trial court had to characterize a pension as directed in the first appeal, it still had discretion in dividing the pension on remand if the changed character of the pension affected its view of how the marital estate should be divided. *Rockwell*, 157 Wn. App. at 454, ¶ 6. In other words, while the trial court had authority to exercise its discretion on remand in *Rockwell*, it could only do so consistent with the appellate court’s earlier mandate establishing the character of the pension.

Here, the trial court’s order on remand granting the Bank – not Treiger – priority was not “consistent” with the Supreme Court’s decision, and thus failed to follow the law of the case. The trial court had no discretion on remand to enter an order that in

effect reinstated the judgment that the Supreme Court had reversed. By doing so, the trial court violated the law of the case, and its order must be reversed.

**B. The Trial Court Could Not Reinstatement The Same Relief Reversed By The Supreme Court On An Alternate Ground That The Bank Could Have, But Failed To, Argue In The First Appeal.** (Reply to Resp. Br. 20-24, 26-28)

The Bank asserts that the trial court's decision was justified because it relied upon a different ground to reinstate its earlier ruling. Although Treiger disputes that the basis for relief argued by the Bank on remand was an independent ground for relief (*see* Arg. § C, *infra*), had the Bank thought its *in rem* claim was a separate basis for affirmance, it should have made that argument in the first appeal. *See* RAP 2.5(a) ("a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground"); *see also LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) (App. Br. 17); *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994) (App. Br. 17); *LK Operating, LLC v. Collection Group, LLC*, 168 Wn. App. 862, 279 P.3d 448, 287 P.3d 628 (2012) (App. Br. 18-19); *Marriage of*

*Katare*, 125 Wn. App. 813, 826, 831, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005) (App. Br. 19).

The cases relied upon by the Bank do not support its argument that it could “lay in wait” and pursue an alternate grounds for affirmance on remand. In *Monroe v. Winn*, 19 Wn.2d 462, 142 P.2d 1022 (1943) (Resp. Br. 26), for instance, the trial court did not reinstate an earlier ruling that the appellate court had vacated, as the trial court did here. Instead, the trial court in *Monroe* did exactly what the Supreme Court directed it to do – it reinstated the former trustees who had been removed in the orders reversed on appeal. On remand, the trial court *complied* with the Court’s mandate by reinstating the former trustees, and did not “rul[e] against the successful appellant on an issue closely related to the overturned ruling.” (Resp. Br. 26)

The out of state authorities relied on by the Bank as “directly on point” (Resp. Br. 27-28), in fact illustrate what the Bank should have done, but failed to do, in the earlier appeal. In those cases, the unsuccessful respondents asked the appellate court to direct the trial court on remand to consider issues that were revived by the appellate court’s reversal, and in each instance the review court

gave specific authority to the trial court to address those claims on remand.

In *Southern Tool & Supply, Inc. v. Beerman Precision Inc.*, 818 So.2d 256 (La. App.), *writ denied*, 825 So.2d 1177 (2002) (Resp. Br. 27), the plaintiffs had appealed the dismissal of antitrust claims based on lack of subject matter jurisdiction. The defendants/respondents asked the appellate court to affirm on the grounds that regardless whether the trial court had subject matter jurisdiction, the plaintiffs still failed to state a claim. When the appellate court reversed the dismissal of the antitrust claims on subject matter grounds, it remanded to the trial court to consider the defendants' alternate grounds for dismissal only because the issue was thus raised, and preserved, by respondents. *Southern Tool*, 818 So.2d at 263.

Likewise, in *Reyher v. State Farm Mut. Auto Ins. Co.*, 171 P.3d 1263 (Colo. App. 2007) (Resp. Br. 27-28), appellants challenged the trial court's summary judgment that plaintiffs could not prevail on their claims as a matter of law and its order dismissing plaintiffs' class action allegations. The appellate court reversed the summary judgment because there were genuine issues of material fact. It also reversed the order dismissing the plaintiffs'

class action claims, because the trial court's decision was based primarily on its conclusion that its summary judgment rendered the class action moot. *Reyher*, 171 P.3d at 1267. Unlike here, the trial court was expressly directed to reexamine the separate class certification issue on remand in light of the reversal of summary judgment.

The Bank's opportunity to address its *in rem* claim was during the earlier appeal. If the Bank believed that it had a right to the proceeds based on its purported *in rem* claim regardless of the trial court's determination of lien priority, it should have raised that as an alternate ground to affirm and asked the appellate court to either affirm on that basis or to remand for consideration of this issue – just as the respondents did in *Southern Tool* and *Reyher*. “[Q]uestions determined on appeal, *or which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965) (emphasis added, citations omitted). The Bank cannot reopen the litigation and obtain relief identical to that which the Supreme Court already

rejected based on an issue that it could have raised as an alternate ground for affirmance in the appellate courts in the earlier appeal.

**C. The Bank Could Not Satisfy Owens' Separate Obligation From Assets Awarded To Treiger In A Decree That Was Entered Before The Bank Secured Its Claims Against Owens.** (Reply to Resp. Br. 10-20)

In the event this Court determines that the earlier decision did not preclude the trial court from considering the Bank's *in rem* claim on remand, the issue before this Court is the same as it was before: whether the trial court erred in allowing the Bank to satisfy Owens' separate obligation from proceeds awarded to Treiger under a decree that was entered before the Bank secured its claim. The answer to this question is, as in the first appeal, "no." The Bank's *in rem* claim is really no different than the arguments it made before. Making the argument in Latin will not have the effect of turning the Bank's unsecured loan into a secured one.

The Bank's claim, *in rem* or otherwise, arises out of Owens' separate obligation to the Bank, and is against Owens and her property. Whereas in the first appeal the Bank had secured its claim against Owens' interest in the proceeds by obtaining a prejudgment writ of attachment, now the Bank has no security. The Bank tried, and failed, to obtain a prejudgment writ of attachment against Owens' interest in the proceeds awarded to Treiger. It

never sought review of that decision. Accordingly, as this Court previously held, Treiger was entitled “to one-half of the proceeds of the Maplewood property sale before satisfaction of Bank of America’s lien,” because Treiger’s claim to the Maplewood proceeds had priority over the Bank. (Opening Br. Appendix A ¶ 30)

The Bank could not, as the trial court ordered on remand, reach the proceeds awarded to Treiger to satisfy Owens’ separate obligation to the Bank. The trial court’s order on remand is contrary to *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979) (App. Br. 20-22), which held that a previously unsecured creditor cannot reach property awarded to a non-liable spouse to satisfy the obligations of a debtor spouse:

[When] creditors have not obtained, during the existence of the marriage, a judgment against one or both of the spouses, or against the community, and when a former spouse, after termination of the marriage, prevails on the merits [by proving that she was not liable to the creditor], then property distributed to that former spouse—even though previously community property—cannot be used to satisfy a judgment against the other former spouse.

*Griggs*, 92 Wn.2d at 586.

Treiger, like the spouse in *Griggs*, was not liable to the Bank. Any liability Treiger or the marital community had to the Bank had been discharged in Treiger’s bankruptcy, in which the Bank was



paid over \$95,000. The trial court could not allow the Bank to satisfy his ex-wife Owen's *separate*, unsecured, obligation from assets awarded to Treiger two years after the bankruptcy court discharged any obligation Treiger may have had to the Bank and four years after Treiger's marriage to Owens was terminated.

This case is markedly different from those relied on by the Bank to claim that the proceeds awarded to Treiger were subject to the Bank's unsecured claim. (Resp. Br. 11) In those cases, an unsecured creditor was allowed to pursue payment of a *community* obligation against community property awarded to a former spouse who was also liable to the creditor. *See e.g., Watters v. Doud*, 95 Wn.2d 835, 631 P.2d 369 (1981) (wife still liable on promissory note signed on behalf of community); *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967) (creditor could pursue former community assets awarded wife for obligation related to former community business awarded to husband); *Dizard & Getty v. Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964) (creditor of former community business allowed to attach and pursue recovery against former community real property awarded wife); *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951) (dissolution court can only settle property rights between spouses,

not between spouses and their creditors); *Farrow v. Ostrom*, 16 Wn.2d 547, 133 P.2d 974 (1943) (plaintiff who obtained tort judgment for car accident while spouses were married could pursue recovery against former community property awarded wife); *Capital Nat'l Bank of Olympia v. Johns*, 170 Wash. 250, 16 P.2d 452 (1932) (creditor on promissory notes and guarantys signed by husband on behalf of community could pursue recovery against former community property awarded wife); *McLean v. Burginger*, 100 Wash. 570, 171 P. 518 (1918) (creditor under promissory notes signed by husband on behalf of community could pursue recovery against former community property awarded wife) (Resp. Br. 11-15).

Further, these cases belie the Bank's claim that the fact that Owens' obligation was a separate liability "is a distinction without a difference." (Resp. Br. 17) In *Farrow*, for instance, the Court recognized that an unsecured creditor could pursue payment from assets awarded to the wife because the creditor's claim related to *both* the husband's interest and wife's interest in the former community property. The *Farrow* Court rejected the notion that the situation was similar to a "priority contestant between two tort

claimants,” because the creditor’s claim and the wife’s claim were “against different things.”

[The wife’s] claim relates to her husband’s community interest in the property only, while [the creditor]’s claim relates not only to that, but also to the community interests of [the wife] herself.

16 Wn.2d at 553. In other words, the creditor could pursue assets awarded to the wife because she too was liable to the Bank.

Here, however, Treiger is indisputably not liable to the Bank, and Treiger’s claim and the Bank’s claim were against the “same thing” – Owens’ interest in the Maplewood proceeds. Using the Bank’s terms, both Treiger and Bank had competing *in rem* claims against Owens’ interest in the Maplewood proceeds. *In rem* is a “technical term used to designate proceedings or actions instituted against the thing.” *In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 159, 60 P.3d 53, 62 (2002) (citing *Black’s Law Dictionary* 793 (6th ed.1990)). Because Treiger secured his claim to “the thing” – the Maplewood proceeds – first, he takes free of any claim from the Bank.

Like the wife in *Griggs*, whose assets awarded in divorce were not subject to execution by the husband’s separate unsecured creditor, the priority between Treiger’s claim to the proceeds and

the Bank's claim was determined by who first secured their interest in the proceeds. As this Court decided in the first appeal, the dissolution decree gave Treiger an equitable lien in the proceeds that took priority over the Bank's later obtained prejudgment writ of attachment.

Restraining the Bank from satisfying Owens' unsecured separate obligation from assets awarded to Treiger in the dissolution action is not a violation of the Bank's due process rights. (Resp. Br. 18-20) Contrary to the Bank's claim, the dissolution court did not purport "to modify the rights of [the] creditors" by awarding Treiger his interest in the proceeds (Resp. Br. 18-19, *citing Arneson*, 38 Wn.2d at 101), and the dissolution court's decree did not "extinguish" the Bank's ability to pursue payment of the unsecured obligation owed to it by Owens from *her* assets. (Resp. Br. 19, *citing Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 374, 680 P.2d 453 (1984))

Nor did the dissolution court "strip a creditor's existing equitable claim from an award of property between spouses." (Resp. Br. 11) The dissolution decree did not purport to release Treiger from any liability to the Bank – that had been achieved in the bankruptcy proceeding, to which the Bank was indisputably a

party as a creditor of the community, when an order was entered discharging Treiger from any obligation to the Bank. The dissolution order simply secured Treiger's interest in the proceeds that were awarded to him. The Bank's failure to secure its own claim before entry of the dissolution is fatal to its demand to claim the proceeds awarded to Treiger.

### III. CONCLUSION

This Court should reverse the trial court's order and remand with directions to award Treiger his one-half of the Maplewood proceeds free from any claim by the Bank.

Dated this 15<sup>th</sup> day of March, 2013.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 15, 2013, I arranged for service of the foregoing Reply Brief of Appellant, to the Court and the parties to this action as follows:

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**DATED** at Seattle, Washington this 15th day of March, 2013.

  
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