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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In the General Receivership of:

JACOB G. BUTTNICK

AMENDED BRIEF OF RESPONDENTS LANCE MIYATOVICH AND
JOLAN INC.

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I. INTRODUCTION

Starting in the mid-1990s, Respondents Lance Miyatovich and Jolan, Inc. (hereinafter “Jolan Creditors”) leased space from Appellant Jacob Buttnick to operate a restaurant and bar, the J&M Café, in the bottom of the J&M building located in Pioneer Square. In 2012, the Jolan Creditors settled a lawsuit against Buttnick arising from his wrongful interference in the sale of their business. Buttnick’s primary asset at the time was the J&M building, which he agreed to market and sell to satisfy the debt owed to the Jolan Creditors. Rather than sell the property and pay the settlement as agreed, however, Buttnick filed for receivership, then bankruptcy, and then receivership again, where he eventually sought a \$125,000 homestead exemption, claiming, for the first time, that he lived at the property.

After a two-day bench trial, the trial court invalidated Buttnick’s homestead exemption based on its determination that Buttnick did not intend to occupy the property as his principal residence. The Jolan Creditors also asserted that Buttnick should be either equitably or judicially estopped from asserting the homestead exemption due to repeated and intentional misrepresentations that he did not reside at the J&M property, but the trial court declined to rule on these defenses because it found the homestead exemption invalid under Washington law.

In finding Buttnick’s claim to a homestead invalid, the trial court evaluated the evidence presented by the Jolan Creditors and came to the correct conclusion. In his appeal, Buttnick tries to raise two issues: (1) he claims the trial court required proof of residence and an intent to remain at

that residence “forever,” and (2) he claims the trial court required a showing of good faith to assert a valid homestead exemption. As explained below, Buttnick blatantly misstates the trial court’s findings of fact and conclusions of law and ignores longstanding Washington law. Additionally, even if a homestead exemption could apply, the equitable arguments made by the Jolan Creditors and supported by the undisputed evidence at trial invalidate any exemption.

The Jolan Creditors request the Court (1) affirm the trial court’s conclusion that Buttnick failed to meet his burden of proof to establish a valid homestead exemption, and (2) award the Jolan Creditors their attorneys’ fees and costs associated with this appeal as provided for under the parties’ settlement agreement.

II. COUNTER-STATEMENT OF ISSUES

Whether the trial court properly invalidated Jacob Buttnick’s homestead exemption claim where, after hearing and evaluating the evidence, the trial court concluded that the J&M building was neither used nor intended to be the primary residence of Buttnick?

Whether Jacob Buttnick should be equitably estopped from asserting a homestead exemption because he repeatedly misrepresented to the Jolan Creditors that he did not live at the J&M property in order to prevent them from taking action to secure their financial interest in the property, such as by obtaining a deed of trust, he represented to the Jolan Creditors that he would not encumber the J&M property when he entered

into a settlement agreement with them, and the Jolan Creditors reasonably relied upon his misrepresentations to their detriment?

Whether Jacob Buttnick should be judicially estopped from asserting a homestead exemption because he previously represented in court proceedings that he did not live at the J&M building and that he would not be asserting such a claim, and now takes a contrary position that imposes an unfair detriment on the Jolan Creditors?

III. STATEMENT OF THE CASE

A. Factual Background

On May 16, 2011, the Jolan Creditors, Respondents, filed their First Amended Complaint against Appellant Buttnick. CP 88. The Jolan Creditors alleged they leased space from Buttnick to operate a restaurant and bar, the J&M Café, in the bottom of the J&M building located at 201 First Avenue South in Seattle, Washington. CP 90. In their complaint, the Jolan Creditors asserted they received an offer to purchase the J&M Café for \$880,000, but Buttnick wrongfully refused to allow the Jolan Creditors to assign or otherwise transfer their lease with him to the prospective buyer. CP 91-92. As a result of Buttnick's wrongful conduct, the Jolan Creditors alleged they were unable to sell the J&M Café and suffered a range of general and special damages, including "damages and lost profits from the lost sale of the J&M, lost revenue and profits from the closure of the J&M, lost security deposits, attorneys' fees and costs from the subsequent bankruptcy of Jolan, as well as attorneys' fees and costs in pursuing this litigation." CP 92-93.

On August 2, 2012, the Jolan Creditors and Buttnick entered into a CR 2A settlement agreement to resolve the foregoing claims asserted by the Jolan Creditors against him. CP 101-06. In the settlement agreement, Buttnick admitted that he is liable on all of the claims that the Jolan Creditors had brought against him:

Buttnick admits that he is liable on all of the claims by Jolan and Miyatovich as set forth in Plaintiffs' First Amended Complaint for Damages in *Jolan, Inc., et al. v. Buttnick et al.*, King County Cause No. 10-2-15302-1 SEA and admits that he is liable on those claims for the amounts claimed by Jolan and Miyatovich, including the \$880,000 sale price, their security deposit, and their attorney's fees and costs. Buttnick agrees and understands that the purpose of this provision is to acknowledge that Jolan and Miyatovich are settling their claims for less than the full value of those claims, and to allow Jolan and Miyatovich to pursue the full value of those claims if Buttnick files for bankruptcy.

CP 101-02. In the settlement agreement, Buttnick also represented that he had sufficient interest in the J&M building to satisfy his obligations, that he would market, sell, and close on the J&M building, and that "he would not encumber the building in an attempt to avoid funding the settlement agreement." *Id.*

The Jolan Creditors timely and properly filed their judgment against Buttnick on August 9, 2012, and properly recorded the judgment on August 24, 2012. CP 109-12.

B. Procedural History

On June 20, 2013, the day before a scheduled foreclosure sale of the J&M building, and shortly before the deadline to fulfill his settlement

obligations to the Jolan Creditors, Buttnick filed for receivership. CP 193, 195-211. Buttnick admitted that he filed the receivership to stop the foreclosure sale of the J&M building. RP Vol. I, 134:17-135:1. In his filing for receivership, Buttnick assigned all of his assets to a receiver, including the J&M building. He did not list any exemptions, let alone a claim that he was living in the building or intended to claim a homestead exemption. Trial Exhibit 35 at 7; RP Vol. I, 132:23-136:12.

After the receiver filed a motion to approve a sale of the J&M building, two things happened: 1) on November 19, 2013, Buttnick recorded a Declaration of Homestead in the building and asserted he was living there, CP 179, and 2) the next day, he filed for Chapter 11 bankruptcy. CP 117-42. Buttnick confirmed that he filed the bankruptcy in order to prevent the receiver's sale of the building. RP Vol. I, 137:14-138:7. The declaration and bankruptcy were the first indications the Jolan Creditors had that Buttnick would try to assert he lived in the J&M building. CP 50, lines 3-4; RP Vol. I, 140:4-10; RP Vol. II, 122:7-124:7.

On March 25, 2014, the bankruptcy court lifted the automatic stay so the Jolan Creditors could obtain a supplemental judgment against Buttnick pursuant to the settlement agreement and order entered in 2012. CP 144-46. The bankruptcy court then dismissed Buttnick's Chapter 11 bankruptcy proceeding. CP 148-50.

On April 17, 2014, the Jolan Creditors obtained a supplemental judgment against Buttnick in the amount of \$818,789.73, resulting in a total of \$1,328,789.73 in recorded judgments by the Jolan Creditors against

Buttnick. CP 152-54. To date, Buttnick has failed to satisfy this judgment. CP 50, lines 13-17.

After the bankruptcy was dismissed, Buttnick's creditors renewed their efforts to foreclose on the J&M building. An attorney for one of Buttnick's creditors testified they sought a receivership to be appointed over the property, yet they were unable to serve Buttnick, even after his counsel at the time stated he would accept service on Buttnick's behalf. RP Vol. II, 65:21-66:3; 67:5-70:2. Buttnick confirmed that he was aware of the creditor's attempts to serve him, and that he deliberately avoided service of the papers seeking a custodial receivership. RP Vol. I, 140:22-141:12. Instead, Buttnick filed a second receivership in order to stay the sale of the J&M building and avoid his creditors. *See, id.* at 141:13-19.

On May 23, 2014, Buttnick executed an assignment for the benefit of creditors in favor of Resource Transition Consultants, LLC ("RTC"). Under the terms of the assignment, Buttnick assigned to RTC scheduled assets (the "Estate") for which RTC was to "take possession of and administer the Estate and shall liquidate the Estate." CP 156. The Jolan Creditors objected to Buttnick's claim of homestead in his second receivership.

C. Evidentiary Hearing Concerning Homestead Exemption

An evidentiary hearing relating to Buttnick's claim that he had a homestead exemption in the J&M Hotel building was held over two days on June 8-9, 2015. The trial court heard testimony from a number of witnesses aimed at resolving the factual determination of whether Buttnick

resided at the J&M building for purposes of obtaining a homestead exemption.

During the hearing, Buttnick admitted that he *deliberately* concealed his alleged “living” in the J&M building from the Jolan Creditors because they were “the enemy.” RP Vol. I, 53:12-22. Buttnick further testified that he believed the Jolan Creditors “have to suffer” for their “mistake.” RP Vol. I, 144:5-9.

Despite his desire to make the Jolan Creditor’s “suffer,” Buttnick admitted that the J&M building was not permitted for residential use since the 1970s. RP Vol. I, 62:4-13. He also admitted that his home in Seward Park was foreclosed upon in July 2010, RP Vol. I, 70:4-16, yet the first time he informed his creditors of his alleged living in the J&M building was not until over three years later, in November 2013, after Buttnick had entered into the CR 2A settlement agreement with the Jolan Creditors and represented that he would not encumber the building. RP Vol. I, 140:4-10.

The Jolan Creditors also presented evidence of the numerous times Buttnick disavowed his residence at the J&M building:

- Buttnick failed to identify himself as an occupant of the J&M building in Buttnick’s 2010 discovery responses. RP Vol. I, 60:20-61:5; CP 269, 275.
- Buttnick testified in a deposition that he was living with a friend in North Seattle. RP Vol. I, 39:6-16; CP 284-85.
- In March 2014, while showing the J&M building to an inspector for the Seattle Department of Planning

and Development, Mr. Buttnick stated that he did not reside in the J&M building. RP Vol. I, 123:8-10; 125:18-23; CP 290.

The Jolan Creditors also presented evidence of their reliance on Buttnick's representations regarding his interest in the J&M building, his ability to fund the settlement through proceeds from the building, Buttnick's representation that he would not encumber the building, and Buttnick's pledge that he would not interfere with the sale of the building. RP Vol. II, 111:13-112:20; 122:7-124:7. Respondent Lance Miyatovich testified that it was only after the building was sold, and Mr. Buttnick asserted he was entitled to a homestead exemption in the proceeds, that the necessity of a deed of trust became apparent. RP Vol. II, 124:8-126:3.

The trial court also noted that all witnesses, including witnesses called by Mr. Buttnick, testified that the upper floors of the J&M building were in serious disrepair and were unfit for human habitation.¹ CP 52, lines

¹ Susan Jones testified that the upper floors of the J&M building were "totally disgusting" and uninhabitable. RP Vol. I, 106:22-107:2. She further testified that she did not see "evidence of a bed or a kitchen that might have been used for Mr. Buttnick's personal use." RP Vol. I, 98:13-16. David DeLaitere testified that while he never went to Buttnick's alleged apartment upstairs, RP Vol. I, 114:15-16, he had been upstairs before and knew it to be dusty and filled with bird feces. *See* RP Vol. I, 114:19-21. Kevin Hanchett testified that there was substantial deferred maintenance in the upper stories" of the J&M building and that the upstairs was "very, very sketchy. There were areas of the floor that weren't properly covered. There were areas where the electricity didn't work..." RP Vol. I, 152:22-153:5. Vincent Scott testified that had Buttnick informed him that he was living in the upstairs area, he would have issued a notice of land use violation and would have required Buttnick to fix the area into a "livable unit." RP Vol. I, 126:6-14. Daniel Swanson testified that the upper floors were not habitable. RP Vol. I, 168:2-3. He further testified that he saw no evidence

19-25. For instance, Buttnick’s longtime friend and employee, Ricky Ferguson, testified the J&M “is not a fit place for no one to live in.” RP Vol. II, 21:4-5. Mr. Ferguson described the area in the J&M where Buttnick claimed to reside as infested with rats and roaches with a smell of rotten eggs and trash piled high above the knee. *Id.* at 21-22. After considering the evidence and testimony, the trial court found that Buttnick’s claim for a homestead exemption was invalid under the statute. CP 56, lines 7-8.

IV. ARGUMENT

A. **Standard of Review**

An abuse of discretion standard is appropriate when the trial court is generally in a better position than the appellate court to make a given determination, or when a determination is fact-intensive and involves numerous factors to be weighed on a case-by-case basis. *State v. Sisouvanh,*

that someone was living at the J&M building when he toured it. RP Vol. I, 168:8-10. Sheena Aebig testified that the basement and the upper floors had been condemned. There was no running water and no electricity in the upper floors. Care had to be taken not to step in certain areas of the floor because of the danger of falling through. She further commented that “[i]t was generally a wreck up there.” RP Vol. I, 187:12-24. Ross Klinger testified that when he toured the upper floors of the J&M building it was in “[c]omplete disrepair,” “[s]tuff [was] everywhere,” and it appeared inhabitable. RP Vol. II, 10:17-24. Irwin Koval testified that the upper levels were messy, disorganized and not “very appetizing.” RP Vol. II, 32:14-21. Tatyana Mamieva testified that she was concerned about the living environment of the upper floors of the J&M building, such as it lacking toilet facilities. RP Vol. II, 39:10-16. Martin Bernstein testified that he visited the upper floors of the J&M building on numerous occasions and even spoke with Buttnick about residential use of the upper floors, concluding that it was impossible. RP Vol. II, 48:14-50:25. Tami Wolff described the upper floors as missing planks of flooring, being dirty, and housing rats. RP Vol. II, 117:3-6.

175 Wn.2d 607, 621, 290 P.3d 942 (2012) (citations and quotations omitted). For example, the trial court is in the best position to weigh fact-dependent criteria under applicable law. *See id.* at 621-22 (trial court is in best position to weigh factors determining whether there is reason to doubt defendant's competence). And, in general, the trial court is best positioned to determine "the prejudice of circumstances at trial." *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). Accordingly, this Court finds an abuse of discretion only where "no reasonable person would take the view adopted by the trial court." *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). Absent such an abuse of discretion, "[a]ppellate courts cannot substitute their own reasoning for the trial court's reasoning." *State v. Lord*, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007).

When a trial court has weighed the evidence, an appellate court reviews "factual matters to determine whether the trial court's factual findings are supported by substantial evidence[.]" *Frank Coluccio Const. Co. v. King Cty.*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007) (stating that the interpretation of an insurance contract is a question of law reviewed de novo, yet the establishment of an insured-insurer relationship is a question of fact); *see Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012) ("We review a trial court's decision following a bench trial by asking whether substantial evidence supports the findings and whether the findings support the court's conclusions of law."). If the trial court's factual findings are indeed supported by substantial evidence, then the Court's role is limited to reviewing "whether the findings support the conclusions of law and

judgment.” *Frank Coluccio Const. Co.*, 136 Wn. App. at 761 (citations omitted). “Substantial evidence” is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.* There is a presumption in favor of the trial court’s findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Id.* (citing *Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990)).

If a case “hinges on a matter of statutory interpretation, *de novo* is the appropriate standard of review.” *State v. Armendariz*, 160 Wn.2d 106, 110-11, 156 P.3d 201 (2007). Only in instances where there are no factual issues raised on appeal would *de novo* review be appropriate. *See In re Upton*, 102 Wn. App. 220, 223, 6 P.3d 1231 (2000).

Finally, this Court may affirm the trial court on any ground supported by the record. *Otis Hous. Ass’n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009).

B. The Trial Court Properly Invalidated Buttnick’s Claim to a Homestead Exemption in the J&M Building

The trial court concluded that Buttnick failed to meet his burden of proof to establish a homestead exemption, yet Buttnick mistakenly argues on appeal that the trial court required both actual use and an intent to make the J&M building his home. This argument misconstrues the trial court’s findings of fact and conclusions of law. Rather, the trial court correctly stated the homestead requirements under the statute, made a series of factual findings and legal conclusions pursuant to the statute, and concluded

Buttnick failed to meet his burden of proof. Buttnick's assignments of error are not with the trial court's statement of the law, but rather the way in which the trial court applied the law to the facts of this case in ultimately deciding against him.

1. The Court considered, then rejected, Buttnick's claim that the J&M building was his "primary residence," and its findings are supported by substantial evidence.

Buttnick claims that the trial court erred in finding that he resided in the property yet refused him the homestead exemption. Brief of Appellant at 6. At the outset, Buttnick's argument fails to correctly state Washington law. Washington's homestead exemption exists to protect homes and residences. The text of the statute specifically requires *not only* that the property is used as a residence, but *also* that the homestead must be actually intended or used as the owner's principal home:

The homestead consists of real or personal property that the owner uses as a residence. In the case of a dwelling house or mobile home, the homestead consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated and by which the same are surrounded, or improved or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. A mobile home may be exempted under this chapter whether or not it is permanently affixed to the underlying land and whether or not the mobile home is placed upon a lot owned by the mobile home owner. Property included in the homestead must be actually intended or used as the principal home for the owner.

RCW 6.13.010(1) (emphasis added). While a homestead "valid on its face is entitled to a presumption of validity, such presumption shall exist

only ‘until the validity thereof is contested in a court of general jurisdiction in the county or district in which the homestead is situated.’” *Bank of Anacortes v. Cook*, 10 Wn. App. 391, 395, 517 P.2d 633 (1974) (citing RCW 6.12.090; *Costanzo v. Harris*, 71 Wn.2d 254, 427 P.2d 963 (1967)).

Nowhere in Buttnick’s opening brief does he assert that the J&M building was his “primary residence” or “principal home,” nor can he. Regardless, the trial court considered Buttnick’s bald assertion that he “resided in the J&M building as his primary residence,” CP 54. Lines 25-26, heard and weighed the evidence provided by both parties at the evidentiary hearing, and ultimately concluded that his claim to the exemption was “invalid under the statute.” CP 56, lines 8-9.

The trial court was fully aware of the methods by which a homestead exemption could be established: “Under Washington law, a homestead is protected in one of two ways: (1) by occupying the property as a person’s principal residence, or (2) if not yet occupied, by executing a declaration of homestead as required by statute and recording it in the county where the property is located. RCW 6.13.040(1).” CP 54, lines 2-6. The trial court noted that “Mr. Buttnick purports to have used both procedures to assert his homestead exemption.” *Id.*

The trial court then analyzed the evidence and evaluated whether Buttnick had a valid homestead exemption under the statute. The court first found that the recorded homestead declaration was “deficient and did not operate to establish Mr. Buttnick’s homestead in the J&M building,” namely because it was “not notarized.” CP 54, lines 7-24. Because the

homestead declaration was not “valid on its face,” it did not carry with it the “presumption of validity” described by the court in *Bank of Anacortes*.

The trial court next turned to Buttnick’s assertion that “he resided in the J&M building as his primary residence[.]” CP 54-55, lines 25-3. The court recognized that “if a person is actually residing in a principal residence, he is not required to record a declaration to claim the homestead. Nonetheless, Mr. Buttnick did so and the Court must determine if the Jolan Creditors have established that his claim of residency is invalid under the law.” *Id.*

The trial court evaluated and weighed the testimony and evidence presented at trial in determining whether the J&M building was used or intended to be used as Buttnick’s primary residence. The court then outlined all the evidence against Buttnick’s claim to the J&M Building as his “primary residence,” including:

- “The building was not approved by applicable codes or fit to be a residence.”
- “Despite purporting to live there since 2010, Mr. Buttnick took no steps to make the small room in which he stayed more habitable.”
- “As Mr. Buttnick testified, he deliberately denied that he stayed in the building, concealing this information from friends, creditors, and authorities.”

CP 55, lines 13-23. Other findings of fact support the court’s rejection of Buttnick’s claim that the building was his “primary residence”:

- “Others testified they never saw evidence Mr. Buttnick resided on the property...” CP 52, lines 19-25.
- “All witnesses, including those who testified in Mr. Buttnick’s behalf, testified that the two upper floors of the building, where Mr. Buttnick’s room was located, were unfit for human habitation.” *Id.*
- “The building was constructed as a hotel in the 1800s, but the upper two floors have not been permitted for residential use since 1972.” *Id.*
- “The J&M is a commercial building.” *Id.*
- “Other evidence contradicts Mr. Buttnick’s homestead claim. In response to discovery requests in September 2010, Mr. Buttnick did not list himself when asked to identify all occupants of the building.” CP 53, lines 11-17.
- “In his February 2011 deposition, Mr. Buttnick stated under oath that he was living with a friend in the north end of Seattle.” *Id.*
- “In March 2014, [after Mr. Buttnick submitted his declaration of homestead,] while showing the building to an inspector for the Seattle Department of Planning and Development, Mr. Buttnick told the Inspector that he did not reside in the J&M building.” *Id.*

While not explicit, the trial court found that the nature of the building and its permitted uses could not qualify it as a “residence” or “home” on which the homestead exemption could attach. This is particularly evident with the trial court’s conclusion that “[t]he building was not approved by applicable codes or fit to be a *residence*.” CP 55, lines 16-17 (emphasis added). Since the J&M building could not have been used as

residence, let alone the “primary residence” so claimed by Buttnick, the court correctly concluded that Buttnick’s claim for a homestead exemption was invalid as to the J&M building.

2. “Good faith” is required in a debtor’s assertion of a homestead exemption.

Buttnick makes much of the Court’s finding that he lacked an “honest intent to reside on the property.” As previously explained, the trial court assessed and found not credible Buttnick’s claim that he was entitled to an automatic homestead exemption via its use as his “primary residence.” Buttnick, however, claims that the trial court required “both actual residence and an intent to reside” for Buttnick to claim a homestead exemption. Brief of Appellant at 6. This claim reaches beyond the trial court’s findings of fact and conclusions of law. The court’s findings in addition to those regarding whether the J&M building was Buttnick’s “primary home” all support that Buttnick lacked the requisite good faith in relying on the homestead exemption.

It is well-established that the homestead exemption cannot be used to facilitate unjust enrichment or fraud. A constant running “thread” throughout Washington’s homestead exemption jurisprudence is a requirement that a homestead exemption be filed in “good faith.” *Webster v. Rodrick*, 64 Wn.2d 814, 816, 394 P.2d 689 (1964) (citing *Barouh v. Israel*, 46 Wn.2d 327, 332, 281 P.2d 238 (1955)). There has been “no decision in this jurisdiction where the court has permitted the judgment debtor to use the statutes as a sword to protect a theft.” *Id.* Further, the use

of the homestead exemption “cannot be used as an instrument of fraud and imposition.” *Id.* at 818 (citation omitted).

Webster v. Rodrick, which is also cited by Buttnick, should be instructive to the court on review. In *Webster*, an employee embezzled funds from her employer to benefit the marital community. The employer sued to recover the embezzled funds and obtained a money judgment against the employee both individually and against her marital community. Prior to judgment, the defendant employee filed a declaration of homestead upon the property occupied by them as a residence. Shortly thereafter, the trial court concluded that “the funds were misappropriated for the purpose of benefiting the community,” and that the “community was unjustly enriched at the expense of the plaintiff.” *Id.* at 815. The trial court then entered judgment for the employer and against the employee and the marital community. *Id.*

The plaintiff employer attempted to have the employee’s home sold to satisfy the judgment. The defendant employee sought to quash the writ of execution, relying on the declared homestead exemption. The employer then attacked the validity of the exemption and asked the court to declare the homestead invalid. The trial court denied the employer’s request, which decision was reviewed on appeal. *Id.* at 816. The Washington Supreme Court reversed and remanded with directions to grant the motion to declare the homestead invalid. The Supreme Court identified the ways in which the employee’s illicit activity went to benefit the community and were traceable to the property claimed as the homestead. *Id.* at 818.

Here, too, Buttnick's illicit conduct is directly traceable, and directly affected the property he had already committed to sell. Buttnick pledged the J&M building to satisfy a judgment, then on the eve of sale claimed an exemption on the property. Well after judgment was entered against him, Buttnick for the first time asserted that the J&M building was his home. The most damaging testimony regarding Buttnick's intentions comes from Buttnick himself. While on the stand he confirmed that he deliberately concealed his alleged "living" in the J&M building from the Jolan Creditors because they were "the enemy" who "have to suffer" for their "mistake." RP Vol. I, 53:12-22; 144:5-9. This "mistake" was relying on Buttnick's written representation in the CR 2A settlement agreement that he had a sufficient interest in the building to pay the Jolan Creditors per the agreement, that he would make a good faith effort to market and sell the building to satisfy the settlement agreement, and that he would not encumber the building to avoid paying the amount due under the settlement agreement. *See id.* Mr. Buttnick further testified that he:

- Agreed to the terms of the CR 2A settlement agreement between him and the Jolan Creditors. RP Vol. I, 71:21-73:5.
- Intended to use the sale of the building to finance the settlement agreement. RP Vol. I, 73:16-22.
- Did not include the J&M building as exempt property in at least two schedules of assets. RP Vol. I, 135:19-136:12; 143:13-144:15.
- Failed to identify himself as an occupant of the J&M building in either deposition or written discovery

requests prior to 2014. RP Vol. I, 39:9-14; 57:14-59:21.

Buttnick relies on *In re Greene*, 346 B.R. 835 (Bankr. D. Nev. 2006), *aff'd in part, rev'd in part*, 583 F.3d 614 (9th Cir. 2009), contending that it “is very similar in facts to Buttnick” with regards to the future intent to vacate the property. *Greene* is neither similar nor helpful here, as it involved the determination of a homestead exemption to a trailer on a property and applied Nevada’s homestead laws. Washington’s homestead law already contains provisions regarding a claim to homestead involving either mobile homes and even personal property. *See* RCW 6.13.010(1); RCW 6.13.030. Additionally, the debtor in *Greene* showed an intent to continue to live on the property:

First, Debtor has produced three affidavits to support his continuing residency on the property from August 11, 2004 to the present. Ironically, Debtor's residency was further corroborated by Washoe County when the county cited him for using a recreational vehicle for dwelling purposes in violation of the building code a year later on August 11, 2005. Finally, since recording the homestead, Debtor has made significant improvements to the trailer and initiated a plan to improve the property, including entering into an agreement to construct a home on the property.

Id. at 839.

This is in direct contrast to the facts presented to the trial court in this case, where Buttnick expressly *denied* living on the property at least three times, RP Vol. I, 39:6-16; 60:20-61:5; 123:8-10; 125:18-23, and stated that he “did not desire to put money in to fix it up.” RP Vol. I, 40:8-11.

The evidence presented at trial, weighed and relied upon by the trier-of-fact, supports that Buttnick did not have the requisite good faith to rely on the homestead exemption. Such bad faith is directly traceable to the building at issue, and should Buttnick be permitted to rely on his claimed homestead exemption, he would be enriched in the manner the Supreme Court sought to avoid in *Webster v. Rodrick*.

C. The Trial Court's Findings Should Be Upheld Because Buttnick is Equitably and Judicially Estopped from Asserting a Homestead Exemption

Because the trial court found that Buttnick's homestead claim was invalid under the statute, the trial court did not reach the Jolan Creditors' equitable arguments against Buttnick's homestead exemption. CP 56, lines 6-9. At trial, however, the Jolan Creditors presented overwhelming and undisputed evidence in support of equitable arguments that would have also defeated Buttnick's homestead claim. Should the Court have any issue with the trial court's findings that invalidated the homestead exemption, the Court should uphold the trial court's findings on the basis that Buttnick is equitably and judicially estopped from asserting a homestead exemption.²

² At a minimum, if the Court declines to affirm the trial court's decision based on the homestead exemption and further declines to reach the alternative ground of equitable estoppel, it should remand to the trial court for a determination of the equitable estoppel defenses. The record clearly demonstrates that the equitable estoppel issues were litigated before the trial court, but it merely declined to reach them given its reliance on statutory grounds.

1. The undisputed evidence shows that Buttnick should be equitably estopped from asserting a homestead claim.

The Jolan Creditors asserted that Buttnick was equitably estopped from asserting a homestead claim because of the representations he made to the Jolan Creditors as part of the parties' CR 2A settlement agreement, which they reasonably relied upon to their detriment.

Equitable estoppel exists when "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarvcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (internal quotations and citations omitted). The elements of equitable estoppel are: 1) a party's admission, statement, or act inconsistent with its later claim, 2) an action by another party in reliance on the first party's act, statement, or admission, and 3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Id.*

First, Buttnick repeatedly represented to the Jolan Creditors, in both his sworn deposition testimony and in his sworn discovery responses, that he did not live or occupy the J&M Hotel building. When asked why he continually lied about his living situation, Mr. Buttnick testified that he deliberately concealed his alleged "living" in the J&M building from the Jolan Creditors because they were "the enemy." RP Vol. I, 53:12-22. It is undisputed that Mr. Buttnick repeatedly represented to the Jolan Creditors

that he did not live at the J&M building during all material times—a position that is clearly inconsistent with his homestead claim.

Second, the Jolan Creditors reasonably relied on Buttnick's misrepresentations when they agreed to settle their claims against him. As Respondent Lance Miyatovich testified at trial, if the Jolan Creditors knew that Buttnick had been untruthful about those representations, they would have taken steps to prevent the assertion of a homestead exemption claim, such as by obtaining a deed of trust on the J&M property. RP Vol. II, 98:15-22; 99:1-25. Instead, based on Buttnick's representations that he did not live in the building, that he had a sufficient interest in the building to fund the settlement agreement, that he would not encumber the building in an attempt to avoid funding the agreement, that he would make a good faith effort to market, sell, and close on it, and that he would fully fund the settlement from those proceeds, the Jolan Creditors entered into a settlement agreement with Buttnick without a deed of trust or waiver agreement. RP Vol. II, 124:8-126:3; CP 101-106.

Finally, it is undisputed that the Jolan Creditors have been damaged by Buttnick's misrepresentations because (1) Buttnick owes the Jolan Creditors at least \$541,000 per the judgments against him in their favor, and (2) the Jolan Creditors will be prevented from obtaining at least \$125,000 of the amount owed if Buttnick is allowed to contradict or repudiate the representations he made about his residence in order to claim a homestead exemption. *See* RP Vol. II, 129:7-16.

Although the trial court did not reach the issue of equitable estoppel because of its finding that Buttnick failed to meet his burden regarding the homestead exemption, the Court could uphold the trial court's decision based on equitable estoppel because the foregoing facts were undisputed by Buttnick – if anything, Buttnick conceded he lied to the Jolan Creditors because they were the “enemy.”

2. The undisputed evidence shows that Buttnick should be judicially estopped from asserting a homestead claim.

The Jolan Creditors also established that Buttnick was judicially estopped from asserting a homestead claim on the J&M building. Judicial estoppel “is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The purposes of judicial estoppel are: “(1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and the waste of time.” *Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007). Put more concisely, “the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* at 849 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001)).

Three factors help courts determine whether to apply judicial estoppel: “(1) whether a party’s later position is ‘clearly inconsistent’ with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’; and (3) ‘whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party, if not estopped.’” *Arkinson*, 160 Wn.2d at 538-39 (citing *New Hampshire v. Maine*, 532 U.S. at 750-51). These elements were all established during the evidentiary hearing.

First, Buttnick confirmed that when he signed his first assignment for the benefit of his creditors, he did not claim the J&M building as among his “exempt” property. RP Vol. I, 135:19-136:12. Buttnick also confirmed that he did not claim the J&M building as among his “exempt” property in the second receivership. RP Vol. I, 143:13-144:15. At these points the building should have been sold free and clear of liens, yet his later claim of homestead was clearly inconsistent with these earlier positions.

Second, up until the point where Buttnick filed his homestead exemption in 2013, the assumption of all parties, including the receiver and lower court, was that Buttnick had no claim of homestead and thus the receiver had the authority to sell the building without Buttnick’s consent. Buttnick’s later claim of homestead is inconsistent with his failure to claim a homestead in both of his assignments, which led to the appointment of two general receivers who had the power to sell the building without his consent and to the imposition of an automatic stay on creditors who were

pursuing his property, including the foreclosure sale that was stopped because of the first receivership filing.

Third, Buttnick's assignment of the building for the benefit of creditors, with no exemptions reserved, afforded Mr. Buttnick: (1) the benefit of the automatic stay under RCW 7.60.110(1); and, (2) entry of an order authorizing the receiver to sell the building without his consent. When Buttnick made a subsequent claim of homestead, the receiver who had been marketing the building was faced with the untenable position of having to accept the asserted homestead claim in exchange for obtaining Buttnick's consent to a sale. *See* RCW 7.60.260(2)(i). This gave Buttnick an unfair advantage and imposed an unfair detriment to the other creditors of the receivership estate, including the Jolan Creditors.

D. The Jolan Creditors Should Be Awarded Their Attorney's Fees and Costs Associated with This Appeal

In Washington, a party may recover attorneys' fees and costs via contract, statute, or another recognized equitable ground. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). "Contractual authority as a basis for an award of attorneys' fees at trial also supports such an award on appeal." *Marine Enter., Inc., v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 750 P.2d 768 (1988).

Two separate contracts provide a basis for the Jolan Creditors to recover their attorney's fees and costs associated with this appeal.

First, the underlying lease between the parties, which Mr. Buttnick admits he breached, provides for attorney's fees and costs:

Costs and Attorneys' Fees. In the event of litigation, arbitration, or other dispute resolution proceedings relating to this Lease or the relationship between the parties created by the Lease, the substantially prevailing party shall be awarded its reasonable costs, disbursements, investigative fees, expert witness fees, paralegal and attorneys' fees.

CP 341-46.

Second, in the parties' CR 2A settlement agreement, Mr. Buttnick agreed that he would indemnify the Jolan Creditors for all attorney's fees and costs they incurred if he breached the agreement and/or if he filed for bankruptcy:

Buttnick agrees to indemnify Jolan and Miyatovich for any claims, fees, costs, or liability arising from this agreement, including any such claims, fees, costs, or liability that arise if Buttnick files for bankruptcy.

CP 102.

Pursuant to RAP 18.1(a) and (b), the Jolan Creditors request the Court award them the attorney's fees and costs they incurred as a result of this appeal.

V. CONCLUSION

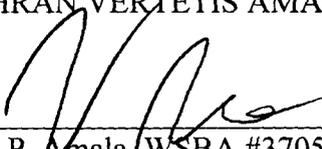
After a two-day evidentiary hearing, the trial court correctly concluded that Buttnick failed to meet his burden of showing that he was entitled to a homestead exemption in a commercial building that had not been occupied for residential purposes for approximately 40 years. The Court should uphold the trial court's decision because its findings are supported by substantial evidence. If the Court disagrees, the Jolan

Creditors request the Court remand this case to the trial court for further findings consistent with the evidence presented at the hearing.

Alternatively, and to the extent Buttnick challenges those findings, the Court can separately uphold the trial court's conclusion because there is overwhelming and undisputed evidence that Buttnick is equitably and judicially estopped from asserting a homestead exemption.

Respectfully submitted this 28th day of July 2016.

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CERTIFICATE OF SERVICE

I, Alina Svyryda, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertetis Amala PLLC, 403 Columbia St., Suite 500, Seattle, Washington, 98104, attorneys for Respondents Lance Miyatovich and Jolan, Inc.

C. I hereby certify that I caused the document to which this certificate is attached to be delivered to the following by email to the following addresses:

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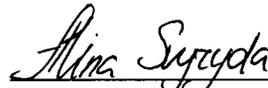
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Declared under penalty of perjury under the laws of the State of
Washington this 28th day of July, 2016, in Seattle, Washington.



Alina Svyryda
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4811-4565-3557, v. 2