

No. 45312-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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

Appellants,

v.

NORTHWEST CASCADE, INC.,

Respondent.

REPLY BRIEF OF APPELLANTS

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COMES NOW the Appellants, William and Suzanne Rehe, by and through their attorney Martin Burns of McFerran & Burns, P.S., and submits this reply brief.

I. INTRODUCTION

The responsive brief misstates and misunderstands the issues before this court. It justifies the violation of due process in giving only a few days' notice of dragging the Rehes back into court after having been awarded judgment for fees and being dismissed as to the NWC claims by claiming the Rehes did not raise the issue fast enough. Part of the reason we have due process and an orderly court system is to give parties time to examine the issues and make arguments. Taken to the logical extreme, the NWC argument would be to violate someone's due process rights to the extent they had no time to respond and then claim a waiver. The law does not support such a slippery slope as explained herein.

Next, NWC focuses so much of its briefing on the automatic homestead somehow implying that the declaration of homestead created the homestead claim. Much to the contrary, Rehe argues that they were entitled to the automatic homestead exemption all along and the filing of the declaration of homestead merely was to give notice to that which already existed.

Finally, as will be shown, NWC supports its opposition to citing to a myriad of inapplicable cases cobbling together bits and pieces of various decisions to justify its position. On the other hand, Rehe points to the plain language of the constitution and the homestead statute – as well as cases that clearly hold that the notion of being a titled owner is not the right analysis.

II. ARGUMENT

Jurisdiction.

As set forth in the opening brief, this matter came before the court on 9 days' notice. There was no motion and order to show cause under CR 60. There was no service under CR 60(e). It was just placed on the motion docket. NWC claims that there was a waiver. However, NWC starts this section of the brief complaining that the trial court should not have considered additional issues on appeal. To support such position, NWC cites to federal district court cases under the federal rules of civil procedure. Even then, the cases hold that it was **not** error for the federal trial court to **not** consider new issues on reconsideration – they do not hold that a trial court could not consider additional issues. In Fay Corp. v. BAT Holdings I, Inc., 651 F.Supp. 307, 309 (W.D. Wash. 1987) it was a situation where after a summary judgment the losing party brought an entirely new theory of the case before the court on reconsideration. The

district court expressed some scorn towards the legitimacy of the new theory but said it would not consider it when the evidence underlying the new theory had been known well before the summary judgment motion. In this case, the Rehes were drug back into court on 9 days' notice.

Besides, under the Washington State CR 59, there are grounds for reconsideration for irregularities, surprise, error of law as well as substantial justice not being done. The annotations to CR 59 show that case law is littered with holdings that reconsideration is in the sound discretion of the trial court. What was not found was any authority saying a trial court abused its discretion in considering issues that might have been raised earlier. There are cases, as cited by NWC, that a trial court can, within their discretion, refuse to consider new issues – but none that say it is error to so consider new issues. The case law cited by NWC is simply that you cannot propose a new theory of the case on reconsideration. That is not what happened here. It was an additional defense – after a brief passage of time that should have been afforded had the case progressed under the normal procedure.

Thereafter, NWC cites inapplicable law claiming a waiver. NWC cites to In re Marriage of Markowski, 50 Wn. App. 633, 749 P.2d 754 (1988). However, in such case, the court of appeals reversed the trial court and vacated a divorce decree against the husband due to lack of

personal jurisdiction as there was no service. Rehes also were not personally served as would be normal in trying to reopen a case under CR 60(e). In Markowski it only goes as far as saying a party “may” waive such defense. Id. at 637. The next case cited by NWC is also a dissolution case and is inapplicable as it was the husband who brought a motion not raising service and then later bringing another motion. In re Marriage of Markowski, 50 Wn. App. 633, 749 P.2d 754 (1988). Such case cited to CR 12 which gives a person at least 20 days to raise defenses – not 9 days. Case law examines such issue to see if “the defendant's assertion of the defense is inconsistent with his or her previous behavior, or if defendant's counsel has been dilatory in asserting the defense, insufficient service may be considered waived as a matter of law.” (citation omitted) Butler v. Joy, 116 Wn. App. 291, 296, 65 P.3d 671, 674 (2003). (Party engaged in discovery and pushed timeline out beyond statute of limitation before asserting service issue in a motion for summary judgment). Another case of waiver is where a county waited through years of discovery before asserting the claims statute in a motion to dismiss. King v. Snohomish Cnty., 146 Wn.2d 420, 425-26, 47 P.3d 563, 566 (2002). The courts have differentiated between responding to a motion brought by the other side and an answer or a motion to dismiss:

Additionally, we note that while CR 12(h) is intended to prevent delays caused by drawn-out pretrial motions, it is also designed to protect parties against the unintended waiver of defenses. 3A L. Orland, Wash.Prac., *Rules Practice* § 5157, at 182 (3d ed. 1980); 5 C. Wright & A. Miller, *Federal Practice* § 1384 (1990). A party who chooses to raise defenses in an answer rather than a motion should not have to risk having those defenses unintentionally waived by making a well-founded argument in response to an opposing party's motion. Nor should one side be able to compel another to bring a "motion" not required by the rules by making a motion of his own. CR 12 does not require, or even support, such a result. Moreover, allowing a party to respond to a motion, while retaining the right to bring his own motion raising all available defenses, in no way undermines the policy of CR 12 against successive pretrial motions. In sum, we conclude that Morris's memorandum in opposition to French's motion for partial summary judgment was not a CR 12 motion. Thus, Morris was not required to raise the defense of insufficient service to avoid waiver of that defense.

(footnote omitted) French v. Gabriel, 116 Wn.2d 584, 591-92, 806 P.2d 1234, 1238-39 (1991). Simply put, responding to NWC motion does not constitute a waiver of personal jurisdiction.

Then, NWC tries to assert the trial court retained jurisdiction over the party for which it entered judgment and handwrote in that the Rehes were dismissed. One would have to wonder what it would take for a court ever to lose jurisdiction. However, the only way NWC cites to retain jurisdiction is under RAP 7.2. But NWC strains credulity to try to fit these into such categories. The motion regarding the homestead had nothing to do with the attorney fee judgment entered in favor of the Rehes. As far as

the order regarding the house, assume it was someone other than the Rehes in the house, could the court have acquired personal jurisdiction over such people on an unserved simple motion? Obviously not, yet NWC presumes that the Rehes are given less protection because of past involvement in the case. Had the Rehes tried to enforce their judgment, then there would be an argument they had consented to continuing jurisdiction as related to such enforcement. However, it was NWC seeking a ruling on an issue never before the trial court against a party which the trial court dismissed.

RAP 7.2 only allows the trial court to retain authority in certain circumstance including settlement, enforcement of trial court orders, awarding attorney fees and costs in divorces, postjudgment motions and actions to modify decisions as discussed above, release of defendants in criminal cases, indigency, supersedeas issues, attorney fee awards, juvenile court decisions, perpetuation of testimony and issues as to multiple parties and claims. None of these apply in the present case. The notion of it being an enforcement of judgment issue is misguided. The judgment being enforced by NWC was the judgment against Unique – not against the Rehes. Suppose Bank of America had an interest in the property – could NWC hauled Bank of America into nine days' notice?

Obviously not. Given that the Rehes were dismissed¹, and their rights vis-à-vis the property related to the homestead were never placed at issue with the trial court in a trial- why are they subject to such an expedited summary judgment procedure to wipe out a constitutional right? There is no good answer.

In an attempt to try to show there is a semblance of some authority supporting this perfunctory adjudication of constitutional rights, NWC cites to Burrill v. Burrill, 113 Wn. App. 863, 56 P.3d 993 (2002). As an aside, divorces cases are different and have different rules. There is the old saying, “marriages end, divorces go on forever” which the courts have wrestled with. Such case was a bitter divorce with unfounded charges of sexual abuse in a custody fight. The court awarded the husband the house

¹ NWC is playing semantics with the the fact the order dismissing was in the Findings of Facts and Conclusions of Law. What is important is that the dismissal was handwritten in by the trial court clearly indicating the judge’s intent to dismiss the Rehes. The courts have had no problems in the past giving effect to mislabeled matters such as findings of fact that are really conclusions of law. See Woodruff v. McClellan, 95 Wn.2d 394, 397, 622 P.2d 1268, 1269-70 (1980) citing to Letres v. Washington Co-op Chick Ass'n, 8 Wash.2d 64, 111 P.2d 594 (1941); Marrazzo v. Orina, 194 Wash. 364, 78 P.2d 181 (1938); Knapp v. Hoerner, 22 Wash.App. 925, 591 P.2d 1276 (1979); 5A A. Corbin, Contracts s 1236 (1964 & Supp.1980). Moreover, dismissed parties move for attorney fees all the time be it under statutes such as RCW 4.84.330, court rules such as CR 11 or equitable grounds such as under Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991). There is no support that the undersigned could find that a dismissed defendant who properly requests and obtains a judgment has submitted to being haled into court on perhaps 7 days’ notice under CR 7 for a normal motion for the rest of their life.

and the wife trashed it on the way out. The court held that it had authority under RAP 7.2(c) as:

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 v. Burrill, 113 Wn. App. 863, 874, 56 P.3d 993, 998 (2002). But note this was a judgment in favor of the husband against the wife on a matter (possession of the home) that the court decided. In the present case, the homestead issue was never raised, the judgment NWC was enforcing was against Unique and, unlike in Burrill, the Rehes were dismissed whereas the wife in Burrill was subject to a divorce decree. The cases are simply dissimilar.

Thereafter, NWC then cites to RCW 6.32.270 to say the court has jurisdiction to decide rights of others. Interestingly ignored is the title to the statute, "Adjudication of title to property – Jury trial." It also only allows the court to adjudicate such interest, "if the person or persons claiming adversely be a party to the proceeding...." RCW 6.32.270. By

this time, the Rehes were dismissed and the statute does not say “was a party”. The statute goes on to say, “Any person so made a party, or any party to the original proceeding, **may have such issue determined by a jury** upon demand therefor and payment of a jury fee as in other civil actions: PROVIDED, That such person would be entitled to a jury trial if the matter was adjudicated in a separate action.” (emphasis added) RCW 6.32.270. It does not say the court can adjudicate it on 9 days’ notice. While Washington courts have not done an in-depth review of the nature of homestead claims, other courts² looking at them note how there can be factual issues to decide. The point being, that homestead issues are not purely law. In Stewart v. Fitzsimmons, 86 Wash. 55, 149 P. 659 (1915) aff’d on reh’g, 88 Wash. 700, 153 P. 20 (1915), a partition case related to acreage of which a portion was declared as part of a homestead, the Washington Supreme Court reviewed the trial court’s decision related to the legal issues in a de novo fashion but simply looked to see if there was “to sustain the finding of the trial judge” as far as a factual issue on the valuation. Id. at 60. The present case, in the short time allowed, the Rehes

² See for example, Savell v. Flint, 347 S.W.2d 24, 27 (Tex. Civ. App. 1961); Wilcox v. Marriott, 103 S.W.3d 469, 474 (Tex. App. 2003); “Whether a property is a homestead is an issue of fact. Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448, 452 (1943).” Barton v. Oculina Bank, 26 So.3d 640, 641 (Fla. Dist. Ct. App. 2010).

brought up their continued possession, their expenditures of personal funds, their building of the home. CP 191-192. Such facts bring up issues that could be tried to a jury. The A & W Farms v. Cook, 168 Wn. App. 462, 466, 277 P.3d 67, 70 (2012) case is of no help to NWC and actually cuts against its position as, while third parties were brought before the court in a supplemental proceeding, there was an actual trial of the issues raised in the supplemental proceedings. Moreover, the claimed jurisdictional defects related to a Spokane County Court deciding issues related to Stevens County property. The court found a waiver as the matter had not been raised to the trial court.

In the case of Enyart v. Humble, 17 Wn. App. 181, 562 P.2d 648 (1977) it involved a \$4000 judgment against the Humbles who then filed bankruptcy and claimed a homestead. The Enyarts had the sheriff levy execution on the property. Humble moved to quash the sale claiming an asserted homestead right. The trial court refused to quash. Division 1 reversed and remanded for a determination of the homestead issue noting a 1928 Washington Supreme Court decision that a superior court “try out the issue”. Traverso v. Cerini, 146 Wash. 273, 263 P. 184 (1928) as cited by Enyart v. Humble, 17 Wn. App. 181, 183-84, 562 P.2d 648, 649-50

(1977). In such case, the debtor moved to quash the sheriff sale in a supplemental proceeding and the trial court approved of the debtor moving the court to decide the matter rather than compelling them to “seek an adjudication of their homestead rights in some future action.” *Id.* at 184. Such case does not say dismissed parties can be drug back into court on 9 days’ notice to have a constitutional right summarily decided.

Homestead issue.

NWC tries to make a “plain language” type argument to try to equate an “owner” to a title owner. However, it does so by distorting the statute and trying to deflect from the very clear case holdings that **“the right to a homestead does not depend upon title, but upon occupancy and use.”** *Edgley v. Edgley*, 31 Wash. App. 795, 644 P.2d 1208 (1982). NWC ignores the constitutional nature of the homestead deriving from the Washington Constitution Article XIX Section 1. NWC ignores the multitude of cases that hold that homesteads are “favored in the law and are to liberally construed.” See, *State ex rel. White v. Douglas*, 6 Wn.2d 356, 107 P.2d 593 (1940); *Cody v. Herberger*, 60 Wn.2d 48, 50, 371 P.2d 626, 628 (1962). What NWC does is it goes through the various parts of the Homestead Statute, RCW 6.13 citing to all places it says “owner”. However, in each event, the court should be reminded that the definition of owner is “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.” (emphasis added) RCW 6.13.010. So the statute itself had a far more expansive view of the who an “owner” can be. Subsequent case law has then provided that the focus is on possession and use. So, NWC is right - the statute says “owner” numerous times. However, such a simplistic reading misses the point that the term “owner” under the homestead statute includes people in possession. “Owner” is not as NWC tried to narrowly define it – it is to be “liberally construed” as has been so construed in case after case.

Face with many cases explicitly holding far more expansively than NWC would care for, it then distorts the holdings of cases. For example, NWC cites to Skinner v. Hunter, 95 Wash. 607, 164 P. 244 (1917) to try to limit the scope of the right to claim a homestead. However, the claimants in such case were a month-to-month tenants who bought the property after the judicial foreclosure was commenced but before the judgment. At the commencement of the suit, a lis pendens was filed. In a few paragraph decision, the Supreme Court discussed how the “filing of the lis pendens bars a stranger to the title” and noted how “appellants' grantors had neither possession nor right of homestead at the time the lis pendens was filed, it follows that the judgment must be affirmed.” Skinner v. Hunter, 95 Wash. 607, 608, 164 P. 244 (1917). This case related more to the lis pendens

statute than the homestead statute and has no applicability to the facts of this case wherein the Rehes paid for, built and lived in the home for about 12 years at the time of trial.

Nw. Trust & Safe Deposit Co. v. Butcher, 98 Wash. 158, 167 P. 46 (1917) is another example of trying to create the appearance of a legitimate argument by citing to inapplicable cases. In such case a purchaser signed a mortgage waiving all homestead rights. Later the property was sold subject to the mortgage to a couple that filed a homestead declaration. The property was later foreclosed and the couple claimed a right of possession during the redemption period via the claim of homestead. Skinner is a case examining a statute not at issue here – the right of possession during a redemption. That statute does discuss a “judgment debtor” having the right of possession during a redemption. However, that is not an issue before this court and relates to an entirely different part of the code.

NWC then goes on to say the Washington Supreme Court rejected the Rehes’ interpretation of owner in Sec. Sav. & Loan Ass'n v. Busch, 84 Wn.2d 52, 523 P.2d 1188 (1974). It did not. A person name Frisone had executed a declaration of homestead for property in Seattle. Frisone and his wife quitclaimed to Mr. and Mrs. Busch who took out a mortgage with Security Sav. & Loan Ass’n. Frisone then entered into a real estate

contract (not subject to the mortgage) with the Busches to buy back the very same property. Mr. Frisone then moved to San Diego and stopped paying leaving his wife and kids in the house, file bankruptcy and filed a declaration of homestead for property in California. Busch then defaulted on the mortgage, and the bank bought the property at sale. The court found that the previous declaration of homestead filed by the Frisones was extinguished by their quitclaim deed to Busch. Id. at 55-56 (“Since the Frisones conveyed all of their then existing legal and equitable rights in and to the McGilvra Blvd. property, there was nothing left to which their homestead could continue to attach. Thus, it was extinguished.”). The court then found that there was no right of possession during the redemption as the person signing the declaration, Mr. Frisone, was in California, a divorce had been filed and so forth. Id. at 57. It was on such facts that the case was decided. Thus, not only does it not help NWC, it shows the inherent factual nature of such issues which should not be decided on nine days’ notice.

NWC then tries to impose its view of what an “equitable right” in the property is. However, in doing so, NWC ignores case law which in looking at such issues have held “Although Washington does not require that the homestead “owner” have a legal interest in the property and deems occupancy and use as the key to the right to homestead, one must, when

there is not occupancy and use, have at least an equitable interest in the property in order to have a homestead. Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wash.2d 416, 679 P.2d 928, 930 (1984).” In re Wilson, 341 B.R. 21, 25 (B.A.P. 9th Cir. 2006). The “equitable interest” test is reserved where there is not possession and use. The Rehes had, and still have, possession and use. In Downey v. Wilber, 117 Wash. 660, 202 P. 256 (1921) the court found a homestead arising from a tenant living in a “portable bungalow”. In such there was a trial over the homestead and the court looked at the use and the purpose of the homestead statute to “to secure the claimant and his family in the possession of his home.” Id. at 661. The Rehes, bought the property and funded the building of the house by Unique where they have lived for over 12 years. NWC has been given a windfall even over and above the homestead amount based on the presence of the Rehes’ home. NWC is simply wrong as to the legal test when there is possession and use and NWC wrong factually when the facts of this case are compared to other cases.

NWC then cites to Swanson v. Anderson, 180 Wash. 284, 38 P.2d 1064 (1934) to make the point that the homestead does not apply after the right of possession is extinguished. However, this was a case where in a contract vendor forfeited a vendee’s interest. The case stands for the simple, and correct, proposition that the homestead does not apply to

consensual mortgage type liens. Id. at 286-7. This case has no bearing on the present dispute as we are not in a consensual lien situation.

NWC then tries minimize the holding in the case of Edgley v. Edgley, 31 Wn. App. 795, 644 P.2d 1208 (1982) as dicta which discussed that “These sections [of the homestead statute] required only that the declarant be the head of the household and reside in or intend to use the property as a homestead. Thus, the right to a homestead does not depend upon title, but upon occupancy and use.” Id. at 798-9. NWC does not mention that such case is cited approvingly in reported decisions including Felton v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 420 679 P.2d 928 (1984) and unreported decisions. Edgley is far more than dicta as the Supreme Court showed as it cited it for such very point that possession and use are key. Felton at 420.

As an aside, in going through the cases and looking at the facts and how certain cases were or were not applicable, it became even more apparent how factual in nature the propriety of each claim of homestead is.

However, not content to rest on inapplicable or misconstrued case law, NWC then cites to cases that shareholders do not have homestead rights. Frankly, NWC is right about that. One cannot, for instance, if one were a shareholder of the Mariners, claim a homestead in Safeco Field (assuming the Mariners own it – which the undersigned did not research)

and move a mobile home into right field. However, where NWC goes astray is that the Rehes are not claiming their homestead based on the shareholder rights in Unique – they are claiming the homestead based on their possession and use – as well as being the ones to pay for the land and the house and doing the construction. This fundamental problem in NWC’s case is illustrated in the cases it cites.

Christensen v. Skagit Cnty., 66 Wn.2d 95, 401 P.2d 335 (1965) is not a homestead case but stands for the basic proposition that as corporations are distinct legal entities – the corporations own the corporate property – not the shareholders. However, the notion of “owner” is different in dealing with homesteads where the actual analysis looks to possession and use. All of the facts in this case point to the fact that the Rehes had possession and use of the subject property for their personal residence. NWC claims that this somehow blurs the corporate distinction – but this is not the veil piercing appeal.³ Similarly the NWC citation to State of Cal. v. Tax Comm'n of State, 55 Wn.2d 155, 346 P.2d 1006 (1959) is unhelpful as it is not a homestead case and relates to basic

³ Interestingly though, in the pendency of this appeal, a decision in the veil piercing claim was rendered by Division 1 reversing the trial court and finding the corporate veil should be disregarded. The matter is under reconsideration and possible higher appeal, but to the extent the corporate veil was disregarded, it would simply strengthen the Rehes’ position that they held a direct legal interest in the property to the extent the Rehes and the Unique were deeded one.

notions that shareholders own stock which is personal property. The citations to the Corporations Act are also unhelpful as the Rehes' homestead claim arise based on personal use and possession – not based on something that was distributed out of a corporation. The right arises from the Washington Constitution, not from Unique Constructions balance sheet.

Then NWC cites to SSG Corp. v. Cunningham, 74 Wn. App. 708, 875 P.2d 16 (1994). Now, this case at least deals with homestead issues. However, again, displaying the intense factual nature of these cases, this case is nothing close to the present scenario. In such case the owner of a corporation tried to claim a homestead in property the he owned but where his corporation had built two houses, a well and a pump house for use by the corporate employees. The owner then borrowed from his sister and gave her a “Leasehold Deed of Trust” covering the corporate real property referenced above. A judgment creditor of the corporation then moved to execute against the structures. After interested parties were joined, an evidentiary hearing was held. But the case got into annexation issues and found the structures still to be the personal property of the corporation. As sort of a last ditch argument there was some discussion of the homestead claim, but the court having found the structures to be personal property owned by the corporation, found that the homestead statute did not apply.

The quotation in such case to RCW 6.13.010 makes clear that since such decision the legislature has changed the statutes language from “[T]he homestead consists of the dwelling house ... in which the owner resides or intends to reside RCW 6.13.010” SSG Corp. v. Cunningham, 74 Wn. App. 708, 714, 875 P.2d 16, 20 (1994) to “[t]he homestead consists of real or personal property that the owner uses as a residence.” RCW 6.13.010. The Statute appears to have been amended in 1993 after the 1992 actions of the judgment creditor in the SSG Corp. case. Such case has not appeared in reported decisions standing for the proposition put forth by NWC. It is factually dissimilar and based off an older version of the statute which was amended to include personal property.

Thereafter NWC tries to use other foreign cases. In re Perry, 345 F.3d 303 (5th Cir. 2003). However, such a case was a debtor in bankruptcy who transferred property to his corporation and then later claimed the transfer was a sham and not effective and hence the Texas homestead applied. What is noteworthy is that the Bankruptcy court held a two day hearing on the issue in finding the transaction transferring the property to the corporation not a sham. It did not do so on 9 days’ notice. It took months to be determined. The situation was complicated as the Perrys owned an RV park that was in the corporation and surrounded their residence which had been on a separate plot inside the mobile home park.

Id. at 307. The case, while interesting, is not really applicable as a party was essentially using his own claim of a sham transaction offensive.

California Coastal Comm'n v. Allen, 167 Cal.App.4th 322, 83 Cal.Rptr.3d 906 (2008) is a case under the California homestead exemption which explicitly only allow the homestead to apply “to property of a natural person.” California Coastal Comm'n v. Allen, 167 Cal.App.4th 322, 329, 83 Cal.Rptr.3d 906, 911 (2008) (citing Cal. Civ. Proc. Code § 703.020). Given the decision is based off a different statutory structure, the case has little relevance to the present issue before this court.

Attorneys can go back and forth and distinguish cases from this court versus cases from that court. The facts are going to differ. This is part of the problem with the summary disposition in this case. However, in viewing facts, the constitution and statutes’ purposes related to the Homestead Act should guide this court. These were set forth in the opening brief and will not be rehashed extensively here. But they are policy determination based on issues of humanity and are to secure heads of households and dependents in their homes. There is no big dispute where the money for the property and the house came from – the Rehes. While NWC wants to kick up some dust as to the exact length of the Rehe’s occupancy – under any measure – it has been for years.

NWC raises a notion of judicial estoppel. However, all of these facts were before the trial court. The Rehes testified to their use of personal funds for the land and the home. They testified how it was to be sold but got hung up in litigation. They testified why they moved back in. All of these matters were before the trial court. There is no shifting position or arguments. The homestead issue was not an issue at trial. However, the later assertion of the automatic homestead and the formal notice flowed logically from the use and occupancy testified by the Rehes. So there is no shifting position or inconsistent claims that underlie notions of judicial estoppel. The 25 page limit of a reply brief inhibits the ability to go through NWC's cases in a 50 page brief on these points and point out how they do not apply. However, this court should note the Rehes were always very consistent that they lived in this house and poured the money into the house and the land. As such, no court has been misled and NWC was free to argue – and did argue – that the Rehe's personal use of the house was evidence in the veil piercing claim. Accordingly, the notion of prejudice or disadvantage inherent in a true judicial estoppel claim simply does not exist.

Then, NWC says that there is a res judicata issue. Again, this is a new theory by NWC thrown in at the end of the brief. However, the Rehes were defendants. The NWC complaint did not seek any

determination of the Rehes regarding the subject property. The homestead right is automatic. RCW 6.13.040. There is no legal authority that the Rehes have to sue or counterclaim to be vested in a constitutional right. Notably, NWC has no real authority for such proposition. The only case cited is In re Wilson, 341 B.R. 21 (B.A.P. 9th Cir. 2006) which is not a res judicata case. The reason the debtor in such case was not allowed to claim a homestead was factual. He had lost the house in divorce and had “vacated under compulsion of a state-court order.” Id. at 23. The court found his declaration of homestead to be untruthful as he did not live there. Id. at 27. No one has alleged that the Rehes declaration of homestead was untruthful or that they did not occupy the home so as to fall under the automatic homestead.

Attorney fees.

The trial court properly denied NWC attorney fees. NWC’s contract was not with the Rehes – it was with Unique Construction, Inc. The issue regarding the homestead did not arise from the contract – it arose from statute. NWC is its initial motion to quash the homestead sought fees against the Rehe – not NWC (CP 136). In NWC response to the reconsideration motion filed by the Rehes, it again asked for the fees against the Rehes. (CP 277). In the Responsive brief, NWC states “Unique is required to pay all costs associated with actions to collect the

contract balance....” Brief of Respondent p. 41. NWC misstates the issue here. Before the trial court, it asked for fees against the Rehes. Before this court, it says the trial court erred in not awarding the fees against Unique. There was no statute or contract or other recognized ground for the trial court to award fees against Rehe. The request was properly denied.

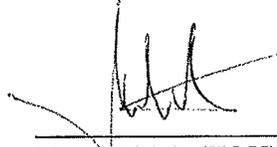
Fees should be awarded to the Rehes.

NWC continues to put the Rehes at jeopardy of attorney fees and cost by trying to tie them into the NWC-Unique contract. Given that they have been put at risk, they too should be benefitted should they prevail.

III. CONCLUSION

For the reasons set forth in the opening brief of the appellant and for the reasons contained herein, the decision of the trial court should be reversed and, to the extent necessary, remanded for further factual determination, to the trial court. The Rehes should be found to have a homestead based on their use and possession. This court should liberally construe the purpose of the Homestead Act and find that the Rehes use is protected thereby and rule accordingly.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

A handwritten signature in black ink, appearing to read 'MB', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on the 30th day of April, 2014, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following via U.S. Mail and email to:

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By 
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