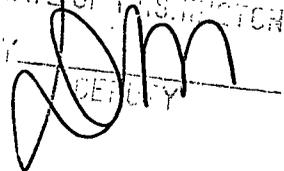


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STATE OF WASHINGTON

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No. 45312-6-II

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

UNIQUE CONSTRUCTION INC; TEMPORAL FUNDING, LLC;
WILLIAM REHE; JANE DOE REHE; WILLIAM K AND MARION L
LLLP; and SAHARA ENTERPRISES, LLC,

Appellants,

v.

NORTHWEST CASCADE, INC.,

Respondent/Cross Appellant,

BRIEF OF RESPONDENT/CROSS-APPELLANT

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March 28, 2014

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I. INTRODUCTION

In 2009, after being sued by creditor Northwest Cascade, Inc. (“NWC”), debtor Unique Construction, Inc. (“Unique”) fraudulently transferred real property to a Nevada shell company controlled by Unique’s sole officers and owners, William and Suzanne Rehe (“the Rehes”). A jury found that Unique had acted with actual intent to defraud its creditors, and the trial court voided the transfer and quieted title to the property in Unique’s name “pending satisfaction of the judgment in favor of Northwest Cascade.” CP 40. Neither Unique nor the Rehes appealed this ruling.

Nevertheless, when NWC attempted to execute on the home, the Rehes filed a Declaration of Homestead claiming an equitable interest in the corporate-owned property. NWC brought the matter before the trial court which properly quashed the Homestead Declaration and determined that the Rehes lacked an interest in the property. After NWC executed on the property, the Rehes brought this appeal.

The homestead exemption is intended to protect judgment debtors when a creditor executes on their residence. It is not intended to protect corporate property or to restrain the transfer of property belonging to others. This is especially true where, as here, the Rehes failed to assert any claim to the property during the course of NWC’s action to quiet title.

The trial court saw the Rehes' Declaration of Homestead for what it really was: a last ditch attempt to steal the property away from the corporation a second time and to further frustrate NWC's efforts to collect on the debt. The trial court's *Order* should be affirmed.

II. ASSIGNMENT OF ERROR FOR CROSS-APPEAL

The trial court correctly decided that the Rehes lacked any right to a homestead exemption in the Gig Harbor house owned by their corporation. However, the court erred in denying NWC's request for attorney fees pursuant to the contract between NWC and Unique.

A. Issues Pertaining to Assignment of Error.

Were the costs and attorney fees expended to adjudicate a shareholder's adverse claim to corporate property a "cost of collection" under the attorney fees provision in the contract between Unique and NWC?

III. STATEMENT OF THE CASE

NWC brought this action against Unique in July, 2008, alleging that it was owed roughly \$140,000 on a construction contract. CP 54. The Rehes were Unique's sole officers and shareholders. FOF 1 at CP 21. On July 29, 2009, Unique quitclaimed its sole remaining asset – a piece of real property – to Black Point Management LLC, a Nevada company controlled by the Rehes. FOF 20 at CP 24. NWC added a claim under the

Uniform Fraudulent Transfer Act against the transferee, and a claim for corporate disregard (aka, “veil-piercing”) against the Rehes. CP 54.

The property in question is a house located in Gig Harbor, Washington (“the 89th Street House”). CP 24. Unique built it as a custom house in 2001 under contract for a client known as the Clarksons. CP ____.¹ The Clarksons subsequently sued Unique in a dispute over the contract and the property was tied up in litigation until 2005. *Id.*; see also CP 191. The House remained the corporate property of Unique until the fraudulent transfer occurred in 2009, and the Rehes continued to pay utility costs and other property expenses from Unique’s bank accounts until Unique became insolvent. FOF 29 at CP 25.

As mentioned above, Unique transferred the 89th Street House to Black Point Management LLC in July, 2009. FOF 20 at CP 24. Eighteen months later, the Rehes caused the property to be transferred a second time to Sahara Enterprises LLC, another Nevada shell company controlled by the Rehes. *Id.*

Ample evidence was adduced at trial that (1) at the time that the property was purchased and the home was built, Unique intended to sell

¹ “CP ____” in this brief identifies forthcoming clerks papers pursuant to NWC’s simultaneously filed Supplemental Designation of Clerks Papers.

the improved property for profit;² (2) the Rehes' alleged financial contributions toward the purchase and construction of the 89th Street House, if any, constituted capital contributions to Unique Construction;³ and (3) the Rehes' later transfer of the property to their Nevada shell company was undertaken with the actual intent to defraud NWC. FOF 21 at CP 24. The jury determined that Unique owed NWC nearly \$140,000, and that it had fraudulently transferred the 89th Street House to Sahara Enterprises LLC with actual intent to hinder, delay or defraud its creditors. CP 141-143. The trial court awarded NWC approximately \$140,000 in unpaid amounts under the contract, approximately \$75,000 in interest, and approximately \$295,000 in attorney fees. CP 29-32. The trial court voided the fraudulent transfer and quieted title to the property in Unique:

Pursuant to the Jury Verdict regarding Unique Construction Inc.'s fraudulent transfer of property, Title to the property located at 2316 89th Street Court Northwest, Gig Harbor, WA 98332, legally described as Lot 7, East Harbor Estates, according to plat recorded under Auditor's No. 9308250624, in Pierce County, Washington, is hereby quieted in favor of Unique Construction, Inc. Unique Construction is hereby enjoined from any future

² This fact is also acknowledged by Mr. Rehe. CP 192.

³ See CP _____. Although William Rehe claims, in a Declaration submitted in Response to NWC's *Motion to Quash*, that the Rehes provided the money for the purchase of the property and the construction of the home, the Rehes failed to produce any documentary evidence that this was the case. In contrast, NWC produced expert testimony at trial that the Rehes had commingled their funds with the funds of Unique Construction, and had misappropriated well over \$150,000 of corporate assets from Unique over the course of several years. CP ____; *see, e.g.*, FOF 29 at CP 25.

encumbrance or transfer of the property, pending satisfaction of the judgment in favor of Northwest Cascade, pursuant to all provisions of this Judgment.

CP 32. Although the Rehes were a party to the action, they *never asserted a legal or equitable claim in the 89th Street House*, and they did not appeal the trial court's ruling quieting title to the property.⁴

When the trial court turned its attention to the issue of corporate disregard, counsel for the Rehes, Mr. Burns, argued that NWC's recovery should be limited to its execution on the 89th Street House and that the Rehes' personal assets should not be reached. As counsel for the Rehes argued,

MR. BURNS: ...as far as the end result of fraudulent conveyance, the act says that you void the transaction, which if you void the transaction, and as much as it hurts me to say that, that property is coming back in there for them to collect. That seems to be the remedy --

THE COURT: I think that's right.

CP 228. The Rehes never informed the court or NWC that they intended to claim or retain any alleged equitable interest in that property. Accepting the Rehes' argument that the 89th Street House would be available to NWC for collection, the trial court agreed that the Rehes' use of the home, though improper, did not cause prejudice or loss to NWC, and found in favor of the Rehes on the issue of corporate disregard. The

⁴ Unique did, however, cross-appeal the award of fees to NWC.

Rehes were awarded attorney fees of over \$80,000 against NWC and were listed as a judgment creditor on the final judgment. CP 29-32. NWC appealed the court's finding on corporate disregard, as well as the award of attorney fees on that issue.⁵

After judgment was entered, NWC proceeded to execute on the 89th Street House. CP 100-105. However, the day before the scheduled sheriff's sale, the Rehes filed a Declaration of Homestead. CP 170-175. NWC postponed the sale and brought a motion before the trial court to adjudicate the Rehes' alleged property interest and invalidate their Homestead Declaration. CP 127-179. The Rehes did not object to the trial court's jurisdiction but instead proceeded to argue the motion on the merits, submitting through their attorney a response to NWC's motion and a factual declaration from William Rehe. CP 180-194. The trial court held a hearing on July 12, 2013 and granted NWC's *Motion*, finding that:

the Rehes do not have a sufficient interest in the real property located at 2316 89th Street Court Northwest, Gig Harbor, WA 98332, and are not the judgment debtors of the July 27, 2012 judgment plaintiff Northwest Cascade Inc. seeks to execute on. Accordingly, the Declaration of Homestead filed by the Rehes is therefore invalid.

⁵ CP 33. See Case # 43852-6-II (transferred to Division I as Case # 71061-3-1).

CP 241. The Rehes filed a *Motion for Reconsideration* which raised **for the first time** their challenge to the trial court's personal jurisdiction. CP 244-253. The trial court denied the *Motion for Reconsideration*. CP 318.

Both in its *Motion* to quash the Rehes' Homestead Declaration, and in its *Response* to the Rehes' Motion for Reconsideration, NWC requested attorney fees pursuant to its contract with Unique. CP 136; CP 277. The trial court denied NWC's request. CP 319. NWC cross-appeals that denial.

IV. STANDARD OF REVIEW

The appellate court reviews facts underlying a trial court's decision for substantial evidence. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1999). Questions of law are reviewed *de novo*, as is a trial court's decision whether a particular contract authorizes an attorney fee award. *Hawkins v. Diel*, 166 Wn. App. 1, 9-10, 269 P.3d 1049 (2011).

V. ARGUMENT IN RESPONSE TO THE REHES' APPEAL

The Rehes argue that the trial court lacked personal jurisdiction over them and that the trial court's ruling is therefore void. This argument is without merit. The Rehes' attempt to establish a homestead exemption on the 89th Street House was a collateral attack on the trial court's

judgment. The trial court retained jurisdiction over the Rehes to address this attack and enforce its judgment by resolving competing claims to the property. In addition, the Rehes waived any defense of personal jurisdiction by failing to raise the issue until after the trial court had ruled on the merits of the issue.

The Rehes also argue that the trial court erred in determining that they lacked sufficient interest in the property to assert a Homestead Exemption. Again, this position cannot be sustained. The Rehes are not entitled to a Homestead Exemption for the simple reason that they are neither judgment debtors nor owners of the property within the meaning of the Homestead Act. Moreover, the Rehes are precluded from asserting any right to the property by the principles of judicial estoppel and *res judicata*. The trial court's *Order* should be affirmed.

A. The Trial Court had personal jurisdiction over the Rehes.

The trial court quieted title to the 89th Street House in Unique, "pending satisfaction of the judgment in favor of Northwest Cascade." CP 40. Neither Unique nor the Rehes attempted to appeal this decision or to supersede the judgment. Instead, without filing a Motion to Vacate, the Rehes filed a Declaration of Homestead. The trial court properly enforced its earlier decision and rejected this collateral attack on its Judgment.

On appeal, the Rehes argue that the trial court lacked personal jurisdiction over them and that the trial court's *Order* was therefore in error. However, the Rehes only raised this issue **after the *Order* was issued**, in a *Motion for Reconsideration*. As such, their jurisdictional argument is deemed waived. Even considering the jurisdictional argument on its merits, the trial court's personal jurisdiction over the Rehes survived final judgment for the purpose of enforcing that judgment and to adjudicate competing claims to the judgment debtor's property.

1. The Rehes waived any objection to personal jurisdiction by failing to raise the issue prior to the trial court's ruling.

The Rehes acknowledge that they did not raise their jurisdictional challenge to the trial court's *Order* until they brought their *Motion for Reconsideration*. *Appellants' Brief* at 3-4; see also CP 250. Their failure to raise this jurisdictional challenge earlier is fatal to their argument.

It is proper for courts to decline to consider new arguments on reconsideration where those arguments were available earlier. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) (CR 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case); *Fay Corp. v. Bat Holdings I, Inc.*, 651 F. Supp. 307 (W.D.Wash., 1987) (A motion for reconsideration may not be used to offer theories of law that were available at the time of the initial ruling).

In seeking reconsideration of the trial court's July 12, 2013 *Order*, the Rehes argued for the first time that the trial court had no jurisdiction over them because they were dismissed in the trial court's Findings of Fact and Conclusions of Law.⁶ CP 249-250. This argument could have been asserted in response to NWC's prior *Motion to Quash*, but was not. The trial court properly denied the *Motion for Reconsideration*.

A party waives a jurisdictional challenge by proceeding to argue an issue on its merits without asking for an immediate ruling on jurisdiction. *In re Marriage of Markowski*, 50 Wn. App. 633, 637, 749 P.2d 754 (1988); *see also In re Marriage of Maddix*, 41 Wn. App. 248, 251, 703 P.2d 1062 (1985). The facts here are nearly identical to those present in *Maddix*. In *Maddix*, a Ms. Jensen brought a "motion as a matter of law" to set aside a portion of an earlier court order on dissolution, and "served the papers on Mr. Jensen's attorney, rather than personally serving Mr. Jensen." *Maddix*, 41 Wn. App. at 250. The Court held,

Even if we do assume the service was ineffective pursuant to CR 60(2), we conclude there was a waiver by Mr. Jensen of his jurisdictional argument, because he did not ask for an

⁶ While the Rehes fail to distinguish between personal jurisdiction and subject matter jurisdiction, it is clear by their arguments that they are challenging personal jurisdiction. "The record is devoid of personal service *submitting the Rehes to the jurisdiction of the court.*" *Appellants' Brief* at 3 [emphasis added]. "[N]owhere in [RAP 7.2] does the superior court retain *jurisdiction over dismissed defendants.*" *Appellants' Brief* at 4 [emphasis added]. "The Rehes' position [is] that once dismissed the court lacked authority to subsequently rule *on matters pertaining to them.*" *Appellants' Brief* at 4 [emphasis added].

immediate ruling by the court on the issue of jurisdiction, and he submitted an affidavit and memorandum of authorities refuting the merits of Mrs. Jensen's position.

...
Nothing in the record indicates Mr. Jensen asked for an immediate ruling on the jurisdictional question nor did the court make reference to it in its findings of fact and conclusions of law. The proper conclusion, therefore, is that although the court may have lacked personal jurisdiction over Mr. Jensen because of Mrs. Jensen's failure to comply with the statutory guidelines, Mr. Jensen waived that defense by presenting arguments on the merits and failing to ask for an immediate ruling on the jurisdictional issue.

Maddix, 41 Wn. App. at 250-51. Similarly, here the Rehes failed to raise their jurisdictional argument and instead “present[ed] arguments on the merits,” which were rejected by the trial court. The Rehes waived their jurisdictional challenge and the trial court was justified in rejecting their *Motion for Reconsideration*.

2. The Trial Court retained jurisdiction over the Rehes after entry of judgment.

Even if the Rehes' jurisdictional argument is considered on its merits, it must be rejected. The Rehes assert the simplistic and unsupportable argument that a trial court loses all jurisdiction over a party immediately upon entry of judgment or dismissal. This is false. Not even the cases cited by the Rehes – largely from other states – support this proposition. Instead, Washington trial courts continue to have jurisdiction

over parties after final judgment pursuant to a variety of statutes, court rules, and RAP 7.2.

a. Washington courts have continuing jurisdiction over parties to enforce trial court orders.

On July 27, 2012, the trial court found in favor of the Rehes on the issue of corporate disregard and entered final judgment that, *inter alia*, (1) quieted title to the 89th Street House in Unique, and (2) awarded fees to the Rehes. NWC appealed the trial court's decision on the issue of corporate disregard, as well as the award of fees.⁷ NWC posted a supersedeas bond pursuant to RAP 8.1, staying the judgment and the supposed dismissal of the Rehes pending review.⁸ CP _____. Neither the Rehes nor Unique appealed the trial court's order quieting title to the house.⁹

⁷ The Rehes claim that they were "dismissed with prejudice" based upon language contained not in the final Judgment, but in the trial court's Findings of Fact and Conclusions of Law. CP 28. While this may be a matter of semantics, this claim is misleading. The Rehes were not "dismissed." Rather, the trial court entered final judgment in their favor, and in fact named them a Judgment Creditor. The Judgment states, "The total judgment entered in favor of the Rehes against Northwest Cascade 88,509 [sic] for attorney fees and costs." CP 31. Judgment in favor of the Rehes occurred on the same day as their "dismissal."

⁸ This stay of the trial court's decision should, in itself, dispose of the Rehes' jurisdictional argument. Pursuant to the stay of the trial court's Findings of Fact and Conclusions of Law, the Rehes must be deemed to remain within the jurisdiction of the trial court.

⁹ Although Unique appealed the fraudulent transfer judgment, it abandoned that appeal in its opening brief and challenged only the award of fees to NWC. See *Brief of Respondents* in Case No. 43852-6-II.

The Rehes were a party to this final judgment, and their subsequent filing of a Declaration of Homestead regarding *the very same property* that was a subject of the lawsuit was a collateral attack on the trial court's decision. Under RAP 7.2(c), "the trial court has authority to enforce any decision of the trial court." This is exactly what the trial court did when it determined that the Rehes lacked any homestead rights in the corporate-owned property.

This matter is similar to the facts in *Burrill v. Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002). There, the trial court entered a final order dividing property in a divorce proceeding but subsequently reasserted its jurisdiction to award a monetary judgment only peripherally related to the court's order. The facts of *Burrill*, as explained by the Court of Appeals, are these:

Cindy next contends that the trial court lacked jurisdiction to enter a postjudgment order concerning damage caused by Cindy upon leaving the family home. RAP 7.2(c) allows a trial court to enforce its decision after a notice of appeal has been filed. ... In this case, Don was awarded the family home. Each party was awarded their respective furniture, clothing and personal effects then in their possession.

When Don moved into the house, Cindy had taken the stove and refrigerator and had also taken everything from the children's bedrooms, including the furniture and the light switch cover. In addition, she had removed window coverings and left the house in a state of filth, including cat feces ground into the carpet and garbage strewn about. The

trial court fairly concluded that the award of the home to Don included the appliances. It was also fair to conclude that the award of the home implied that it be left in a habitable condition. The award of damages because of these problems with the home upon transfer to Don is an enforcement of the decree, over which the trial court had jurisdiction.

Burrill, 113 Wn. App. at 873-74. Similarly, the Rehes attempted to subvert the intent of the trial court after final judgment by belatedly asserting an interest in the property. The trial court was in the best position to interpret the boundaries of its own judgment. It is fairly implied in the trial court's *Judgment* that Unique's legal and equitable rights to the 89th Street House were exclusive, and that NWC was entitled to execute on that property. The trial court properly exercised its jurisdiction to address the issue of the Rehes' belatedly-asserted rights.

b. Washington courts have specific statutory authority to consider competing claims to property in a post-judgment supplemental proceeding.

A trial court has specific statutory authority to adjudicate competing interests in land subject to execution. RAP 7.2(e) gives a trial court "authority to hear and determine ... postjudgment motions authorized by the civil rules, the criminal rules, or statutes." This includes matters that are collateral to the judgment or supplemental to the action.

Where another party claims an interest in real estate owned by a judgment debtor, the trial court has statutory authority to rule on the

matter in a post-judgment supplemental proceeding pursuant to RCW

6.32.270. That statute states in part,

where it appears to the court that a judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor *or disputed by another person*, ...the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests of the parties in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor.

RCW 6.32.270 (emphasis added). As Washington Courts have held,

RCW 6.32.270 in combination with RCW 6.32.240 allows a superior court to adjudicate title to real property in a supplemental proceeding against a judgment debtor and other persons joined “claiming adversely” to the debtor, and the trial court in such a situation is not required to resort to [RCW Chapter 4.12] for its jurisdiction. The Spokane County Superior Court properly exercised jurisdiction.

A & W Farms v. Cook, 168 Wn. App. 462, 469, 277 P.3d 67 (2012).

Here, by filing their Declaration of Homestead, the Rehes made a claim to an equitable interest in the property of the judgment debtor, Unique Construction. NWC has the right to have that competing claim heard in a supplemental proceeding, and the trial court has jurisdiction to rule on the validity of the alleged interest, pursuant to RCW 6.32.270. The Rehes were a party to the proceeding, and the trial court properly adjudicated the respective interests. The trial court concluded that “the Rehes do not have a sufficient interest in the real property.” CP 241. The

trial court had statutory authority and jurisdiction to determine the property interests of the Rehes in the subject property.

As the court held in *Enyart v. Humble*, 17 Wn. App. 181, 184, 562 P.2d 648, 650 (1977):

There is no reason to compel the Humbles to seek an adjudication of their homestead rights in some future action. They timely raised the issue of the validity of the homestead before a court of general jurisdiction in the county in which the property claimed exempt was situated. All necessary parties were present; it served no useful purpose to defer resolution of the homestead question until an independent action could be commenced, the pleadings settled, and the case brought on for trial. The legislature has provided that homesteads should be identified and protected by the courts; it has expressed no concern as to the procedure to be employed. In the interest of economy and in fairness to the Humbles, the homestead question may properly be, and we believe should be settled as a part of the proceedings supplemental to judgment.

In short, the trial court had authority under state statute and under RAP 7.2 to resolve competing claims to the 89th Street House through supplemental proceedings, and it did so. Such a course of action is consistent not only with the statute, rules, and constitution, but also with principles of judicial economy. The trial court did not exceed its authority but properly adjudicated the competing property interests efficiently through a supplemental proceeding.

c. No cases support the overly broad and simplistic position put forth by the Rehes.

The Rehes cite three Washington cases and fifteen non-Washington cases to support their overly simplistic position that a trial court automatically loses all jurisdiction of a case after dismissal or final judgment. The cases cited by the Rehes do not support their position. In particular, none of the cases prohibits a court from retaining jurisdiction to enforce the express terms of an earlier order or judgment, or to exercise authority granted pursuant to state statute.

The closest case to the Rehes' position is the 90-year-old case, *Phillips v. Wenatchee Valley Fruit Exchange*, 124 Wash. 425, 214 P. 837 (1923). That case held that "the trial court was without jurisdiction to enter the supplemental decree or order after the case had been appealed to this court under section 1731, Rem. Code." *Phillips*, 124 Wash. at 428. However, this case was decided long before the enactment of the Rules of Appellate Procedure, which specifically provide for the trial court's continuing jurisdiction as set forth in RAP 7.2.

The Rehes cite to *Krikava v. Webber*, 43 Wn. App. 217, 716 P.2d 916 (1986), yet that case only stands for the proposition that a final judgment acts as *res judicata* to all issues that were, or could have, been litigated in the dispute. It does not say that a trial court lacks authority to

enforce its orders, or to engage in other postjudgment supplemental proceedings authorized by statute. If anything, *Krikava* shows the impropriety of the Rehes' attempt to assert a property interest in the 89th Street House after title to the property had finally been quieted in Unique.

Many of the foreign cases cited by the Rehes deal with a stipulated or voluntary dismissal. There is a significant difference between the effect of a dismissal pursuant to agreement between the parties, and a final judgment on the merits entered by the trial court. A stipulated dismissal suggests that all issues before the court have been resolved between the parties, whereas a final judgment frequently involves a trial court's additional, supplemental authority to address post-judgment disputes. As one of the cases cited by the Rehes explains,

The reason for this rule is apparent. If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit, he must be held to have anticipated the effect and necessary results of this action, and should not be restored to the position and the rights which he voluntarily abandoned.

People ex rel. Waite v. Bristow, 391 Ill. 101, 111-12, 62 N.E.2d 545 (1945). The rule does not extend, however, to a final adjudication on the merits of a claim, which frequently requires continuing judicial oversight. The following cases cited by the Rehes address stipulated and voluntary dismissal, and are therefore inapposite: *84 Lumber Co. v. Cooper*, 656

So.2d 1297, 1298 (1994) (trial court lacked jurisdiction to adjudicate dispute between plaintiff and intervener after plaintiff voluntarily dismissed suit against defendant)¹⁰; *Randle-Eastern Ambulance Service, Inc. v. Vasta*, 360 So.2d 68, 69 (1978) (Florida courts did not retain jurisdiction over voluntarily dismissed defendants to entertain plaintiff's motion to vacate voluntary dismissal); *Sprague v. P.I.A. of Sarasota, Inc.*, 611 So.2d 1336 (1993) (trial court was divested of jurisdiction to entertain summary judgment motion by plaintiff's voluntary dismissal); *Oceanair of Florida, Inc. v. Beech Acceptance Corp.*, 545 So.2d 443(1989); *People v. Bristow*, 391 Ill. 101, 112, 62 N.E.2d 545, 552 (1945); *Davis v. Robinson*, 374 Ill. 553, 30 N.E.2d 52 (1940) (voluntarily dismissed action did not bar subsequent action, notwithstanding the fact that a post-judgment motion remained undecided in prior action); *Bettenhausen v. Guenther*, 388 Ill. 487, 58 N.E.2d 550 (1945).

In fact, a number of these cases involve the specific question of whether a voluntarily dismissed suit can be reinstated on motion by the

¹⁰ Even Florida courts have disapproved of *84 Lumber*, pointing out that the Court of Appeals in that case erred in determining that subject matter jurisdiction was lacking. As the Court noted in *MCR Funding v. CMG Funding Corp.*, 771 So. 2d 32, 35 (2000), "Subject matter jurisdiction is the power of a court to adjudicate the type of case before it." The *MCR Funding* case implies that the *84 Lumber* Court had the power to adjudicate the competing interests of the parties, and that *84 Lumber* was wrongly decided. The *MCR Funding* Court certified the conflict to the Florida Supreme Court, but the case was settled before the Florida Supreme Court had an opportunity to reconcile the conflict. *MCR Funding v. CMG Funding Corp.*, 797 So. 2d 587 (Fla. 2001)

trial court. See, e.g., *Randle-Eastern, supra*; *Bristow, supra*; *Bettenhausen, supra*. This question is not at issue here.

Other cases cited by the Rehes likewise involve different legal questions. *Phillips v. Citibank, N.A.*, 63 So. 3d 21 (2011) held only that dismissal of parties who had never been served did not preclude the plaintiff from proceeding against parties that had been served. *Seijo v. Futura Realty, Inc.*, 269 So. 2d 738 (1972) held that where the defendant was dismissed six months before trial, she was entitled to notice before the order of dismissal was vacated.¹¹ *Chicago Title & Trust Co. v. Tilton*, 256 Ill. 97, 99 N.E. 897 (1912) held that a Plaintiff who inadvertently sought relief from judgment under the wrong case number was not entitled to reinstatement. *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397,418, 513 N.E.2d 776,795 (1987) held that a dismissed party had no obligation to participate in discovery notwithstanding trial court's invitation to do so.

It is important to note that none of the cases cited by the Rehes addresses a trial court that is enforcing an earlier judgment, or exercising ancillary jurisdiction specifically authorized by statute. Further, none of these cases address a defendant that failed to assert the jurisdictional defense prior to the court's ruling.

¹¹ No cases, even in Florida, cite *Seijo* for the proposition that a previously dismissed defendant can only be brought back into a case by the service of new process.

A number of the cases cited by the Rehes even support NWC's position that the trial court retains post-judgment jurisdiction, as authorized pursuant to statute. *Day v. Collingwood*, 144 Cal.App.4th 1116, 1124, 50 Cal.Rptr.3d 903 (2006), held that the court retained post-judgment jurisdiction pursuant to a statute to award fees. *Frank Annino & Sons Construction, Inc. v. McArthur Restaurants, Inc.*, 215 Cal.App.3d 353, 357, 263 Cal. Rptr. 592 (1989) and *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1364, 117 Cal. Rptr. 3d 747, 757 (2010), reached the same result. *Governale v. Nw. Cmty. Hosp.*, 147 Ill. App. 3d 590, 596, 497 N.E.2d 1318, 1322 (1986), held that, notwithstanding dismissal and/or final judgment, the trial court could retain jurisdiction "where the party in whose favor dismissal was entered otherwise conducts himself in a manner inconsistent with the order of dismissal."

Finally, the case of *Firchau v. Gaskill*, 88 Wn. 2d 109, 113-14, 558 P.2d 194 (1977), also cited by the Rehes, actually supports the trial court's continuing jurisdiction here. As that Court held,

Although the general rule is that a court loses jurisdiction of a case after an order of dismissal has been entered, this rule is not absolute, and we will not follow it when to do so would be manifestly unjust.

Firchau, 88 Wn. 2d at 113-14.

In *Firchau*, the parties submitted a dismissal of a dissolution action without informing their attorney, in an attempt to prevent the court from awarding fees. The attorney brought his own motion for fees after dismissal and the trial court ruled that it would retain jurisdiction to prevent injustice. The Washington Supreme Court affirmed.

Similarly, here the Rehes first fraudulently transferred the 89th Street House in an attempt to prevent NWC from collecting on its debt. After this transfer was voided by the trial court, the Rehes again attempted to prevent collection by filing a homestead exemption. The trial court had ample authority, under *Firchau*, to retain jurisdiction to prevent a manifest injustice.

Despite seeking persuasive authority far afield from Washington, the Rehes fail to cite any substantial authority to undermine the trial court's clear jurisdiction pursuant to RCW 6.32.270 and RAP 7.2. The trial court properly exercised jurisdiction over the Rehes.

B. The Trial Court correctly found that the Rehes could not assert a homestead exemption against Northwest Cascade

“The homestead consists of real or personal property that the *owner* uses as a residence.” RCW 6.13.010(1) (emphasis added). “As used in this chapter, the term “owner” *includes but is not limited to* a

purchaser under a deed of trust, mortgage, or real estate contract.” RCW 6.13.010(2) (emphasis added).

Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW 6.13.070 from and after the time the real or personal property is occupied as a principal residence *by the owner*.

RCW 6.13.040 (emphasis added). “[T]he homestead is exempt from attachment and from execution or forced sale *for the debts of the owner* up to the amount specified in RCW 6.13.030.” RCW 6.13.070 (emphasis added).

The concept of “ownership” is central to the notion of a homestead exemption, as well it should be. Not every squatter on land may invoke a homestead exemption, or attempt to divert \$125,000 of the sale price away from the rightful owner of the land. Similarly, to invoke a homestead exemption, the claimant must be the judgment debtor whose ownership interests are being executed upon. Both prongs must be met before the claimant can qualify for a homestead exemption: the Rehes must be both owners and judgment debtors. They are neither, and their homestead claim must fail. In addition, the Rehes are precluded from asserting any right to the property by the doctrines of *res judicata* and judicial estoppel.

Here, Unique Construction was the judgment debtor and the owner of the property. NWC properly executed upon Unique’s fee simple title to

the property. With respect to NWC's judgment lien against Unique, the Rehes' homestead claim was void and invalid.

1. Washington's homestead exemptions apply only to judgment debtors, not to third parties.

Washington's statutory homestead protections apply to protect *judgment debtors* from execution against *their homestead property*. RCW Title 6, Chapter 13. The Homestead Act does not allow *third parties* – strangers to the debt – to prevent lawful execution against a judgment debtor's property interests. To hold otherwise would allow tenants to declare homesteads against their landlord's interests, and squatters to declare homesteads against properties lawfully owned by others.

RCW 6.13.070 contains the exemption for homestead property and states, in pertinent part, "the homestead is exempt from attachment and from execution or forced sale *for the debts of the owner* up to the amount specified in RCW 6.13.030." *Id.* (emphasis added). The plain language of the statute exempts real property from execution only for "the debts of the owner." As Washington courts have held, the homestead exemption "is a right reserved to a 'judgment debtor' to 'retain' possession of the mortgaged premises during the period of redemption." *Skinner v. Hunter*, 95 Wash. 607, 608, 164 P. 244 (1917).

The Rehes have failed to cite a single case where a stranger to the judgment was allowed to claim a homestead exemption against the judgment debtor's property. That is because Washington law does not allow this. Only judgment debtors are allowed the protection of the homestead exemption:

Appellants are not judgment debtors either actual or potential. They did not sign the mortgage note; did not assume the mortgage; did not owe the debt. No money judgment was taken, or could have been taken, against them or either of them. ... Under the statute as it now exists appellants have no right to retain possession in virtue of their homestead declaration simply because they are not judgment debtors.

Nw. Trust & Safe Deposit Co. v. Butcher, 98 Wash. 158, 159-60, 167 P. 46 (1917).

The policy justification for this rule is clear: strangers to a debt may not stand in the way of its execution. If the Rehes were tenants under the terms of a 10-year lease, and *their personal creditors* attempted to execute on *that leasehold interest* in property, then the Rehes might be able to assert a homestead exemption in the leasehold pursuant to statute. However, the Rehes would not be able to assert a homestead exemption in an execution sale by *their landlord's creditors* as against the landlord's fee simple title to the property.

Here, as discussed below, the Rehes had no right to possession of the property, and subsisted on the land by the sufferance of the former property owner Unique Construction. The Rehes are not the judgment debtors of NWC and cannot raise the Homestead Act as an impediment to NWC's execution against Unique's fee simple interest. NWC acquired (through Unique) fee simple title to the 89th Street House, and the Rehes are in wrongful possession of the property.

Allowing third parties to assert homestead rights would likewise lead to absurd consequences. For example, if the Court were to grant the Rehes' homestead exemption, the first \$125,000 in proceeds from the sale would be paid to "the judgment debtor." Under the Rehes' theory, how are we to interpret this result? Do the Rehes (as they claim) receive the first \$125,000, even though the property is owned by their corporation? Such a result would be a clear and undeserved windfall to a party whose prior attempt to defraud NWC of the same asset was already rejected by a jury verdict. Or is the money paid back to the true judgment debtor, Unique, despite the fact that Unique is not a "head of family" and does not "reside" in the house?¹² These absurd results further demonstrate why third parties may not claim homestead rights in enforcement actions

¹² Indeed, if the first \$125,000 is paid to Unique (the actual judgment debtor) as required by the statute, it would be subject to offset or immediate garnishment by NWC pursuant to its judgment, thereby rendering the homestead claim process a waste of time.

between judgment debtors and creditors. “Statutes should be construed to affect their purpose and unlikely, absurd, or strained consequences should be avoided.” *State v. Stannard*, 109 Wn.2d 29, 742 P.2d 1244 (1987). The Rehes’ interpretation of the Homestead Act should be rejected, and the protections of the Act should not be extended to encompass strangers to the collection action.

2. The Rehes have failed to prove any legal or equitable interest in the property.

The fact that the Rehes are not judgment debtors is sufficient to warrant affirmance of the trial court’s *Order*. However, the *Order* can also be affirmed on the separate ground that the Rehes failed to demonstrate any right to a homestead exemption.

The Rehes claim that possession alone entitles a resident of real property to a homestead exemption. This is not and never has been the law. The language of the Homestead Act requires that the person claiming the exemption be the “owner” of the subject property. RCW 6.13.010(1). The Rehes’ position has been expressly rejected by the Washington Supreme Court:

[Appellant] argues that it is unnecessary for one claiming a homestead to have legal title to the residence, citing *Downey v. Wilber*, 117 Wash. 660, 202 P. 256 (1921) and *Desmond v. Shotwell*, 142 Wash. 187, 252 P. 692 (1927). While the language in *Downey* and *Desmond* is broad, it does not support appellant's contention. First, in each case

the homestead declarant actually possessed a legal interest in the questioned property which the court held to be sufficient. Thus, the suggestion at page 188 of 142 Wash., at page 692 of 252 P. of *Desmond* that it is unnecessary for one asserting the right to ‘own either a legal or an equitable interest in the property claimed’ is pure *dicta*. Second, *Downey* and *Desmond* are not on point. In both cases the declarants possessed a prior legal interest in the property upon which they later sought to impose a declaration of homestead. ***The question was whether a homestead declaration could be claimed upon the type of legal interest there involved.***

Sec. Sav. & Loan Ass'n v. Busch, 84 Wn.2d 52, 55, 523 P.2d 1188, 1190 (1974) (emphasis added).

There are only three circumstances in which Washington courts have held that an equitable, as opposed to legal, right can ground a homestead exemption: (1) where the party claiming an exemption dwells in a portable shelter on leased land (*Desmond v. Shotwell*, 142 Wash. 187, 189, 252 P. 692 (1927)); (2) where the party claiming the exemption dwells on the land pursuant to a contract to purchase the land (*Downey v. Wilber*, 117 Wash. 660, 202 P. 256 (1921)); and (3) where the party claiming the exemption holds title subject to a Mortgage and/or Deed of Trust (*Felton, supra.*) These “equitable rights” identified in early case law are now built into the definition of “Owner” in RCW 6.13.10, but none of them even remotely applies to the Rehes.¹³

¹³ A careful review of the cases cited by the Rehes shows that, in each, the party asserting a homestead must have a legal or equitable right of possession. *Robin L. Miller Const.*

Indeed, the Rehes have failed to articulate what sort of “equitable right” they claim in the property. Washington cases, however, have made this explicit: “if a claimant has a sufficient interest in real property to entitle him to maintain a home thereon, he has such an interest as will entitle him to protection under the homestead statute.” *Downey*, 117 Wash. at 661. Thus a right to possession of the property, whether legal or equitable in nature, must exist before a party can assert a homestead exemption. “The right of homestead, however, does not exist after the right of possession is lost.” *Swanson v. Anderson*, 180 Wn. 284, 286, 38 P.2d 1064 (1934).

The Rehes cite to *Edgley v. Edgley*, 31 Wn. App. 795, 798-99, 644 P.2d 1208 (1982), to bolster their argument that mere possession entitles them to a homestead exemption. However, *Edgely* cites to *Swanson* as its sole support for this proposition. *Swanson* does not say that possession

Co., Inc. v. Coltran, 110 Wn. App. 883, 43 P.3d 67 (2002) (person asserting homestead exemption had full legal ownership right); *Whitworth v. McKee*, 32 Wash. 83, 72 P. 1046 (1903) (same); *State v. Superior Court of Chelan Cnty.*, 147 Wash. 574, 266 P. 731 (1928) (same); *Macumber v. Shafer*, 96 Wn.2d 568, 637 P.2d 645 (1981) (same); *Pinebrook Homeowners Ass'n v. Owen*, 48 Wn. App. 424, 739 P.2d 110 (1987) (same); *In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007) (same); *State ex rel. White v. Douglas*, 6 Wn.2d 356, 107 P.2d 593 (1940) (person asserting homestead exemption had equitable right to possession of property as holder under deed of trust); *Sweet v. O'Leary*, 88 Wn. App. 199, 944 P.2d 414 (1997) (same); *Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle*, 101 Wn.2d 416, 679 P.2d 928 (1984) (same); *Cody v. Herberger*, 60 Wn.2d 48, 371 P.2d 626 (1962) (person not entitled to homestead exemption over deceased spouse's separate property); *In re Poli's Estate*, 27 Wn.2d 670, 179 P.2d 704 (1947) (person entitled to homestead exemption over deceased spouse's community property); *In re Wilson*, 341 B.R. 21 (9th Cir., 2006) (person not entitled to homestead exemption where he lacked any legal or equitable right in property.)

alone entitles one to a homestead exemption. Rather, *Swanson* says that the ***right to possession*** entitles one to the exemption, and that the right to the exemption ceases when the right to possession does. *Swanson*, 180 Wn. at 286. Moreover, *Edgley* ignores the Washington Supreme Court's ruling in *Busch*, 84 Wn.2d at 55. Regardless, *Edgley's* discussion is dicta here because, as the *Edgley* Court goes on to note, "the trial court found the community had a sufficient interest to entitle it to maintain a home on the property." *Edgley*, 31 Wn. App. at 798. Thus, even in *Edgley*, the homestead declarant was found to have the right to possession – something that the Rehes lack. Here, the Rehes have never had a right of possession, and have lived on the property only at the sufferance of Unique. There is no right to possession, and there is therefore no right of homestead. *Swanson*, 180 Wn. at 286.

3. Corporate shareholders have no legal or equitable interest in corporate assets.

As discussed above, in order to sustain a claim under the Homestead Act, the Rehes must establish some personal interest in the 89th Street House. The Rehes claim that their capital contributions related to the acquisition, construction and maintenance of the property support

their claim to an equitable interest.¹⁴ However, these capital contributions entitle the Rehes only to a “right to participate as a stockholder in the management of the corporation.” *Christensen v. Skagit Cnty.*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965). The Rehes do not have a legal or equitable interest in the assets of the corporation. “An individual shareholder has no property interest in physical assets of the corporation.” *Christensen*, 66

¹⁴ Mr. Rehe makes a number of factual claims in his declaration that are at odds with previous statements and findings of the trial court. For example, Mr. Rehe claims that the Rehes paid all the utilities for the 89th Street House throughout their occupation of the property. CP 191. However, NWC presented unrefuted evidence at trial that Unique paid for utilities on behalf of the Rehes, and the trial court so found. See CP 25 at FOF 29. The Rehes claim that they paid the costs of litigation relating to the Clarkson lawsuit, but they had earlier acknowledged that Unique recovered its attorney fees as damages from the Clarksons. CP ____ (Note: transcript of proceeding on this page erroneously transcribed "Clarkson" as "Markley", but "Clarkson" is properly used on following page.) The Rehes claim that they personally paid for the property and the cost of construction, though Mr. Rehe swore in an earlier deposition that Unique took out a loan for the acquisition of the land and construction of the property. CP 293. The Rehes claim that they occupied the house continuously except for a "six month period" in early 2010. However, the court had earlier found, based upon the Rehes' own testimony at trial, that there was an 18-month period of time when they did not occupy the house. CP 25 at FOF 31. And perhaps most disturbingly, Mr. Rehe now claims that he has been living in the house since 2002. However, he previously swore to the IRS when he appealed an adverse determination arising out of an audit, that he did not reside in the house prior to 2005. As Mr. Rehe stated at his deposition in 2011,

The IRS auditor said, “Well, since you didn't sell it, you can't write off any of that because it was your house,” and I said, “But the attorneys say I can't live -- move into it.” She says, “But you did live in it,” and I said, “No, I didn't live in it.” She says, “Well, it was your house. You've been living in it.” I says, “No, I was paying bills on the house in Sammamish.”

CP 221. (*See, generally*, CP 219-223). The trial court was in the best position to evaluate these factual claims and Mr. Rehe's credibility, and the trial court ultimately determined that the Rehes “lacked sufficient interest” in the property to maintain a homestead exemption. CP 241. This Court should not disturb that finding, especially where it is supported by substantial evidence. *Rogerson Hiller*, 96 Wn. App. at 924.

Wn.2d at 97; *State of California v. State Tax Commission*, 55 Wn.2d 155, 346 P.2d 1006 (1959).

A shareholder's rights to corporate assets are limited to those rights described in RCW 23B.06.400 governing corporate distributions to shareholders. The first principle of that statute is that "[n]o distribution may be made if, after giving it effect...[t]he corporation would not be able to pay its liabilities." RCW 23B.06.400(2)(a). The Rehes' attempt to assert a homestead exemption on corporate property is not only an attempt to end-run the trial court's Judgment, but also an attempt to secure a corporate distribution in violation of the Washington Business Corporation Act.¹⁵

The general principle that shareholders have no property interest in a corporation's assets should not be relaxed out of misguided sympathy for the Rehes. In 1999, Unique took title to the parcel of land at issue in this case. The home was built not by or for the Rehes personally but by Unique, for customers of Unique, in a corporate business transaction that went sour and ended in litigation. Regardless of whether the money ultimately came from the Rehes as a capital contribution, they chose to

¹⁵ At the time of execution, Unique owed NWC over \$500,000 plus substantial postjudgment interest. CP 103-105. NWC acquired the property at the execution sale for \$300,000. CP 257. Unique still owes NWC well over \$200,000. Its corporate shareholders may not divert \$125,000 of the sale price into their own pockets, in violation of RCW 23B.06.400, by asserting a homestead interest in corporate property.

title the property in their closely held corporation. In so choosing, the Rehes availed themselves of the protections of the corporate form. They may not, after judgment has been entered, seek instead the protections provided for personal heads of families under the Homestead Statute.

In circumstances nearly identical to those present here, the Court in *SSG Corp. v. Cunningham*, 74 Wn. App. 708, 714, 875 P.2d 16 (1994), had no difficulty in determining that the president of a corporation had no right of possession over the corporately-owned domicile. In *SSG Corp.*, plaintiff Cunningham secured a \$50,000 judgment against SSG, and sought to execute on property owned by the company. However, the company's president Mr. Gwynn objected. The Court explained,

Mr. Gwinn contends the structures should be exempt from execution under the homestead statutes because he is living in them. “[T]he homestead consists of the dwelling house ... in which the owner resides or intends to reside ...”. RCW 6.13.010. The trial court found SSG is the owner of the structures. This finding is unchallenged. Even under the most liberal construction of the homestead statutes, if Mr. Gwinn is not the owner, the structures are not his homestead.

SSG Corp., 74 Wn. App. at 714. Similarly, here the trial court entered an unappealed order quieting title to the 89th Street Property in Unique. Unique is the property owner, and it alone has the right of possession.

Other jurisdictions have likewise rejected a shareholder's efforts to declare a homestead on corporate-owned property. For example, the Fifth Circuit Court of Appeals has held,

When a homestead is conveyed to a corporation, the stock of which is owned by the grantors, the property loses its homestead character regardless of whether the grantors continue to occupy the property. *Nash v. Conatser*, 410 S.W.2d 512, 521-22 (Tex.Civ.App.1966). *Accord Eckard v. Citizens Nat. Bank in Abilene*, 588 S.W.2d 861 (Tex.Civ.App.1979); *Nowlin v. Wm. Cameron & Co.*, 54 S.W.2d 1035 (Tex.Civ.App.1932). Valid title then vests in the corporation, and the property becomes subject to the debts of the corporation. *Id.*

In re Perry, 345 F.3d 303, 311 (5th Cir. 2003). California similarly rejects attempts to claim homestead rights for corporate property:

There is no ambiguity in the governing statutes; the dwelling exemption is available only to a natural person, not to a corporation. Once Allen conveyed the property to Trans America Property & Investment Inc., it was not owned by a natural person, and Allen was not entitled to the protection of the homestead exemption.

California Coastal Comm'n v. Allen, 167 Cal. App. 4th 322, 329, 83 Cal. Rptr. 3d 906, 911 (2008).

In a desperate attempt to try to find support for the proposition that corporate shareholders may claim a homestead in corporate property, the Rehes cite to a decision from Minnesota, *Cargill, Inc. v. Hedge*, 358 N.W.2d 490, *aff'd*, 375 N.W. 2d 477 (1985), but that case is readily distinguishable.

The issue in *Cargill* was whether a sole shareholder of a Minnesota Family Farm Corporation (“FFC”)¹⁶ was entitled to claim a homestead exemption in property that she was legally required to reside in. *Id.* at 491. The Court in *Cargill* found that Annette Hedge, as the sole shareholder in the FFC, had an equitable interest in the property based on Minnesota precedent allowing a “reverse pierce” of the corporate veil, where “the corporate shareholder and the corporate entity shall be one and the same.” *Id.* at 492. The Court also based its decision on the FFC statute under which the corporation was incorporated and which was enacted to encourage use of FFCs in Minnesota.¹⁷

Cargill is readily distinguishable. First, it is based on a Minnesota statute encouraging the use of Family Farm Corporations. Importantly, that statute *requires* FFC shareholders to reside on the FFC property.

¹⁶ According to Minn. Stat. Ann. § 500.24 (West) (emphasis added),

“Family farm corporation” means a corporation founded for the purpose of farming and the ownership of agricultural land in which the majority of the stock is held by and the majority of the stockholders are persons, the spouses of persons, or current beneficiaries of one or more family farm trusts in which the trustee holds stock in a family farm corporation, related to each other within the third degree of kindred according to the rules of the civil law, **and at least one of the related persons is residing on or actively operating the farm**, and none of whose stockholders are corporations.

¹⁷ “The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.” Minn. Stat. Ann. § 500.24 (West)

Minn. Stat. Ann. § 500.24. Unique's Gig Harbor property is not a family farm, Unique is not a Family Farm Corporation, and we are not in Minnesota. Moreover, the *Cargill* Court expressly limited application of its decision:

Cargill contends ... that if this court allows the homestead exemption here, the door is opened for its use by all corporations. The homestead exemption is being applied for the benefit of the individuals in this case, Annette Hedge and Sam Hedge. The holding does not deal with corporations of different kinds, or in different circumstances.

Cargill, 358 N.W.2d at 492.¹⁸

Further, the *Cargill* case was expressly based on a prior Minnesota case that allowed "reverse" veil piercing. *Id.* at 492. As Federal Courts have noted, "reverse piercing has rarely been applied outside of Minnesota, and the application of the doctrine to allow a debtor to exempt assets held by a corporate entity appears to be unique to Minnesota." *In re Hecker*, 414 B.R. 499, 504 (Bankr. D. Minn. 2009)

Washington, by contrast, has expressly rejected the concept of reverse veil piercing:

[the Defendant] does not have the luxury to now pierce the

¹⁸ It is also worth noting that the farm property at issue was originally owned by the Hedges personally, but was transferred to the FFC pursuant to the Minnesota statute. *Cargill*, 358 N.W.2d at 492. In contrast, the 89th Street House at issue here was originally corporate property and remained corporate property until it was fraudulently transferred.

veil of his own corporation...If [he] were sued by a third party... it is clear that [he] would raise the corporate veil to protect his individual assets. [He] is not free to raise the corporate veil to block liability and yet lower it to receive immunity.

Evans v. Thompson, 124 Wn.2d 435, 439-440, 879 P.2d 938 (1994). See also *Schenley Distillers Corp. v. U.S.*, 326 U.S. 432, 437, 66 S.Ct. 247, 249 (1946) (“One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity”). The foregoing warrants rejecting the Rehes’ theory.

Moreover, the trial court’s Findings of Fact and Conclusions of Law have already conclusively addressed the issue of veil-piercing, and ruled that it was not warranted. In fact, ***this was the Rehes’ own position at trial.*** As the Court held in *Evans*, Mr. Rehe “is not free to raise the corporate veil to block liability and yet lower it to receive immunity,” yet that is exactly what the Rehes are attempting to do. *Evans*, 124 Wn.2d at 440.

Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.

Ashmore, 165 Wn.2d at 951-952.

The Rehes argued extensively at trial that the corporate veil should not be pierced, ***and the trial court ruled in their favor***. Judicial estoppel prevents the Rehes from reversing their position on veil-piercing in an attempt to exempt a corporate asset from execution and thereby gain an advantage over NWC.

4. The Rehes are precluded from asserting any legal or equitable rights in the property.

The Rehes are precluded from asserting any interest in the 89th Street House by the principles of *res judicata* and judicial estoppel. *Res judicata* prevents a party from litigating claims and issues that have already been litigated, ***or that could have been litigated***, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.*

Here, the prior judgment, *inter alia*, quieted title to the property in Unique. While other aspects of that judgment were appealed, this aspect was not. The Rehes were a party to that action, and in fact were identified as a judgment creditor on the judgment. Ownership of the 89th Street House was directly at issue in that litigation. The Rehes could have, and should have, asserted their legal and/or equitable property interests in the context of that action. However, they did not. The doctrine of *res judicata* prevents them from doing so after final judgment has been rendered.

Of particular note is the case of *In Re Wilson, supra*. In *Wilson*, the debtor had recently been divested of all title or interest in his former domicile. The Court held that, because of the prior judgment, the debtor lacked all legal or equitable right to the property and was not entitled to a homestead exemption. *Id.*, 341 B.R. at 24. Although this case is relied upon heavily by the Rehes, it actually supports NWC's position. Here, just as in *Wilson*, there can be no homestead right because any interest that the Rehes may have had in the 89th Street House was divested by virtue of the trial court's judgment quieting title to the property in Unique.

Further, as discussed above, judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Ashmore*, 165 Wn.2d at 951.

The Rehes argued at trial, in defending the veil-piercing claim, that their improper use of corporate assets (including the uncompensated use of the 89th Street House as their residence) did not prejudice NWC or deprive it of its ability to recover against Unique. CP 225-235. Further, they argued that NWC's remedy should be limited to execution on the 89th Street Property after the avoidance of the fraudulent transfer. *Id.* On the basis of this argument, the trial court found in favor of the Rehes on the issue of corporate disregard, concluding that NWC was not prejudiced by the Rehes' corporate abuses. CP 27-28.

Now, the Rehes claim before this Court that their uncompensated use of the corporate-owned 89th Street House actually entitles them to the first \$125,000 in proceeds from the execution sale and continued residence on the property during the redemption period. This claim is clearly inconsistent with their position at trial. If the Rehes' current position is correct, then the Rehes' misconduct and improper use of the 89th Street House would have directly caused substantial prejudice to NWC by depriving it of \$125,000 in otherwise-collectible corporate assets. By changing their position after receiving judgment in their favor, they will have succeeded in misleading the trial court. The Rehes are barred by the doctrine of judicial estoppel from asserting homestead rights in the corporate property.

VI. ARGUMENT IN SUPPORT OF NWC'S CROSS-APPEAL

A. The trial court erred in refusing to award NWC its fees in connection with its Motion to Quash and the Rehes' Motion for Reconsideration.

After NWC succeeded in invalidating the Rehes' homestead claim, it asked for an award of fees based upon the contract between NWC and Unique. The trial court denied NWC's request without explanation, claiming simply that there was no basis for the fees. The trial court erred in this determination. NWC is clearly entitled to fees under the contract.

A court of appeals reviews entitlement to fees *de novo*. *Hawkins v. Diel*, 166 Wn. App. 1, 9-10, 269 P.3d 1049 (2011). Under the parties' Contract, Unique is required to pay all costs associated with actions to collect the contract balance, including a reasonable attorneys' fee. The relevant clause of the contract reads,

If the contract price is not paid as agreed and if **collection proceedings** or a suit is started then you agree to pay all costs incurred by us, including all costs of suit and a reasonable attorneys' fee as determined by the court.

CP 302 (emphasis added).

The attorney fees provision of the contract is a standard, broad "costs of collection" provision. Similar provisions have been construed by Washington courts in the past. For example, in *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 237, 287 P.3d 606, 608 (2012), the

contract at issue contained a clause stating, “applicant agrees to pay the costs of collection, including reasonable attorney fee.” *Id.* In *Atlas* the plaintiff, a supplier, sued defendant Realm to recover the purchase price on supplies that Realm had purchased. Realm filed a counter-claim for breach of contract, breach of warranty, and negligent misrepresentation. After Atlas prevailed on its claims, it sought fees pursuant to the contract. However, the trial court refused to award fees relating to Realm’s counter-claims on the grounds that those counter-claims were not part of Atlas’s collection efforts. The Court of Appeals reversed, agreeing with Atlas that “the credit application entitles it to those fees because that defense *was necessary to a successful collection.*” *Id.* at 237 (emphasis added).

Other Washington courts have likewise affirmed the award of attorney fees necessary to collect on debts, where contracts contained similar language. *See, e.g., Paulman v. Filtercorp*, 127 Wn.2d 387, 394, 899 P.2d 1259 (1995) (“Costs of collection” clause in promissory note entitled lender to fees defending against borrower’s unsuccessful action alleging usury); *Leen v. Demopolis*, 62 Wn. App. 473, 485, 815 P.2d 269 (1991) (Contract that provided for “attorney fees and other collection costs” logically encompassed fees relating to defendant’s unsuccessful efforts to set aside default judgment); *Seattle First Nat. Bank, N.A. v. Siebol*, 64 Wn. App. 401, 409, 824 P.2d 1252 (1992) (Plaintiff entitled to

“costs of collection including attorney fees,” pursuant to contract, despite the fact that defendants were successful in obtaining an equitable offset).

Similarly, here NWC’s motion to invalidate the Rehes’ claimed homestead right was necessary to its collection efforts. If the Rehes had been successful in claiming a homestead exemption, NWC would have been unable to collect on \$125,000 raised by the sale of the home. Pursuant to the contract between Unique and NWC, Unique is liable for fees associated with NWC’s efforts to invalidate the Rehes’ claim of homestead. This Court should reverse the trial court’s *Order* on the sole issue of attorney fees, and remand with instructions to award NWC its reasonable attorney fees and costs associated with bringing the Motion to Quash, responding to the Rehes’ Motion for Reconsideration, and prosecuting this appeal.

B. This Court should award fees on appeal.

For the reasons addressed in Section A above, NWC is also entitled to fees should it be the prevailing party on appeal. RAP 18.1.

VII. CONCLUSION

Corporate shareholders do not have property interests in the assets of their corporation, and are not entitled to a homestead exemption in corporate-owned property. The Rehes lack any legal or equitable right to possess the 89th Street House, and the fact that they are not the judgment

debtors further invalidates their continuing attempts to hinder Unique's creditor Northwest Cascade. The trial court properly exercised its jurisdiction to adjudicate competing interests in real property, and to enforce its own judgment. This Court should uphold the trial court's determination that the Rehes lack any homestead interest in the 89th Street House, reverse the trial court's denial of NWC's request for fees, and remand to the trial court to determine a supplemental award to NWC for fees both below and on appeal.

RESPECTFULLY SUBMITTED this 28th day of March, 2014.

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read "Daniel C. Carmalt", written over a horizontal line.

Michael J. Murphy, WSBA No. 11132

Daniel C. Carmalt, WSBA No. 36421

Attorneys for Appellant

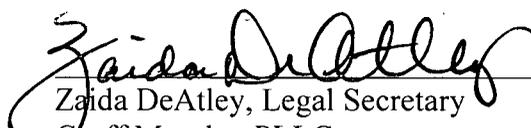
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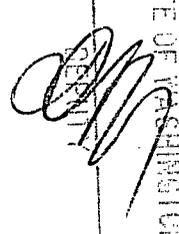
I hereby certify that I caused to be served on March 28, 2014 a true and correct copy of the foregoing document to the counsel of record listed below, via the method indicated:

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March 28, 2014

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Case No. 45312-6-II

Dear Clerk:

Enclosed please find the original plus one copy of the Brief of Respondent/Cross-Appellant in the above matter. Please file the original, conform the enclosed face sheet, and return the conformed face sheet to me in the enclosed envelope. Thank you in advance for your help in this matter.

Very truly yours,

GROFF MURPHY, PLLC


Zaida DeAtley
Legal Assistant

Enclosures

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