IN THE IOWA SUPREME COURT

SUPREME COURT NO. 17-2009

STANDARD WATER CONTROL SYSTEMS, INC.,
Plaintiff-Appellee,

v.

MICHAEL D. JONES, CORI JONES,
Defendants-Appellants.

DATE OF COURT OF APPEALS OPINION UNDER REVIEW:
February 27, 2019

APPELLANTS' RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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MICHAEL AND CORI JONES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT IN SUPPORT OF RESISTANCE TO APPLICATION FOR FURTHER REVIEW

The Iowa Court of Appeals ("Iowa Appellate Court")correctly held that (1) Iowa Code sections 561.21(3) and 572.32 are not exceptions to the longstanding rule that a mechanic's lien claimant cannot recover attorney fees through the forced sheriff's sale of a family's homestead, and (2) Michael and Cori Jones ("Michael and Cori") properly asserted their statutory homestead rights by complying with Iowa's requirement that homeowners assert their homestead rights prior to the sheriff's sale of their home.

This case began as a dispute over a $4,900 bill for basement waterproofing services that resulted in a damaged pipe and flooding in Michael and Cori's basement. It has since been transformed into an effort by Standard Water Control Systems, Inc. ("Standard Water") to collect $58,953.69 in attorney fees through the forced sheriff's sale of Michael and Cori's homestead. The Iowa Appellate Court correctly held that Iowa law does not allow such collection efforts against a family's homestead. Iowa Code section 561.16 states, "The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary." Iowa Code section 561.21(3) makes a limited exception to this homestead protection for "work done or materials furnished exclusively for the improvement of the homestead." Both the Iowa District Court and the Iowa

Appellate Court properly read this plain language to mean that while Standard Water can collect against Michael and Cori's homestead for the limited amount of actual waterproofing services it provided (i.e., the "work done or materials furnished exclusively for the improvement of" Michael and Cori's homestead), it may not collect attorney fees from Michael and Cori's homestead, because attorney fees do not constitute "work done or materials furnished exclusively for the improvement of the homestead." Iowa's mechanic's lien statute, Iowa Code chapter 572, similarly does not include any language exempting mechanic's liens from Iowa's homestead protections.

Standard Water grasps at three legal theories to argue that Michael and Cori should not be entitled to Iowa's homestead protections. The Iowa Appellate Court correctly held that these legal theories do not apply and that Michael and Cori are, indeed, entitled to Iowa's longstanding homestead protections, protections that this Court has recently described as serving "the important public purpose" of "provid[ing] a margin of safety to the family, not only for the benefit of the family, but for the public welfare and social benefit which accrues to the State by having families secure in their homes." *In re Estate of Waterman*, 847 N.W.2d 560, 566-67 (Iowa 2014).

PROCEDURAL HISTORY

Standard Water's Application for Further Review presents the Court with an incomplete picture of the procedural history in this case. A review of the complete facts and procedural history in this case indicates that Michael and Cori have complied with each and every requirement under Iowa law for asserting homestead rights, and have never agreed, expressly or otherwise, to waive their homestead rights. Consequently, as the procedural history of the case is very important for the discussion on the merits, a detailed review of the procedural history is necessary to cure the incomplete picture painted by Standard Water.

Michael and Cori hired Standard Water to waterproof their home's basement. (Tr. 216:1-18)(App. 22). During the course of Standard Water's work, Standard Water damaged Michael and Cori's water and sewer line, causing damage to Michael and Cori's basement. (Tr. 221:4-9)(App. 22). After Michael and Cori refused to pay the full amount for the work that resulted in flooding and damaged water and sewer lines, Standard Water filed a petition to foreclose a mechanic's lien on Michael and Cori's home. (Petition)(App. 7-20). The Iowa District Court for Polk County ruled in Standard Water's favor. (Ruling 11/5/2014)(App. 23-35). Despite Standard Water receiving a judgment of only $5,400, plus interest, minus $500 worth

of unfinished work ($4,900, the "Judgment Amount"), the District Court additionally awarded Standard Water $43,835.25 in attorney fees and $479.04 in costs. (Order 2/11/2015)(App. 75-88).

On March 13, 2015, Michael and Cori appealed the District Court's ruling. (Notice of Appeal 3/13/2015)(App. 95-97). The Court of Appeals affirmed on the merits, but held that the District Court abused its discretion by entering an attorney fee award that "exceeded 800% of the underlying judgment." *Standard Water Control Systems, Inc. v. Jones*, 888 N.W.2d 673, 679 (Iowa Ct. App. 2016) ("*Standard Water I*"). The Court of Appeals remanded the case for a recalculation of an appropriate fee award. *Id.*

While *Standard Water I* was pending, Standard Water attempted to collect its judgment by levying on Michael and Cori's home. (Praecipe 8/3/2015; Execution 8/4/2015)(App. 102-103; 104-106). The sheriff levied on Michael and Cori's home on October 21, 2015. (Return on Execution 10/21/2015)(App. 107-119). Iowa law provided Michael and Cori the right to redeem their home from the sheriff's sale, with this redemption right expiring on October 20, 2016. *Id.*

Shortly after the *Standard Water I* ruling, Michael and Cori filed their Motion to Set Aside Sale (of their home). (Motion to Set Aside 9/1/2016)(App. 120-147). Michael and Cori argued that "[p]art of the basis

of the execution on the Joneses' property was the attorney fee award," and "[i]n light of the appellate court vacating the attorney fee award, the execution and Sheriff's sale should likewise be set aside." *Id.* ¶¶ 8-9 (App. 121). The identification of the subject property as homestead was raised as part of the motion. (Reply Sppt. Motion to Set Aside Sale 9/20/2016, ¶ 6)(App. 150). The District Court granted this motion on the basis that "[t]he court of appeals' decision reversed a substantial amount of the judgment which precipitated the sheriff's sale. Since the underlying judgment which made the sheriff's sale possible has been eliminated equity demands that the sheriff's sale which was authorized by the judgment should likewise be set aside until the court has the opportunity to address the court of appeals' decision." (Order 9/28/2016 at 4)(App. 158). On March 24, 2017, the District Court further clarified that in light of its order vacating the sheriff's sale, "[i]f a sheriff's sale is to occur Standard will need to initiate a new one in *accordance with the requirements under Iowa law*." (Order 3/24/2017 at 24)(App. 183) (emphasis added).

On March 24, 2017, the District Court (on remand from *Standard Water I*) entered on order granting Standard Water $41,670.25 for trial fees and $17,283.44 for appellate fees for a new total fee award of $58,953.69. (Order 3/24/2017)(App. 160-184). On June 1, 2017, Michael and Cori appealed the District Court's decision to award $58,953.69 in trial and appellate attorney

fees. (Notice of Appeal 6/1/2017)(App. 187-189). The Court of Appeals affirmed the District Court's order on February 7, 2018. *Standard Water Control Sys., Inc. v. Jones,* No. 17-0854, 913 N.W.2d 274 (Iowa Ct. App. Feb. 7, 2018) ("*Standard Water II*"). However, no further award was made for appellate attorney fees in Standard Water's favor. *Id.* The Iowa Supreme Court denied Standard Water's Application for Further Review on this issue. *Standard Water Control Sys., Inc. v. Jones*, No. 17-0854 (Iowa July 18, 2018).

During *Standard Water II,* Standard Water resumed the process of collecting its judgment by attempting to levy on Michael and Cori's home by sheriff's sale. On June 6, 2017, Standard Water moved to foreclose its lien on Michael and Cori's home. (Special Execution 6/6/2017)(App. 190-192). This new execution was made necessary by the District Court's order vacating Standard Water's previous execution and sheriff's sale, because a vacated judgment restores the parties to their prior position. *Clarke Cnty. Reservoir Comm'n v. Abbott*, 862 N.W.2d 166, 177 (Iowa 2015) ("A judgment, once reversed or vacated, no longer has preclusive effect."); *In re Marriage of Lenz*, No. 02-1022, 2003 WL 21458484 at *5 (Iowa Ct. App. June 25, 2003) ("[B]y vacating the dissolution decree, the parties are placed in the positions they held prior to the entry of the decree."). The sheriff's sale of Michael and

Cori's home was held on August 22, 2017. (Sheriff Return Execution 08/22/2017)(App. 324-325).

On August 10, 2017 (***prior*** to the sheriff's sale of their home), Michael and Cori again asserted their homestead rights in their Motion to Vacate. (Mot. to Vacate 8/10/2017)(App. 193-198). The gist of the Motion to Vacate was that Standard Water's praecipe was erroneous in that it included amounts not allowable by Iowa Code section 561.21(3) against the homestead. *Id.*

Michael and Cori also attempted to tender the judgment amount, less attorney fees, to redeem their home prior to the sheriff's sale. (Aff. of Cori Jones 8/22/2017) (App. 322-323). That is, Michael and Cori attempted to tender the amount due under Iowa Code section 561.21(3) for work done and material furnished: $4,900. *Id.* The Sheriff's Office refused the tender. *Id.*

On August 21, 2017, the District Court ruled on Michael and Cori's Motion to Vacate. (Order 8/21/2017)(App. 316-318). The District Court held that it did not have sufficient factual findings to rule that Michael and Cori's home constituted their "homestead" under Iowa Code chapter 561. *Id.* However, the District Court also explained that if Michael and Cori were able to provide additional factual support for their home's "homestead" status, Michael and Cori could assert their homestead rights at that time. *Id.*

On August 22, 2017, Cori filed an affidavit stating that the home "is the homestead of my family." (Aff. of Cori Jones 8/22/2017 ¶ 2)(App. 322). On August 24, 2017, Michael and Cori filed a Notice of Recording Selection of Homestead and Plat of Homestead. (Notice 8/24/2017)(App. 334-335). This affidavit included an attached exhibit, titled "Selection of Homestead and Plat of Homestead," that Michael and Cori had filed with the Polk County, Iowa Recorder on August 21, 2017. (Notice 8/24/2017 Ex. 1)(App. 335).

On August 22, 2017, Michael and Cori also filed their Motion to Reconsider Order Re: Motion to Vacate Writ of Special Execution and Alternative Motion Pursuant to Iowa Code section 628.21 ("Motion to Reconsider/Alternative Motion"). (Motion to Reconsider/Alternative Motion 8/22/2017)(App. 319-321). This motion explained that, in light of Cori's affidavit and Michael and Cori's Selection of Homestead and Plat of Homestead, the District Court now had sufficient factual basis to (1) vacate Standard Water's writ of execution on Michael and Cori's home, and (2) enter an order clarifying that Michael and Cori could redeem their home by paying $4,900 (i.e. the amount that is actually collectible from Michael and Cori's homestead pursuant to Iowa Code sections 561.16 and 561.21). (Motion to Reconsider/Alternative Motion 8/22/2017)(App. 319-321). Standard Water filed a resistance that "stipulate[d] that the Property in this litigation is the

Joneses' homestead," but argued (1) that Michael and Cori should not be entitled to their homestead right "pursuant to the doctrine of judicial estoppel" and "law of the case," and (2) that the entire judgment was somehow collectible from Michael and Cori's home despite Iowa Code chapter 561's homestead protections. (Resist. Motion to Reconsider/Alternative Motion 9/5/2017 ¶¶ 31, 37)(App. 346, 347-348). The District Court allowed the sale to proceed. (Order 8/21/2017)(App. 316-318).

Approximately two weeks after Michael and Cori documented the homestead status of the property, the sheriff's sale of Michael and Cori's home occurred, with Standard Water the successful bidder. (Sheriff's Return on Execution 8/22/2017)(App. 324-333).

On November 12, 2017, the District Court ruled on Michael and Cori's Motion to Reconsider/Alternative Motion. (Order 11/12/2017)(App. 374-386). The District Court agreed that Michael and Cori's home was entitled to Iowa Code chapter 561's homestead protections, explaining:

> Our Supreme Court determined long ago that the homestead statute was to be construed "liberally in favor of the owner of the home." It is evident to this court that the legislature passed the statute for the purpose of protecting the homes of individuals from execution except in certain limited cases. In this case the exception is that an execution may be brought against a homestead to satisfy debts for [t]hose incurred for work done or material furnished exclusively for the improvement of the homestead. The statute does not state that the homestead may be

> executed upon to satisfy interest, court costs, costs of the action or attorney fees.

Id. at 6-7(App. 379-380) (internal citations omitted).

Despite recognizing Iowa Code chapter 561's broad protection for a family's "homestead," the District Court ultimately held that Michael and Cori somehow "waived" their homestead rights. *Id.* at 11-12(App. 384-385). A Rule 1.904(2) motion was unsuccessful. (Motion per IRCP 1.904(2) 11/27/2017; Order 12/10/2017)(App. 398-403; 404-405). On December 12, 2017, Michael and Cori filed their Notice of Appeal from the District Court's refusal to recognize Michael and Cori's homestead rights. (Notice of Appeal 12/12/2017)(App. 410-411).

On appeal, the Iowa Appellate Court affirmed the District Court's ruling that section 561.21(3) does not allow attorney fee awards to be collected against a homestead, but reversed the District Court's ruling that Michael and Cori waived their homestead rights. *Standard Water Control Sys., Inc. v. Jones*, No. 17-2009 (Iowa Ct. App. Feb. 6, 2019). Standard Water has now sought further review of the Court of Appeal's decision.

STATEMENT OF FACTS

Michael and Cori own a small home at 2910 Mahaska Avenue in Des Moines, Iowa. (Pet. ¶¶ 5-7)(App. 7-8). The subject property is the family's home and Michael and Cori have children. (Aff. of Cori Jones

8/22/2017 at 1; Michael and Cori's Reply in Support of Mot. to Quash Garnishment 11/3/2017 ¶¶ 6-7)(App. 322; 368-369). In June 2013, Michael and Cori hired Standard Water to install drain tile in their basement in response to water intrusion issues in the home. *Standard Water I* at 674. While installing drain tile in the basement, a Standard Water employee struck a water line and sewer line with a jackhammer, causing flooding and other damage in Michael and Cori's home. *Id.*

That same day (while the water and sewer lines remained damaged), Standard Water tendered a bill to Michael and Cori seeking payment for the $5,400 balance of the contract. *Id.* at 674-675. Michael and Cori refused to pay the bill on the basis that Standard Water had jackhammered Michael and Cori's sewer line and had not repaired the damage or completed the waterproofing work. *Id.* at 675. Standard Water then filed an action to foreclose a mechanic's lien. *Standard Water I* at 675. As discussed in the Course of Proceedings above, a lengthy procedural history unfolded.

ARGUMENT IN SUPPORT OF RESISTANCE TO APPLICATION FOR FURTHER REVIEW

THE IOWA APPELLATE COURT CORRECTLY HELD THAT STANDARD WATER MAY NOT COLLECT ITS ATTORNEY FEE AWARD THROUGH THE FORCED SHERIFF'S SALE OF MICHAEL AND CORI'S HOMESTEAD.

A. The Iowa Appellate Court Correctly Determined that Iowa Code Sections 561.21(3) and 572.32 are Not Exceptions to the Rule that a Mechanic's Lien Claimant Cannot Recover Attorney Fees through the Sheriff's Sale of a Homestead.

Iowa Code section 561.16 states, "The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary." Iowa Code section 561.21(3) provides one limited exception to the homestead statute by allowing a creditor to collect against a homestead for "[t]hose [debts] incurred for work done or material furnished exclusively for the improvement of the homestead."

Iowa Courts will not interpret a statute to limit homestead protections unless that statute contains "specific language abrogating homestead rights." *First Am. Bank v. Urbandale Laser Wash, LLC,* 894 N.W.2d 24, 29 (Iowa Ct. App. 2017). This is because inferring an intent to limit homestead rights "without the legislature's use of specific language abrogating homestead rights would be contrary to century-old case law that extolls the 'important public purpose of the protections established for the homestead interest.'" *Id.*, (quoting *In re Estate of Waterman*, 847 N.W.2d 560, 566-67 (Iowa 2014)).

"The purpose of homestead statutes is to provide a margin of safety to the family, not only for the benefit of the family, but for the public welfare and social benefit which accrues to the State by having families secure in their homes." *In re Estate of Waterman*, 847 N.W.2d at 566-67 (internal quotation marks omitted). "Recognizing the important public purpose of the protections established for the homestead interest, we construe our homestead statute broadly and liberally to favor homestead owners." *Id.* at 567; *see also In re Wipperling*, 286 B.R. 106, 108 (N.D. Iowa 2002) ("The law regarding improvements to a homestead should be construed liberally in favor of the debtor so as to effect the purpose and policy of the homestead statutes."). "Homestead rights are jealously guarded by the law." *Iowa State Bank & Tr. Co. v. Michel*, 683 N.W.2d 95, 101 (Iowa 2004).

In this case, Standard Water admits that Michael and Cori's home is their "homestead." However, Standard Water argues this Court should read Iowa Code section 561.21(3) as including "specific language abrogating homestead rights" such that Standard Water should be entitled to enforce its attorney fee award through a sheriff's sale of Michael and Cori's home. (App. Further Review at 20-24). As both the District Court and the Court of Appeals determined, the plain language in this statute demonstrates that this argument is incorrect.

Iowa Code section 561.21(3) allows collection against a homestead for debts incurred "***exclusively*** for the improvement of the homestead." Iowa Code § 561.21(3) (2017) (emphasis added). However, this does not authorize Standard Water to collect its *entire* judgment against Michael and Cori's homestead. This is because the only part of the District Court's judgment that qualifies as "work done or material furnished *exclusively* for the improvement of the homestead" is the $4,900 mechanic's lien that represents the amount Michael and Cori refused to pay for Standard Water's basement waterproofing services. When interpreted "broadly and liberally to favor homestead owners," Iowa Code section 561.21(3), by its plain language, allows Standard Water to collect no more than $4,900 from the foreclosure of Michael and Cori's home.

Standard Water additionally argues that Iowa's mechanic's lien statute, Iowa Code chapter 572, exempts mechanic's liens from Iowa Code Chapter 561's homestead protections. (App. Further Review at 19-20). However, Iowa's mechanic's lien statute does not contain any provision that, when interpreted "broadly and liberally to favor homestead owners," constitutes "specific language abrogating homestead rights." *See Urbandale Laser Wash, LLC*, 894 N.W.2d at 29.

Standard Water's briefing to the Court of Appeals quoted just one sentence from Iowa Code chapter 572. (Appellee Br. at 32). This sentence reads in its entirety: "in an action to enforce a mechanic's lien, a prevailing party may be awarded reasonable attorney fees." *Id.*, (quoting Iowa Code § 572.32). Standard Water then jumped to the logically incomprehensible conclusion that this sentence means "that attorney fees awarded *must* be a part of a judgment *in rem* that attaches to the foreclosed property." (Appellee Br. at 32).

It is difficult to determine how Standard Water could conclude that section 572.32 constitutes "specific language abrogating homestead rights." Section 572.32 can be read in perfect harmony with Iowa's homestead statute without limiting the homestead statute's "important" and "century-old" protections. *Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006); *First Am. Bank*, 894 N.W.2d at 28-29 (quoting *In re Estate of Waterman*, 847 N.W.2d at 566-67). The mechanic's lien statute broadly applies when a person "furnishes any material or labor for, or performs any labor upon, any building or land for improvement, alteration, or repair … by virtue of any contract with the owner, owner-builder, general contractor, or subcontractor." Iowa Code § 572.2(1). This broad language encompasses any number of residential and non-residential construction projects that do not involve a

"homestead," such as commercial properties, second homes, residential storage buildings, etc. Therefore, the attorney fee and cost shifting provisions of Iowa Code chapter 572 will, in most cases, be completely unaffected by Iowa's homestead statute. It is only in cases involving a homestead that Iowa Code section 572.32's attorney fee provision gives way to Iowa Code chapter 561's clear statutory protections for a family's homestead. Therefore, Iowa Code section 572.32's attorney fee provision is perfectly consistent with Iowa Code chapter 561's homestead protections, and Standard Water's apparent belief that section 572.32's fee shifting mechanism somehow demonstrates that attorney fees are always collectible against the subject property in mechanic's lien cases (even in cases involving a family's homestead under Iowa Code chapter 561) is incorrect. Standard Water's claim that the Court of Appeals' ruling will leave "a successful mechanic's lien claimant…without any means to recover…attorney fees" is simply false in all cases other than cases involving homesteads entitled to Iowa's longstanding homestead protections under Iowa Code chapter 561. (*See* App. Further Review at 20).

Additionally, Standard Water's argument that "the Joneses expressly agreed to be liable for Standard Water's attorney fees and interest in any collection action on the contract" is a red herring. (App. Further Review at 19). Standard Water has, undoubtedly, obtained an award of attorney fees in

this case. The only question facing this Court is whether Iowa law allows Standard Water to *collect* the attorney fee award through the forced sheriff's sale of Michael and Cori's homestead. The clear answer is "no," and there is nothing in the contract between Standard Water and Michael and Cori that changes this. Standard Water cannot cite this Court to a single case allowing a mechanic's lien claimant to collect attorney fees against a homestead based solely on a contractual agreement to pay attorney fees in subsequent collection actions. (*See* App. Further Review at 18-19) (citing to *Rohlin Const. Co. v. Lakes, Inc.*, 252 N.W.2d 403, 406 (Iowa 1977), *S. Hanson Lumber Co. v. De Moss*, 253 Iowa 204, 111 N.W.2d 681, 684 (Iowa 1961), and *Deerfield Construction Co. v. Crisman Corp.*, 616 N.W.2d 630, 633 (Iowa 2000).

The District Court correctly held "that the house in question is [Michael and Cori's] homestead." (Order 11/12/2017 at 3)(App. 376). Indeed, the District Court was well aware of the homestead nature of the property. (Order 9/28/2016 at 3)(App. 157) ("This is their home and they cannot financially afford to post an appeal bond…"). See also *id.* (inability to redeem their home from sheriff's sale "would effectively make them homeless.") The District Court also correctly determined that "section 561.21(3) does not allow a homestead to be sold to recover attorney fees, costs of the action or interest that may have been entered as a judgment against the home in [a] foreclosure

action under chapter 572," because (1) the homestead statute "does not state that the homestead may be executed upon to satisfy interest, court costs, costs of the action or attorney fees," and (2) there is "no language in chapter 572 that could be interpreted as a 'special declaration of statute'" that specifically limits chapter 561 homestead rights. (Order 11/12/2017 at 7-8)(App. 380-381).

The Iowa Appellate Court correctly affirmed the District Court on this issue by holding that there is "no ambiguity in the language of section 561.21(3)" and that the "plain meaning of the statute" is that a judgment creditor in a mechanic's lien action may not collect attorney fees from a family's homestead. *Standard Water*, No. 17-2009 at 9-10.

B. The Iowa Appellate Court Correctly Determined that Michael and Cori did Not Waive their Statutory Homestead Protections.

This Court has instructed that "[t]he homestead right is a favorite of the law," and "[u]nless the language is plain and unmistakable, we should not conclude that the parties, through mere inference or uncertain implications, meant that a homestead right should be waived or relinquished." *Mills Owners' Mut. Fire Ins. Co. v. Petley*, 210 Iowa 1085, 229 N.W. 736, 740-41 (Iowa 1930). Despite these instructions, Standard Water grasps at three legal theories in an effort to argue that Michael and Cori somehow impliedly

waived their statutory homestead protections: (1) judicial estoppel, (2) the law of the case doctrine, and (3) res judicata. Standard Water asks this Court to change direction in its homestead jurisprudence by setting a low bar for inadvertent waiver of homestead rights by finding waiver in situations where the district court, appellate court, and all parties agree that there has not been an express waiver. The Court should reject this argument and affirm the Iowa Appellate Court's conclusion that "the Joneses raised their claims regarding their homestead rights prior to the second sheriff's sale, thereby making the claims timely under *Francksen v. Miller*, 297 N.W.2d 375, 377 (Iowa 1980). We determine the Joneses are not precluded by the doctrine of res judicata from raising their homestead claims in the present action." *Standard Water*, No. 17-2009 at 14.

1. Judicial estoppel does not apply because Michael and Cori have never taken a position inconsistent with their belief that Iowa's homestead statute protects their home from Standard Water's claim for attorney fees and costs.

The Iowa Appellate Court correctly held that judicial estoppel does not apply to the homestead issue in this case, because judicial estoppel prevents a party from taking inconsistent positions in the same litigation, and Michael and Cori have never taken a position inconsistent with their belief that Iowa's homestead statute protects their home from Standard Water's claim for

attorney fees and costs. *Standard Water*, No. 17-2009 at 10-12; *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003).

"The doctrine [of judicial estoppel] 'prohibits a party who has successfully and ***unequivocally*** asserted a position in one proceeding from asserting an ***inconsistent*** position in a subsequent proceeding.'" *Wilson*, 666 N.W.2d at 166 (quoting *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987)) (emphasis added). Michael and Cori have not, at any point, taken unequivocally inconsistent positions in this litigation. Certainly, Michael and Cori never argued that the property was not their homestead.

Michael and Cori's overall litigation strategy and procedure can be summarized as follows:

1) Michael and Cori did their best to contest Standard Water's claim for unpaid fees related to the basement waterproofing work that resulted in broken water and sewer pipes and flooding;

2) Michael and Cori appealed the underlying case on the merits and on the basis that the attorney fee judgment in particular was excessive;

3) After receiving a favorable ruling on appeal that ordered the District Court to reduce Standard Water's attorney fee judgment, Michael and Cori moved to vacate a sheriff's sale that was based on a judgment amount that the Court of Appeals had determined was inappropriate;

4) After the District Court vacated the prior sheriff's sale and amended its judgment based on the Court of Appeals' ruling, Michael and Cori asserted their homestead rights prior to sheriff's sale.

There is nothing "inconsistent" with these positions. The Iowa Appellate Court correctly held that at no point did Michael and Cori make "a plain, unmistakable, or express waiver of their homestead rights" and, therefore, they did not waive their homestead rights under the doctrine of judicial estoppel. *Standard Water*, No. 17-2009 at 10-12. Given that homestead rights are jealously guarded in this state, it follows that homestead right could not be inadvertently waived.

2. The law of the case doctrine does not apply because no appellate court in the present case has addressed the homestead issue.

The law of the case doctrine holds that "an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case." *United Fire and Cas. Co. v. Iowa Dist. Court for Sioux County*, 612 N.W. 2d 101, 103 (Iowa 2000). However, "[t]he doctrine generally applies only to issues raised and passed on in a prior appeal." *Lee v. State & Polk Cnty. Clerk of Court*, 874 N.W.2d 631, 646 (Iowa 2016).

Standard Water appears to be retreating from their "law of the case" argument, because its Application for Further Review does not include a

discussion of the "law of the case" doctrine. Therefore, Standard Water concedes that the Iowa Appellate Court correctly held that "the Joneses' claims concerning their homestead rights are not barred by the law of the case doctrine" because there is no prior appeal "where the issue of the Joneses' homestead rights was previously raised and decided." *Standard Water*, No. 17-2009 at 12-14.

3. Res judicata principles do not bar Michael and Cori's claim, because Michael and Cori timely asserted their homestead rights prior to the sheriff's sale of their home as required by state law.

The District Court's Order stated that it "adopts the position in [*Francksen v. Miller*, 297 N.W.2d at 375 (Iowa 1980)] where the court denied the [homestead] defense based upon the principles of res judicata." (Order 11/12/2017 at 12)(App. 385). The District Court additionally cited to *Scheffert v. Scheffert*, No. 12-2147, 2013 WL 5508538 (Iowa Ct. App. Oct. 2, 2013) in support of this argument. *Id.* at fn. 30. Standard Water relies almost exclusively on *Francksen* and *Scheffert* to argue that Michael and Cori somehow waived their homestead rights. (App. Further Review at 25-27).

The Iowa Appellate Court correctly rejected these arguments. *Standard Water*, No. 17-2009 at 14-15. Under longstanding Iowa law, the only timing requirement for asserting homestead rights is that those rights must be asserted prior to the sheriff's sale at issue. In *Francksen*, this Court explained, "The

record of the foreclosure suit shows defendant did not assert his homestead claim until after the sheriff's sale. The trial court held the claim was untimely and refused to set the sale aside. No appeal was taken from that adjudication. Therefore, under *Dodd*, defendant is precluded from raising a homestead defense in the present action …." 297 N.W.2d at 377 (citing *Dodd v. Scott*, 81 Iowa 319, 46 N.W. 1057, 1058 (Iowa 1890)). The Court held that the defendant's failure to "assert his homestead claim until after the sheriff's sale…precluded [the defendant] from raising a homestead defense" in a subsequent forcible entry and detainer action "based on the principle of res judicata." *Id.* Under any reasonable interpretation, *Francksen*'s only timing requirement for homestead rights is that the homestead owner must assert her homestead rights prior to sheriff's sale.

In *Scheffert*, the homestead owner actually consented to summary judgment partitioning his homestead. 2013 WL 5508538 at *1. A court-appointed referee then sold the property. *Id.* After the sale, the homestead owner finally objected and asserted his homestead rights. *Id.* In other words, this case does nothing to change *Francksen*'s requirement that a family is entitled to its homestead rights so long as they assert those rights prior to sheriff's sale.

Iowa's homestead statute does not include a requirement that a family assert its homestead rights at a particular time. *See* Iowa Code ch. 561. Instead, longstanding case law has established that the only timing requirement for asserting homestead rights is that a homeowner must raise those rights before the sheriff's sale at issue. *Francksen*, 297 N.W.2d at 376-77; *Scheffert*, 2013 WL 5508538 at *1-3. This rule is consistent with Iowa's strong public policy favoring a family's homestead protection rights and disfavoring waivers of these rights except in very narrow circumstances. *See In re Estate of Waterman*, 847 N.W.2d at 566-67; see *also* Iowa Code § 561.22 (prohibiting contractual waivers of homestead rights except where the waiver is "signed and dated by the person waiving the exemption" and complies with other strict format requirements, including "boldface type of a minimum size of ten points"). "The homestead right is a favorite of the law, and its surrender or waiver will not be presumed, nor will such intent be inferred from the use of words of a general and indefinite signification…. Unless the language is plain and unmistakable, we should not conclude that the parties, through mere inference or uncertain implications, meant that a homestead right should be waived or relinquished." *Petley*, 229 N.W.2d at 740-41.

In this case, Michael and Cori raised their homestead rights prior to the sheriff's sale of their home and at a point in the litigation where they were still

contesting the underlying judgment amount. (Mot. to Vacate 8/10/2017 at 1)(App. 193). This is far different than the homeowners in *Francksen* and *Scheffert*, each of whom failed to assert their homestead rights until *after* the underlying judgment was established and no longer contested, and *after* their homes were sold pursuant to judicial decree. *Francksen*, 297 N.W.2d at 375; *Scheffert*, 2013 WL 5508538. Michael and Cori's assertion of their homestead rights prior to the sheriff's sale of their home satisfies the timing requirement for asserting homestead rights under Iowa Code chapter 561 and related case law.

Standard Water asks this Court to abandon long-standing Iowa law and hold, for the first time in a published decision in Iowa history, that a party who asserts their statutory homestead rights prior to the sheriff's sale of their homestead nevertheless waives their homestead rights by failing to assert those rights earlier. First, and foremost, the argument is unpreserved. Second, this argument directly contradicts this Court's history of carefully and consistently protecting Iowa's statutory homestead protections since the early 1900s. This argument is also inconsistent with the fact that no Iowa appellate court has ever found a waiver of a family's homestead rights where that family asserted those rights prior to sheriff's sale. *See e.g.*, *Francksen*, 297 N.W.2d 375.

CONCLUSION

The Iowa Appellate Court correctly held that Michael and Cori are entitled to the Iowa homestead statute's important, longstanding protections for family homesteads, protections that the Iowa legislature enacted with the purpose to "provide a margin of safety to the family, not only for the benefit of the family, but for the public welfare and social benefit which accrues to the State by having families secure in their homes." *In re Estate of Waterman*, 847 N.W.2d at 566-67. The Iowa Supreme Court should continue its longstanding tradition of maintaining these important statutory protections by denying Standard Water's Application for Further Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Resistance to Application for Further Review was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on March 6, 2019, pursuant to Iowa R. App. P. 6.901(1), (8) (2017) and Iowa Ct. R. 16.315(1)(*b*) (2017).

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Resistance to Application for Further Reviewed was filed with the Iowa Supreme Court by electronically filing the same on March 6, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt and contains 5,600 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Tara Johnson
Signature

March 6, 2019
Date