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COURT OF APPEALS NO. 71007-9-I

KING COUNTY SUPERIOR COURT NOS. 09-3-07405-8 SEA  
13-2-03411-5 SEA

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

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AHMAD ABDEL-WAHED,

Appellant,

and

NANCY A. GASS,

Respondent.

---

REPLY BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAR -5 PM 2:54

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*Reply to Counter-Statement of the Case*

The parties arbitrated the issues in their dissolution proceeding with Harry Slusher, who issued his rulings on April 24, 2010 and May 30, 2010. Those rulings were incorporated into the Findings of Fact and Conclusions of Law, and the Decree of Dissolution which were drafted by Ms. Gass'<sup>1</sup> attorney and entered on August 24, 2010. CP 274-300.

Mr. Abdel-Wahed concedes that his attorney erred in his Opening Brief by inadvertently using the arbitrator's matrix from his April 24, 2010 ruling, rather than the modified matrix or May 30, 2010, and that he misread the award of the Fidelity Account.<sup>2</sup>

Mr. Abdel-Wahed was awarded the parties' home, in which he had had a homestead exemption from the time he first began occupying it as his principal residence in June of 2000.<sup>3</sup> RCW 6.13.030 and 6.13.040(1).

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<sup>1</sup> For ease of review, the Appellant shall be referred to as Mr. Abdel-Wahed and the Respondent shall be referred to as Ms. Gass.

<sup>2</sup> Ms. Gass did not garnish the Fidelity Account until more than a year after the Decree had been entered, CP 64-65.

<sup>3</sup> RCW 6.13.040 states in pertinent part:

(1) Property described in RCW 6.13.010 constitutes a homestead and is automatically protected by the exemption described in RCW

Each party was awarded financial and other personal property assets. CP 299.

While the awards were of equal value, there is no indication that one party's award was in exchange for or in consideration of the other party's award. No judgment was created by these pleadings. Nor did the court award a lien to Ms. Gass against the home or any other property.

Mr. Abdel-Wahed also concedes that he took money from certain financial accounts awarded to Nancy Gass. Nor does he contest the judgment she was subsequently awarded totaling \$190,318.35 on August 8, 2012 for amounts she was owed, pursuant to the Decree of Dissolution, for unpaid maintenance, interest, and attorney fees ---although this judgment was never recorded and thus never attached to his homestead property. CP 374; *Mahalko v. Arctic Trading Co.*, 99 Wash.2d 30, 34-36, 659 P.2d 502 (1983), *overruled in part on other grounds*, *Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle*, 101 Wash.2d 416, 679 P.2d 928 (1984); *Matter of Deal*, 85 Wash.App. 580, 584-586, 933 P.2d 1084 (1997); RCW 6.13.090.

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6.13.070 from and after the time the real or personal property is occupied as a principal residence by the owner....

Ms. Gass obtained an order forcibly removing Mr. Abdel-Wahed from his home on September 14, 2012. CP 5. Mr. Abdel-Wahed filed a Declaration of Homestead on September 28, 2012, CP 2, to make clear that he intended to maintain this property as his homestead even though he had been forced out of his home.

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

On November 27, 2012, Ms. Gass released any judgment liens she may have had against Mr. Abdel-Wahed's homestead property, CP 406, even though she had never recorded any of her judgments, and therefore had no judgment liens against his homestead.

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

Ms. Gass then filed a Complaint for Declaratory and Other Relief seeking a judgment declaring that the Mr. Abdel-Wahed's homestead exemption did not bar the execution of her judgment against the proceeds of the sale of his home, on the grounds that a homestead exemption is not available against judgments obtained

on vendor's liens, pursuant to RCW 6.13.080(1)<sup>4</sup>, or against debts arising from obligations to pay maintenance, pursuant to RCW 6.13.080(4). CP 1-3.

An Order Consolidating the Declaratory Judgment proceeding with the dissolution proceeding was entered on August 22, 2013. CP 150. Ms. Gass then filed a Motion to Modify Property Division in Decree of Dissolution, pursuant to CR 60. CP 160-182. The Court denied that Motion. CP 197-198.

No appeal was taken from that ruling.

The Honorable Dean Lum entered an Order on Cross-Motions for Summary Judgment, on September 18, 2013. CP 199-202. The Court specifically found, as a matter of law, "that no vendor's lien exists because the plaintiff [respondent] is not a purchaser of the property, and no owelty lien<sup>5</sup> exists because the

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

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

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

<sup>5</sup> A lien awarded in a dissolution proceeding to equalize distribution of jointly held or community property is an owelty lien. In *In Re*

original Decree did not explicitly include language imposing such a lien". CP 202.

No appeal was taken from these rulings either.

Nonetheless, after finding that none of the exceptions to the protections of the homestead statute existed, as a matter of law, and even though such relief had not been requested in Ms. Gass' Complaint, the Court, *sua sponte*, imposed a constructive trust on the net sale proceeds in the amount of" those funds awarded to plaintiff in the original Decree, consisting of \$50,400 in maintenance (which has now been paid) and \$96,760.35 for the investment assets that were not transferred to the plaintiff ". The Court based its ruling on its conclusion that "the defendant intentionally and in bad faith "looted' the investment accounts which were supposed to be transferred to plaintiff as part of the Decree<sup>6</sup>...[and] that the

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*Stone*, 119 B.R. 222, 230-231 (Bkrtcy. E.D. Wash. 1990); *Hartley v. Liberty Park Assocs.*, 54 Wash.App. 434, 438, 774 P.2d 40, 42 (1989).

<sup>6</sup> As indicated in the Appellant's Opening Brief, findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court, *Hemenway v. Miller*, 116 Wash.2d 725, 731, 807 P.2d 863 (1991). A failure to assign error to them has no effect on the case. *Chelan Cy. Deputy Sheriffs' Ass'n v. Chelan Cy.*, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987). In any event, whether Mr. Abdel-Wahed "looted' the investment accounts which were supposed to be transferred Ms. Gass as part

Homestead Statute exemption cannot be used to facilitate unjust enrichment or fraud, and the court in equity may impose a constructive trust.” CP 201.

Mr. Abdel-Wahed appeals this ruling.

*Argument*

**1. The Lower Court Lacked Jurisdiction/Authority To Impose A Constructive Trust Where No Such Relief Had Been Requested And The Trust Corpus Was Exempt From Execution Under The Homestead Act.**

In this case, Ms. Gass never asked the Court to impose a constructive trust on the net sale proceeds from Mr. Abdel-Wahed’s home in her Complaint. Nor did she allege “unjust enrichment”.

Instead, Ms. Gass only asked the Court below to declare whether she had a vendor’s lien or an owelty lien against the home awarded to Mr. Abdel-Wahed in their dissolution proceeding. CP 3. The lower court ruled, as a matter of law, that Ms. Gass did not have either a vendor’s lien or an owelty lien, as a matter of law. CP 202. Ms. Gass did not appeal that ruling.

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of the Decree intentionally or not, or in “good faith” or in “bad faith” is *immaterial* to whether he is entitled to the protections of the homestead statute. Even though he wrongfully took money which had been awarded to Ms. Gass, there was no fraud. *Angelo v. Angelo*, 142 Wn.App. 622, 642-644, 175 P.3d 1096, *review denied*, 164 Wash.2d 1017, 195 P.3d 89 (2008).

Once the Court ruled, as a matter of law, that Ms. Gass did not have either a vendor's lien or an owelty lien, CP 202, it lacked the authority to grant relief which had never been requested in the Complaint on grounds which had never even been alleged. Such a judgment is void. *In re Marriage of Hardt*, 39 Wn.App. 493, 494-496, 693 P.2d 1386 (1985).

Nonetheless, Ms. Gass argues that the lower court still had jurisdiction to impose a constructive trust against property protected by the homestead statute, because she had asked in her Complaint to grant her whatever relief "the Court finds just and equitable." CP 3. She is incorrect.

The cases relied upon by Ms. Gass do not support what the lower court did here. For example, in *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003), the Court concluded that "district courts may issue mutual protection orders even in the absence of a petition requesting that relief, as the facts of the relationship between the parties may warrant" because:

A district court has power to issue mutual protection orders on its own motion. Authority to issue such orders can be found both in the state constitution and the applicable statute.

Similarly, in *Marriage of Lanaham*, 153 Wn.2d 553, 560, 106

P.3d 212 (2005), the Court concluded that the trial court had jurisdiction to enter a post-dissolution judgment of conversion against the wife's former husband through her equitable action to enforce the dissolution decree, where the husband admitted exercising stock options belonging to his former wife which he held in connection with his employment because the Court retained jurisdiction to enforce its decree. See also, *Farmer v. Farmer*, 172 Wash.2d 616, 625, 259 P.3d 256 (2011).

While the lower court certainly had the authority to enter a judgment against Mr. Abdel-Wahed for taking monies awarded to Ms. Gass, it did not have the jurisdiction/authority to disregard the constitutional and statutory protections provided by the Homestead Act. Washington Constitution Article XIX, § 1; RCW 6.13.010 et. seq. As the Court held in *Arneson v. Arneson*, 38 Wash.2d 99, 100 and 101, 227 P.2d 1016 (1951):

Divorce, probate, bankruptcy, receiverships, and assignments for the benefit of creditors are statutory proceedings, and the jurisdiction and authority of the courts are prescribed by the applicable legislative enactment. In them the court does not have any power that can not be inferred from a broad interpretation of *the act in question*.

\* \* \* \* \*

Since the divorce act nowhere provides for it, the court has no power to compel a liquidation for the benefit of creditors as an incident to a divorce decree. Nor can any of the statutory proceedings, having that as its purpose, be consolidated with a divorce action for trial. Nothing can be found in the divorce act authorizing the court to deprive the spouses of their rights to prefer creditors, claim exemptions and/or homesteads, compromise claims, take bankruptcy, invoke statutes of limitation, made contracts, and enjoy their property rights. Their several interests in the property are, of course, determined, *as between themselves*, by the decree, and are subject to the burdens imposed upon them therein for purposes within the scope of the divorce act. As to the common law rules of jurisdiction, we know of none which empowers the court to encroach upon civil rights simply because persons are parties to a divorce action. [emphasis added].

See also, *Buecking v. Buecking*, 316 P.3d 999, 1004-1005 (2013).

Likewise here, the court below did not have the authority or jurisdiction to disregard the constitutional and statutory protections provided by the Homestead Act to Mr. Abdel-Wahed to the net sale proceeds of his home after finding, as a matter of law, that no statutory exceptions existed to his homestead exemption.

Contrary to Ms. Gass' argument, the Declaratory Judgment Act provides the lower courts with only *limited* authority. A declaratory judgment is the appropriate method to determine questions of construction, or the validity of a statute or ordinance. RCW 7.24.020; *Cary v. Mason County*, 132 Wash.App.

495, 501, 132 P.3d 157 (2006). As the Respondent acknowledges (Opening Brief of Respondent, p. 11), the Declaratory Judgment statute, *only* grants the court “the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. RCW 7.24.010<sup>7</sup>. It does not give the court the authority to fashion relief beyond that declaration regardless of “whether or not further relief is or could be claimed.”

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

Similarly, in *City of Tacoma v. City of Bonney Lake*, 173

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**<sup>7</sup>7.24.010. Authority of courts to render**

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

Wash.2d 584, 269 P.3d 1017 (2012), Tacoma filed a declaratory judgment action to determine who was responsible for the hydrant costs pursuant to certain franchise agreements. Once the lower court had declared the rights, status, and other legal relations between the parties to the franchise agreements by finding that those agreements required Tacoma to provide and to maintain the hydrants, the Supreme Court held that the lower court properly refused to determine who was responsible for the ongoing costs and maintenance of those hydrants, since it had already declared the rights, status, and other legal relations between the parties to the franchise agreements that were dispositive on the issues presented by the declaratory judgment act. *City of Tacoma v. City of Bonney Lake*, 173 Wash.2d at 595.

Likewise here, once the court below had “declared the rights, status, and other legal relations between the parties” that there were no statutory exceptions to the protections provided by the Homestead Act that would permit Ms. Gass to execute her judgment against the net sale proceeds from Mr. Abdel-Wahed’ home, as a matter of law, the lower court had no authority to impose a constructive trust, *sua sponte*, on those same net sale proceeds so that she could execute her judgment against them.

**2. Ms. Gass May Not Re-litigate Whether She Is Entitled To A Vendor's Lien.**

Relying upon *Webster v. Rodrick*, 64 Wn.2d 814, 394 P.2d 689 (1964), Ms. Gass asserts that the “remedy of constructive trust has been applied to deny the protection of the homestead exemption to a homeowner liable for embezzlement”. Brief of Respondent, p. 13.

But, as discussed in the Opening Brief of Appellant, pp. 12-13, Ms. Gass' reliance upon *Webster v. Rodrick*, *supra*, is misplaced. In *Webster v. Rodrick*, 64 Wn.2d at 819, the Court reversed an order denying plaintiff's motion to declare defendants' homestead declaration invalid when the evidence showed that the *defendant had purchased and improved the property in question with funds embezzled from the plaintiff, and thus possessed a vendor's lien*. See also, *Christensen v. Christgard, Inc.*, 35 Wash. App. 626, 630-631, 668 P.2d 1301(1983), where this Court held:

We do not read language in *Webster v. Rodrick* and the authorities there cited to support exemption of property from the protections of RCW 6.12.090 whenever *the purchase funds* were somehow “wrongfully” acquired.... [but at p. 629]... it is clear that an equitable lien may be imposed when the homestead claimant acquired the funds *to purchase his homestead* by fraud.

But, in this case, the evidence is undisputed that the funds which Mr. Abdel-Wahed wrongfully took from the investment accounts which had been awarded to Ms. Gass were *not* used to purchase or to improve his homestead. Nor were they obtained by fraud. *Angelo v. Angelo, supra*. Yet, the homestead exemption is unavailable *only if the funds used to purchase or to improve the home were obtained by fraud. Pinebrook Homeowners Ass'n v. Owen*, 48 Wash.App. 424, 739 P.2d 110 (1987). They were not.

And, accordingly, the lower court ruled on cross-motions for summary judgment, that Ms. Gass did not have a vendor's lien, as a matter of law. CP 202. No appeal was taken from that ruling.

In spite of this unappealed ruling, Ms. Gass continues to argue that since Mr. Abdel-Wahed acquired her one-half community interest in the parties' homestead "in consideration" for his community interest in the parties' investment accounts, and because he testified that he had used the money he had wrongfully taken for his living expenses, that she was entitled to a vendor's lien, pursuant to *Webster v. Rodereick, supra*. Opening Brief of Respondent, pp. 14-16.<sup>8</sup>

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<sup>8</sup> Ms. Gass made this same argument to the lower court, RP 27-28. Her argument was rejected. CP 202.

There is no language in the parties' Decree of Dissolution, the Findings of Fact and Conclusions of Law, or the Arbitrator's rulings which support Ms. Gass' assertion that Mr. Abdel-Wahed acquired her one-half community interest in the parties' homestead "in consideration" for his community interest in the parties' investment accounts which were awarded to her. Nor is there any evidence which shows that Mr. Abdel-Wahed used any of the money he wrongfully took from her *to either purchase or to improve* his homestead. *Pinebrook Homeowners Ass'n v. Owen, supra*.

In any event, Ms. Gass chose not to appeal the lower court's ruling that she did not have a vendor's lien. Accordingly, the lower court's ruling is now the law of this case, and is not subject to review by the Court of Appeals. *State v. Hubbard*, 103 Wash.2d 570, 574, 693 P.2d 718 (1985); *In re Marriage of Trichak*, 72 Wn.App. 21, 24, 863 P.2d 585 (1993).

Accordingly, Ms. Gass may not re-litigate that ruling here.

In the absence of vendor's lien, the net sale proceeds from the sale of the Mr. Abdel-Wahed's homestead up to \$125,000 are exempt from execution. *Brown v. Manos*, 140 Wash. 525, 250 P. 36 (1926); See also, *In re Goodale*, 298 B.R. 886 (Bkrtcy. W. D. Wash. 2003).

**3. The Court Below Erred By Disregarding Mr. Abdel-Wahed's Homestead Exemption.**

Homestead and exemption statutes are favored in the law and should be liberally construed. *In re Dependency of Schermer*, 161 Wash.2d 927, 953, 169 P.3d 452 (2007); 'They do not protect the rights of creditors. In fact, they are in derogation of such rights.' *Lien v. Hoffman*, 49 Wash.2d 642, 649, 306 P.2d 240 (1957)(quoting *First National Bank v. Tiffany*, 40 Wash.2d 193, 202, 242 P.2d 169, 173 (1952)).

Thus, in holding that the homestead exemption took priority over a local district assessment tax lien, this Court held in *City of Algona v. Sharp*, 30 Wash.App. 837, 842, 638 P.2d 627 (1982):

The legislature has listed several types of liens which may be executed against a homestead. RCW 6.12.100. "Assessment Liens" are not among them. The maxim "expressio unius est exclusio alterius" is the law in Washington, barring a clearly contrary legislative intent. *Knowles v. Holly*, 82 Wash.2d 694, 513 P.2d 18 (1973). An inference must therefore be made that the legislature intended the omission of "assessment liens" from the homestead statute. Had it not so intended, it could have amended the statute to include such liens, as it did for materialmen's liens in 1909. Laws of 1909, ch. 44, at 71.

The homestead statute does not make a homestead exempt from taxation, but rather prevents a forced sale to satisfy a lien. The homestead laws are to be liberally construed in favor of the debtor.

Likewise here, the Homestead Act does not preclude Ms. Gass from collecting her judgment, but rather prevents her only from executing her judgment against exempt property protected by the homestead statute. As the Court in *In re Cunningham*, 163 B.R. 593, 595 (Bkrcty.W.D.Wash. 1994) explained:

The message of the *Algona v. Sharp* case is clear: If the legislature wishes to create additional exceptions to the homestead exemption, it must do so clearly and specifically by adding them to the statute's list of exceptions.

In fact the legislature has done so more than once since 1981. In *Pinebrook Homeowners Association v. Owen*, 48 Wash.App. 424, 739 P.2d 110 (1987), the Court ruled that the exceptions contained in the statute could not be construed so as to include homeowner association dues. In response, the legislature added condominium and homeowner association's liens to the list of exceptions contained in RCW 6.13.080. Most recently, the legislature has added construction, maritime, and automobile liens against property claimed as a homestead, presumably to accommodate the addition of a homestead exemption in personal property used as a residence. In short, when the legislature has wanted to add exceptions to the homestead exemption, it has done so clearly and directly. Based on the cases of *Algona v. Sharp* and *Pinebrook Homeowners Association v. Owen*, this Court should not read into the homestead statute any exceptions that are not contained in the statutory list.

There is no legal authority which supports the lower court's ruling that, after finding that none of the statutory exceptions to the

Homestead Act applied, it could disregard its protections and impose a constructive trust upon the net sale proceeds from Mr. Abdel-Wahed's home, because he had acted "intentionally" and in "bad faith" by "looting" those portions of the investment accounts which had been awarded to Ms. Gass.

As this Court held in *Christensen v. Christgard, Inc.*,  
35 Wash.App. at 631:

If mere "wrongful" conduct is to remove the protections afforded by RCW 6.12.090, this determination should be made by the Legislature rather than the courts.

Accordingly, unless and until the Legislature makes an exception to the protections of the homestead statute, for instances where "the defendant intentionally and in bad faith 'looted' the investment accounts which were supposed to be transferred to plaintiff as part of the Decree", CP 201, the lower court erred by imposing a constructive trust on proceeds protected by the homestead statute.

#### **4. The Respondent Is Not Entitled To An Award Of Attorney Fees.**

This appeal arises from a declaratory judgment proceeding brought pursuant to RCW 7.24.010. Yet, Ms. Gass seeks to recover the attorney fees she has incurred on appeal from this

Declaratory Judgment proceeding, pursuant to RCW 26.09.140, arguing that this proceeding is but a continuation of the parties' dissolution proceedings.

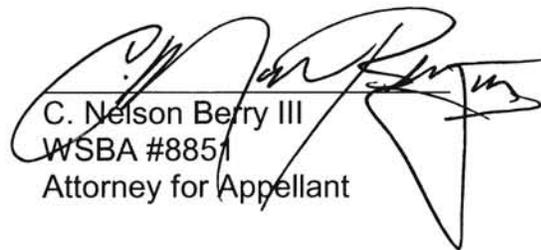
She made no claim for attorney fees on this basis in the court below. She cites no authority to support this contention here.

In any event, RCW 26.09.140 is not available for the recovery of attorney fees in this proceeding. If they were, Mr. Abdel-Wahed would seek them because he has been infirm and unable to work since at least 2011.

#### **CONCLUSION**

For each of the foregoing reasons, the ruling of the court below must be reversed. This case should be remanded with directions to the lower court that Mr. Abdel-Wahed's homestead exemption protects the balance of the net sale proceeds of his home from execution up to \$125,000.

Respectfully submitted this 4th day of March, 2014.

  
C. Nelson Berry III  
WSBA #8851  
Attorney for Appellant

**Certificate of Service**

I certify that on the 4th day of March, 2014, I mailed a copy of the foregoing Opening Brief of Appellant to the attorney for the Petitioner/Plaintiff/Respondent, by first class mail, postage prepaid, to the following address:

O.W. Hollowell  
PO Box 1041  
Carnation, Washington 98014

  
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