No. 100918-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, *a Washington nonprofit corporation*,

Petitioner,

v.

SHAWN A. KURTZ and STEPHANIE A. KURTZ, *husband and wife and the marital or quasi-marital community composed thereof*; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, *a Washington corporation*,

Petitioner.

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST, *not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP*,

Respondent.

REPLY

Jacob DeGraaff, WSBA #36713
Henry & DeGraaff, PS
119 1st Ave S, Ste 500
Seattle, WA 98104
Tel# 206-330-0595
Fax# +1-206-440-7609
Email: *jacobd@hdm-legal.com*

Christina Latta Henry, WSBA #31273
Henry & DeGraaff, PS
119 1st Ave S, Ste 500
Seattle, WA 98104
Tel# 206-330-0595
Fax# +1-206-440-7609
Email: *chenry@hdm-legal.com*

Samantha Brown, WSBA #48131
BARKER MARTIN, P.S.
701 Pike Street, Suite 1150
Seattle, WA 98101
(206) 381-9806
Email: *sbrown@barkermartin.com*

Attorneys for Petitioner Copper Creek (Marysville) Homeowners Association

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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

Copper Creek (Marysville) Homeowner's Association, a Washington nonprofit corporation, hereby replies to Respondent's Cross Petition for Review of the Trial Court's Attorney Fee Award and requests the Court deny review. In its cross petition, Respondents once again challenges the Fee Award by the trial court. The trial court awarded attorney fees to Petitioner because of Respondents' "improper behavior" at the trial court. This sanction has now been reviewed twice by the trial court, and three times by the appellate court, and both courts agreed that these sanctions are appropriate regardless of the outcome on appeal.[1]

II. STATEMENT OF PERTINENT FACTS

It is undeniable that Respondents' behavior at the trial court was egregious and sanctionable. Respondents' behavior highlights the disturbing practice where huge corporations attempt to

[1] The Trial Court reviewed this issue in the initial motion for fees on November 18, 2020, and then again when it denied a supersedeas bond for those same fees on November 25, 2020. The denial of the supersedeas bond was reviewed be the appellate court and upheld on January 5, 2021. The Appellate Court then issues its initial published ruling on January 18, 2022, reversing this Fee Award, but reconsidered that and ultimately upheld the trial courts Fee Award in its published decision on April 11, 2022.

intimidate and strong arm their opponents into submission. This time that behavior did not work, and Respondents behavior was called out. To understand the trial court's Fee Award, Petitioner must first rehash what occurred at the trial court. To keep this brief, Petitioner will only highlight the Respondents most egregious behavior, but it reserves the right to bring in further behavior if review is accepted.

A. Respondent's Five Month Lie that Drove Up Petitioner's Attorney Fees at the Trial Court.

As the court knows, Respondent took no action until about nine years after the Kurtzes' bankruptcy discharges and conveniently, about a month after Petitioner had completely repaired the home, spending over $22,000.00, Respondent schedules a trustee's sale. CP 1012-13, 1023-25, 1030, 1035-39. Petitioner requested that Respondents strike their Trustee Sale, but they refused, leaving Petitioner with no choice but to move for a temporary restraining order ("TRO") to stop the sale. CP 1013, CP 1100-11. In its TRO the Association argued that Respondents' sale was time barred. *Id*.

Instead of responding substantively to Petitioner's TRO, Respondents argued standing and stated, "even if the court were inclined to reject the standing argument, there was an acknowledgment of the debt in this case. The [Kurtzes], requested a short sale in 2013, which operates to re-start the statute of limitations as of 2013." CP 1140, 1172. This re-acknowledgement was crucial because – if true – it may have restarted the statute of limitations under RCW 4.16.280.[2] To resolve this dispositive issue, the Association requested proof of re-acknowledgement through informal discovery, but Respondents unexpectedly refused. CP 1140, 1175-82.

Over the next several weeks, Petitioner sent at least five written requests for proof of the re-acknowledgment, even offering to dismiss its suit if Respondent sent proof, but Respondents still refused, all while pressuring Petitioner to dismiss its claims. CP 1140, 1175-82. Initially, Respondent stated they would not provide proof to protect the Kurtzes' privacy. *Id.* However, after Petitioner

[2] While it is unclear if a re-acknowledgment can occur under these circumstances and Washington Law, Petitioner was prepared to dismiss the entire suit if this was provided.

provided the Kurtzes' written authorization for the release of these documents to Petitioner, Respondents changed tunes. CP 1140, 1184. Now Respondents stated, "my client is not interested in entering into a release or disclosing loan file documents to your client at this time. . ." *Id.*

Shortly thereafter, Respondents filed their first motion to dismiss Petitioner's suit and Petitioner propounded formal discovery requests expressly requesting evidence of re-acknowledgment. CP 844-58, 1140, 1154-70. Mere days before the discovery deadline, Respondents stated they needed more time to respond but refused to postpone their motion to dismiss. CP 1140. Ultimately, Respondents motion was stricken, and Petitioner agreed to extend the discovery deadline by about a month. CP 811-17.

Just days before the extended discovery deadline, Respondents again stated they would not respond to discovery. CP 805-08. Petitioner scheduled a CR 26(i) conference, but Respondent refused to provide a date by which they would respond. CP 1140. Instead of responding to the discovery requests Respondent filed a

second motion to dismiss. CP 1112-20. Petitioner filed a motion to compel discovery. CP 1132-38.

Days before the scheduled hearing of these motions, Respondents finally served "discovery responses." CP 1265-81. The problem was, those responses contained nothing more than objections, not a single substantive response or piece of evidence. *Id.* In fact, they were not responses at all under CR 37(a)(3), which is exactly what Petitioner pointed out to the court. CP 1547, 1251-54. The court agreed, compelled discovery and continued Respondents second motion to dismiss until after discovery was provided. CP 658-60, 1069-71. The court specifically ordered that Respondent had waived their right to object to any discovery responses due to their delay in responding. CP 1069-71.

Still, Respondent refused to provide discovery, and days before the court ordered discovery deadline Respondents requested a protective order for discovery responses. CP 1282-94. Respondents did not provide discovery as the court ordered, forcing Petitioner to again request continuance of Respondents' motion to dismiss. CP 1325-36. Petitioner also responded to the Respondents' motion to

dismiss, arguing that Petitioner's complaint was sufficient to survive a CR 12(b)(6). CP 1282-94. The court agreed and denied Respondents motion to dismiss and ordered that the court would enter an order of default if Respondent did not respond to discovery. CP 517-19, 504-07.

Finally, five months and four motions after initially requested, Respondents provided discovery responses. CP 405-06. Upon review, the reasoning for Respondents extreme resistance became clear: The debt had never been re-acknowledged and the statute of limitations defense never waived. CP 405-06.

B. Respondent's Attempt to Bribe the Kurtzes Without Counsel's Knowledge.

Moreover, this falsehood was no error in judgment or mistake because, while Respondent claimed to have a re-acknowledgement, they were secretly attempting to purchase a statute of limitations waiver from the Kurtzes, all while delaying their discovery responses and repeatedly attempting to dismiss Petitioner's claims on procedural grounds. CP 1251-54. In an email to the Kurtzes, Respondent stated:

> I'm wondering if you would be interested in executing a Waiver document in favor of my client, which would waive the statute of limitations on the underlying loan. Given that you both seem to have moved on from the Property now, executing such a document likely wouldn't impact you much, if at all, but if you could help my client in the underlying litigation, we'd be willing to give you something in exchange for your trouble. CP 1254.

This happened after Petitioner had already accepted a deed from the Kurtzes and the email was sent directly to the Kurtzes who were represented by counsel, facts which Respondents were fully aware of at the time they sent this email. CP 405-06. The intention of this email was not lost on Sgt. Kurtz and he forwarded this email to his counsel and Petitioner's counsel stating that he, "[did not] like how they are trying to bribe [him] into a waiver." CP 1254.

Respondents' insistence that they had a debt re-acknowledgment while simultaneously attempting to resolve the matter thru dismissal repeatedly, refusing to produce discovery, and attempting to bribe the Kurtzes to sell them a statute of limitations waiver without their counsel's involvement reveals the only logical conclusion: Respondent simply lied about having re-acknowledgment documents in an attempt to strong arm Petitioner to

drop its claims. But for Respondents' egregious behavior, this matter would have been resolved on the merits in one motion for summary judgment, none of the discovery motions or dismissals would have been necessary if Respondents had not lied about the re-acknowledgment.

C. The Trial Court's Partial Fee Award for Respondent's "Improper Behavior."

After prevailing on Summary Judgement to Quiet Title, Petitioner moved for an award of fees, citing multiple bases for those fees. On November 18, 2020, the trial court declined to award the full amount requested, instead providing a handwritten breakdown of those fees specifically associated with Respondents' "improper behavior" as described above, which the court then awarded:

> The Court Awards fees for the following months: July - $17,423.05; June- $22,815.54; August - $12,941.23; September- $ 23,001.97; October- $ 17,164.85; and November- $3,432.85. *The Court further finds that these fees were associated with the improper behavior described above* – the total is $96,779.09. [3]

[3] R. App. 3.

(Emphasis added). The trial court further reiterated that these fees were awarded as sanctions when it denied a supersedeas bond on the Fee Award and allowed immediate execution. R. App. 6. The trial court stated that the Fee Award was, "an *equitable Fee Award* granted to Plaintiff due to Defendants' Improper Behavior. *Id.* Plaintiff may execute on this judgment in any legal manner available." *Id.*

D. Division One Reviewed the Fee Award Three Times and Upheld it.

Respondents sought review of the trial court's order denying a supersedeas bond in its Motion and Objection to Trial Court Supersedeas Decision at the appellate court. R. App. 7-26. That motion was denied. R. App. 27-30. In support of its motion, Respondents argued that they had a right to stay enforcement of a money judgment through a supersedeas bond under RAP 8.1(b)(1). R. App. 7-26. Petitioner responded that these were sanctions for improper behavior such that the stay was discretionary under RAP 8.1(b), (b)(3). R. App. 43-45. In upholding the trial court's decision, the appellate court found:

> An attorney Fee Award is usually a money judgment. But the trial court awarded attorney fees as an "equitable" remedy and made an equitable decision that the Association should be able to immediately enforce the award. In view of the record, Selene and Wilmington fail to show an abuse of discretion in that decision.[4]

Respondents raised the issue of fees again in their Opening brief and their Reply and the appellate court reversed the trial court's Fee Award on the sole basis that Petitioner was "no longer the prevailing party and cannot recoup attorney fees. . ." The January 18, 2022, opinion is attached as Supplemental Appendix A. Petitioner moved to reconsider the issue of attorney fees on the basis that they were sanctions for Respondents' "improper behavior" at the trial court and needed to be reviewed for an abuse of discretion. Motion to Reconsider attached as Supplemental Appendix B. Ultimately, the Appellate court issued a revised opinion upholding the trial court's Fee Award and stating:

> [W]e do not set aside the award of attorney fees made by the trial court. The record is clear that the trial court strongly believed that an independent basis in equity justified the award of attorney fees. We agree. The

[4] R. App. 27-30.

> change of prevailing party does not require vacating that equitable award.[5]

Respondents now bring the issue again and rehash the same argument that the trial court's initial Fee Award was not detailed enough, but still disregarding the clear record throughout the trial court's docket which supported that Fee Award. Some of the behavior relating to that Fee Award is detailed above, although it is impossible to recreate the entire atmosphere at the trial court here nearly two years later.

III. ARGUMENT

A. The Appellate Court Accurately Found No Abuse of Discretion by the Trial Court.

The trial court's Fee Award was for equitable sanctions and should not be disturbed absent an abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075 (1993). Respondent does not even argue that the trial court abused its discretion, but only claims that the trial court did not sufficiently order attorney fees.

[5] Appendix B to Petition for Review.

The abuse of discretion standard is particularly important because, as this court said:

> [S]anction rules are, 'designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to reduce the reluctance of courts to impose sanctions…. If a review de novo was the proper standard of review, it could thwart these. *Id.*

While Petitioner can list out the behavior that the trial court witnessed, this court and well-established Washington Law recognizes that the trial court has the advantage of witnessing the behavior first-hand, but also has the power to manage its own courtroom. *Id.* When reviewing the Fee Award for abuse of discretion, Respondents "[bear] the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable." *In re Custody of Smith*, 137 Wn.2d 1, 22, 969 P.2d 21, 31 (1998). Respondents did not, nor can they, meet their burden, despite taking multiple chances.

B. Petitioner is Entitled to Keep the Fee Award.

Petitioner is entitled to keep the Fee Award regardless of what happens with the remaining appeals. *See, Andren v. Dake*, 14 Wn. App. 2d 296, 322, 472 P.3d 1013, 1029 (2020). In *Andren* the Court

held that a non-prevailing party was entitled to attorneys' fees as "equitable sanctions" for "inappropriate and improper conduct" because, "it would defeat the purpose of that award and let [respondent] profit from the misconduct of [their] counsel". *Id*. at 322. The Andren decision extends previous holdings that, "Fees awarded as sanctions should ensure that the wrongdoer does not profit from the wrong." *Id*. at 322, citing *Washington State Physicians Insurance Exchange and Association v. Fisons Corp*., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993); and, *Gammon v. Clark Equip. Co*., 38 Wn. App. 274, 282, 686 P.2d 1102, 1107 (1984). As well as extending a generally accepted societal concept of not rewarding bad behavior.

It cannot be disputed that most of the attorney fees and costs incurred at the trial court would have been avoided but for Respondents' refusal to engage in discovery, even after being ordered to do so by the trial court. It is also abundantly clear that Petitioner was forced to respond to the same issues and motions repeatedly because of Respondents' unnecessary, duplicative, and repetitive motions at the trial court. Had Appellants been honest about the facts from the beginning, provided the necessary discovery, and allowed

adjudication on the merits instead of repeatedly filing CR 12 motions, this case could have been resolved in one CR 56 motion for a fraction of the incurred costs.

Here, the Fee Award was granted for "improper behavior" and regardless of what this Court does this petition for review, Respondent should not be allowed to profit from their misconduct at the trial court. The converse of that is that Petitioner should not be punished for Respondents' bad faith behavior by being left with the excessive bills necessitated by their misconduct at the trial court.

C. Respondent Makes No Real Argument for Why Review Should be Granted.

Despite multiple attempts at overturning this Fee Award Respondent has yet to make a real argument in favor. Respondent relies on *Marriage of Bobbitt*, to say that the trial court did not have a sufficient finding of facts to award attorney fees. *Respondent's Answer*, p. 19. However, *Bobbitt*, is a divorce case looking at an award of additional attorney fees for intransigence, and that court generically awarded $10,000 "for the necessity of having to pursue this action." *In re Marriage of Bobbit*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). In this case the trial court painstakingly reviewed the

attorney invoices and determined in detail which "*fees were associated with the improper behavior described above.*" This was not some generic, arbitrary amount like in *Bobbitt*, but a specific dollar amount because behavior clearly in the trial court's record.

Likewise, Respondent cites to *State v. S.H.*, and makes a confusing argument that the Court will not "assume that the judge found bad faith. . ." 102 WN. App. 468, 479, 8 P.3d 1058 (2000). No assumption is necessary in this case. The trial court expressly found that the fees were awarded for improper behavior. Respondent cannot cite to a single case showing that sanctions for bad behavior should be overturned solely because the other side is no longer the prevailing party.

IV. CONCLUSION

For the reasons above Petitioner requests that this Court deny review of the trial court's attorney Fee Award.

I certify that this document contains 2731 words, pursuant to RAP 18.17.

DATED this 8th day of August, 2022.

Respectfully submitted

Samantha Brown, WSBA# 48131
Barker Martin, PS
701 Pike St, Ste 1150
Seattle, WA 98101
Tel# 206-381-9806
Email: *sbrown@barkermartin.com*

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, I caused the foregoing document to be e-filed with the Supreme Court of Washington, and I served via e-mail on counsel of record as follows:

Amy Edwards, WSBA #012492
Stoel Rives LLP
760 SW Ninth Ave, Ste 3000
Portland, OR 97205
(503) 224-3380
Amy.edwards@stoel.com

Anne M. Dorshimer, WSBA #50363
Stoel Rives LLP
600 University Street, Ste 3600
Seattle, WA 98101
(206) 624-0900
Anne.dorshimer@stoel.com

8/8/2022

*/s/Madeleine Fries*____
Paralegal

No. 100918-6

IN THE SUPREME COURT
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COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, *a Washington nonprofit corporation*,

Petitioner,

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WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST, *not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP,*

Respondent.

PETITIONER'S SUPPLEMENTAL APPENDIX ISO OF PETITIONER'S REPLY

Jacob DeGraaff, WSBA #36713
Henry & DeGraaff, PS
119 1st Ave S, Ste 500
Seattle, WA 98104

Christina Latta Henry, WSBA #31273
Henry & DeGraaff, PS
119 1st Ave S, Ste 500
Seattle, WA 98104
Tel# 206-330-0595

Tel# 206-330-0595
Fax# +1-206-440-7609
Email: *jacobd@hdm-legal.com*

Fax# +1-206-440-7609
Email: *chenry@hdm-legal.com*

Samantha Brown, WSBA #48131
BARKER MARTIN, P.S.
701 Pike Street, Suite 1150
Seattle, WA 98101
(206) 381-9806
Email: *sbrown@barkermartin.com*

Attorneys for Petitioner Copper Creek (Marysville) Homeowners Association

APPENDIX INDEX

SUPPLEMENTAL
APPENDIX A

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

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v.

SHAWN A. KURTZ and STEPHANIE A. KURTZ, husband and wife and the marital or quasi-marital community composed thereof; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation,

Defendants,

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST, not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP,

Appellant.

No. 82083-4-I

DIVISION ONE

PUBLISHED OPINION

APPELWICK, J. — Selene/Wilmington seeks reversal of summary judgment quieting title in favor of Copper Creek. Relying on Edmundson v. Bank of America, 194 Wn. App. 920, 378 P.3d 272 (2016), the trial court determined the statute of limitations rendered the Selene/Wilmington deed of trust unenforceable. This was error.

The statute of limitations ran against the deed of trust only to the extent it ran against the underlying debt. The underlying debt was an installment debt. The statute of limitations accrued on each individual installment as it came due. Bankruptcy discharge of the debtor did not extinguish the debt, modify the schedule of payments, or accelerate the maturity date. And, the lender did not accelerate the maturity date of the loan. The statute of limitations on each of the missed installments began running from the date they came due. Bankruptcy did not toll the statute of limitations. The discharge left intact the lender's option to enforce the debt against the property in rem.

However, the Servicemembers Credit Relief Act (SCRA), 50 U.S.C. § 3936(a), tolled the period for any action to enforce the debt until the debtor, an active duty servicemember, was relieved of personal liability on the debt by the discharge in bankruptcy. At that time, the statute of limitations began to run on any unpaid installments. Selene/Wilmington may enforce the deed of trust, except to the extent the statute of limitations has rendered any unpaid installments uncollectable.

We reverse and remand for further proceedings.

FACTS

In 2007, Shawn and Stephanie Kurtz purchased real property with a note for $303,472.00 secured by a deed of trust (DOT).[1] Shawn was active duty in the

[1] CTX Mortgage Company, LLC was the original beneficiary of the DOT. CTX assigned the DOT to J.P. Morgan Mortgage Acquisition Corporation in December 2013. In December 2018, J.P. Morgan Mortgage Acquisition assigned the DOT to JPMorgan Chase Bank who immediately assigned it to Citibank N.A. as trustee for CMLTI Asset Trust. Citibank assigned the DOT to Wilmington

United States military at the time and continued to be an active duty serviceman until at least September 2020. The property was within the Copper Creek (Marysville) Homeowners Association and the Kurtzes were obligated to pay annual assessments of $400.

In January 2008, Shawn and Stephanie separated and Stephanie moved out of the property. The Kurtzes stopped paying on the note in 2008 or 2009. Stephanie filed for Chapter 7 bankruptcy protection in February 2010. Stephanie included the property secured by the DOT on the bankruptcy schedule of creditors holding secured claims. On the debtor's statement of intention, Stephanie noted the mortgage and her intention to surrender the property. Stephanie did not claim the property as exempt. Stephanie received a bankruptcy discharge in June 2010. The note was among the claims discharged without payment. Stephanie's bankruptcy case was closed on June 18, 2010.

The Kurtzes ceased payment of their annual assessment to Copper Creek in July 2010.

Shawn filed a separate Chapter 7 bankruptcy in March 2011. He identified the property secured by the DOT and his intention to surrender it. Shawn did not claim the property as exempt. Shawn also included Copper Creek as a creditor holding a secured claim for homeowners' dues in the amount of $1,826.50. His

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Savings Fund Society as trustee for Pretium Mortgage Acquisition Trust in April 2019.

bankruptcy was discharged on July 13, 2011 and his case closed on July 18, 2011.[2] The note was among the claims discharged without payment.

The property sat vacant and fell into disrepair. In November 2018, Copper Creek recorded a notice of claim of lien against the property for the $15,278.68 in assessments, fees, interest, and attorney fees and costs that had accrued on the property. Copper Creek filed for judicial foreclosure to recoup the delinquent assessments.[3] Copper Creek acknowledges that it named only the Kurtzes as defendants in the judicial foreclosure, omitting the lenders because its assessment lien was junior to the lender and it was not seeking to foreclose the lender's interest. Copper Creek requested appointment of a receiver to "obtain possession of the Lot, refurbish it to a reasonable standard for rental units, and rent the Lot or permit its rental to others." In April 2019, Copper Creek and the Kurtzes entered an agreed order with the court for appointment of a custodial receiver. Copper Creek recorded the order appointing the receiver with Snohomish County Superior Court. The receiver spent $22,470.24 rehabilitating the property and began renting it at fair market value.

Shortly after completion of the repairs to the property, Quality Loan Service Corporation of Washington (QLS) as Trustee commenced nonjudicial foreclosure on the property on behalf of successor beneficiary Wilmington Savings Fund

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[2] Because the record does not include whether the secured property was abandoned by the bankruptcy court prior to closure, we assume the protective injunction ended upon closure of the bankruptcy case. See 11 U.S.C. 362(c)(1).

[3] Shawn was still an active servicemember when Copper Creek filed for judicial foreclosure. He does not appear to have challenged the suit, instead he agreed to receivership. The validity of Copper Creek's judicial foreclosure action is not before us.

Society FAB and loan servicer Selene Finance LP (together "Selene/Wilmington"). On October 30, 2019, QLS provided a notice of trustee sale of the property to Copper Creek. In February 2020, Copper Creek notified QLS that enforcement of the DOT was barred by the statute of limitations and demanded discontinuation of the sale. QLS refused and Copper Creek filed a motion to restrain the sale.

Copper Creek also filed a complaint against the Kurtzes, Selene/Wilmington, and QLS for lien foreclosure, restraint of the trustee sale, wrongful foreclosure, and quiet title.[4] In April 2020, Selene/Wilmington filed a CR 12(b)(6) motion to dismiss the action to quiet title for lack of standing. Prior to a ruling on that motion, Copper Creek received a deed in lieu of foreclosure from the Kurtzes that was recorded with the county on June 10, 2020.

In May 2020, Selene/Wilmington contacted Shawn and Stephanie and asked if they would execute a waiver of the statute of limitations on the underlying loan: "Given that you both seem to have moved on from the Property now, executing such a document likely wouldn't impact you much, if at all, but i[t] could help my client in the underlying litigation, and we'd be willing to give you something in exchange for your trouble." Shawn refused and notified Copper Creek of the request.

In June 2020, Copper Creek moved to continue the sale and the motion to dismiss. The trial court granted Copper Creek's motion, continuing both the trustee

[4] Shawn was still an active duty servicemember at the time of this lawsuit. Arguably, the SCRA barred this action as against him. The issue of the SCRA's application to these claims is not before us. Moreover, the issue became moot when Copper Creek received the deed in lieu of foreclosure and the Kurtzes were no longer party to the suit.

sale and the motion to dismiss to allow the parties time to conduct discovery. The court entered an order compelling discovery with a deadline of July 7, 2020, and awarded attorney fees to Copper Creek. QLS then cancelled the sale.

Copper Creek requested and received leave to amend its complaint to reflect its standing through the deed in lieu of foreclosure. Selene/Wilmington did not comply with discovery requests by the deadline. On July 10, 2020, QLS provided notice of trustee sale on the property to be conducted in October 2020. Copper Creek moved to enjoin the sale, and the trial court granted the motion.

Copper Creek requested an additional continuance on the motion to dismiss and moved for default judgment due to Selene/Wilmington's failure to provide discovery or file an answer to the amended complaint. In support of its motion to dismiss, Selene/Wilmington argued that because the property formerly belonged to a member of the United States military, the SCRA applied to toll the statute of limitations on the DOT. After oral argument on several competing motions, the trial court denied Selene/Wilmington's motion to dismiss and awarded Copper Creek attorney fees. The court expressed concern about Selene/Wilmington's "bad faith compliance with the rules in terms of discovery." In an attempt to force Selene/Wilmington to complete discovery, the court entered an order of default against Selene/Wilmington that would "enter on August 14, 2020 unless an order striking this default is entered by this court before said date." Selene/Wilmington answered the complaint and the parties stipulated to strike the order of default.

Copper Creek then filed a motion for summary judgment. Selene/Wilmington opposed the summary judgment and filed a CR 12(c) motion

for judgment on the pleadings. After oral arguments, the trial court granted the summary judgment and quieted title in Copper Creek. The court struck Selene/Wilmington's motion for judgment on the pleadings as a CR 11 sanction. The trial court also awarded reasonable attorney fees to Copper Creek under RCW 4.84.185, the contractual attorney fee provision in the DOT, and also "as a matter of equity because [of Selene/Wilmington's] bad faith and misconduct shown repeatedly throughout this case." The court subsequently entered a judgment against Selene/Wilmington for $96,779.09 in attorney fees.

Selene/Wilmington appeals the court's orders on summary judgment, motion to dismiss, motion for judgment on the pleadings, and the judgment for attorney fees.

DISCUSSION

The trial court granted summary judgment quieting title as to Copper Creek, because the statute of limitations had run on enforcement of the DOT. We review orders on summary judgment de novo. Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c)). When the underlying facts are undisputed, we review de novo whether the statute of limitations bars an action. Edmundson, 194 Wn. App. at 927-28. The six year statute of limitations for an agreement in writing applies to enforcement of a DOT. Id. at 927; RCW 4.16.040(1).

I. Enforcement of the Deed of Trust

A DOT creates a security interest in real property. Brown v. Dep't of Commerce, 184 Wn.2d 509, 515, 359 P.3d 771 (2015). A note is a separate obligation from the deed of trust. Boeing Emps.' Credit Union v. Burns, 167 Wn. App. 265, 272, 272 P.3d 908 (2012). The note represents the debt, whereas the deed of trust is the security for payment of the debt. See id. The security instrument follows the note that it secures. Deutsche Bank Nat'l Trust Co. v. Slotke, 192 Wn. App. 166, 177, 367 P.3d 600 (2016). "The holder of the promissory note has the authority to enforce the deed of trust because the deed of trust follows the note by operation of law." Winters v. Quality Loan Serv. Corp. of Wash., Inc., 11 Wn. App. 2d 628, 643-44, 454 P.3d 896 (2019).

A. The SCRA Tolled the Statute of Limitations on Enforcement of the Debt

Selene/Wilmington tried to enforce the terms of the note as secured by the DOT through nonjudicial foreclosure which prompted Copper Creek to bring the action to quiet title. The trial court concluded that the SCRA tolling provision did not apply to the foreclosure action, which allowed the statute of limitations to run on the DOT. The SCRA tolls statutes of limitations in lawsuits involving servicemembers.[5]

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court or in any board, bureau, commission, department, or other agency of a State (or

[5] Washington has an equivalent statute that provides, "The period of a service member's military service may not be included in computing any period limited by law, rule, or order, for the bringing of any action or proceeding in a court . . . by or against the service member or the service member's dependents, heirs, executors, administrators, or assigns." RCW 38.42.090(1).

> political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a).

Shawn appears to have defaulted on the note in 2008 or 2009. The parties do not dispute that Shawn was an active duty servicemember until at least September 2020. As a result, the SCRA tolled any court action involving Shawn during his service. 50 U.S.C. § 3936(a). Bankruptcy discharge extinguished Shawn's personal liability on July 13, 2011. See Johnson v. Home State Bank, 501 U.S. 78, 82-83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). Without Shawn's personal liability, the debt, as evidenced by the note, was no longer enforceable against a servicemember. Without a servicemember's involvement, the SCRA ceased to toll the statute of limitations. As of July 14, 2011, the six year statute of limitations began running on enforcement of the unpaid installments.[6] See id. at 84.

[6] The statute of limitations was tolled only because of the SCRA. Bankruptcy does not toll the statute of limitations. Hazel v. Van Beek, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998); Merceri v. Deutsche Bank AG, 2 Wn. App. 2d 143, 148, 408 P.3d 1140 (2018). A bankruptcy petition triggers an automatic stay on "proceedings to obtain possession or exercise control of property in the bankruptcy estate." Merceri, 2 Wn. App. 2d at 148 (citing 11 U.S.C. 362(a)(3)). This stays all creditor actions to enforce liens against the debtor's property, including commencement of a foreclosure action. Id. at 148-51. Actions against the debtor are stayed until the earliest of case closure, dismissal, or discharge. 11 U.S.C. 362(c)(2). The stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C. 362(c)(1). If the statute of limitations to enforce a claim expires during the bankruptcy stay, 11 U.S.C. 108(c)(2) provides a 30 day window after lifting of the bankruptcy stay in which to file the claim. Id. at 148-49.

B. Bankruptcy Did Not Extinguish the Secured Debt

The Kurtzes both filed for Chapter 7 bankruptcy. "A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation." Id. at 82-83. Discharge of debts in bankruptcy extinguishes the "'personal liability of the debtor.'" Id. at 83 (quoting 11 U.S.C. § 524(a)(1)). So, the Kurtzes no longer had liability for the monthly installment payments on the note, past due or future, as of their respective discharge dates. But, the discharge extinguishes only the right of action against the debtor in personam, leaving intact the option to enforce a claim against a debtor in rem. Id. at 84. The Bankruptcy Code provides that a creditor's right to foreclose on secured property survives the bankruptcy. Id. at 83; 11 U.S.C. 522(c)(2). A lien on real property passes through bankruptcy unaffected. Dewsnup v. Timm, 502 U.S. 410, 418, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). However, a stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C. 362(c)(1).

C. The Statute of Limitations Application to Promissory Notes

The ability to enforce a breach of a promissory note depends on whether it is a demand or installment note. A demand promissory note is mature at its inception and is enforceable at any time. Cedar W. Owners Ass'n v. Nationstar Mortg., LLC, 7 Wn. App. 2d 473, 483, 434 P.3d 554 (2019). Therefore, the statute of limitations on a demand note runs from date of execution. 4518 S. 256th, LLC v. Karen L. Gibbon, PS, 195 Wn. App. 423, 434, 382 P.3d 1 (2016). By contrast, an installment note is payable in installments and matures on a future date. Merceri v. Bank of New York Mellon, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018).

"[T]he statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). A separate statute of limitation accrues and runs for each individual installment. Edmundson, 194 Wn. App. at 931. The note holder has six years from default on an installment to enforce payment of that installment. See Merceri, 4 Wn. App. 2d at 759-60. The final six year period to take action related to the debt begins to run at the date of full maturity. Id. at 760.

An installment note or the DOT securing it may include an option to accelerate the maturation date in case of breach of the contract. See 4518 S. 256th, 195 Wn. App. at 441. Upon acceleration, the entire balance becomes due and triggers the statute of limitations for all remaining installments. Id. at 434-35. Acceleration of the maturity date of a promissory note requires an affirmative action that is clear, unequivocal, and effectively notifies the borrower of the acceleration. Id. at 435. Default alone does not accelerate the note. Id. "[E]ven if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note." A.A.C. Corp. v. Reed, 73 Wn.2d 612, 615, 440 P.2d 465 (1968).

Deed of trust remedies are subject to RCW 4.16.040, the six year statute of limitations. Merceri, 4 Wn. App. 2d at 759. A debtor facing foreclosure can raise the statute of limitations as a defense to the sale. Walcker v. Benson & McLaughlin, PS, 79 Wn. App. 739, 746, 904 P.2d 1176 (1995); RCW 7.28.300. Applying the statute of limitations defense to nonjudicial foreclosure of a deed of

trust based upon past due installments, we held that recovery was allowed for the actionable installments but not for those made unenforceable by the six year statute of limitations. Cedar W., 7 Wn. App. 2d at 489-90. To the extent that the statute of limitations runs on the underlying note, it also runs to the same extent on the enforcement of a deed of trust. See Walcker, 79 Wn. App. at 740-1.

D. Bankruptcy Discharge of Personal Liability on an Installment Note Does Not Modify the Payment Schedule or Accelerate the Maturity Date of the Note

The trial court concluded that Selene/Wilmington was precluded from enforcing its deed of trust by the statute of limitations. It reached this conclusion by relying on Edmundson for the proposition that the statute of limitations runs against enforcement of a deed of trust from the date of the last payment due prior to the debtor's discharge in bankruptcy.[7] This was error. Edmundson did not establish such a rule. No Washington Supreme Court case has established such a rule. It is not the law in Washington. The federal cases, which are the source of that interpretation of Edmundson, are in error.[8] To the extent that unpublished

[7] The trial court referenced Hernandez v. Franklin Credit Management Corporation, which relied on Edmundson as discussed below. No. BR 18-01159-TWD, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020).

[8] These cases were also questioned in an article published by the Creditor Debtor Rights Section of the Washington State Bar Association. Jason Wilson-Aguilar, Does A Bankruptcy Discharge Trigger the Running of the Statute of Limitations on Actions to Enforce a Deed of Trust?, 37 CREDITOR DEBTOR RTS. NEWS LETTER, no. 1, Summer 2019, at 3-6, https://wsba.org/docs/default-source/legal-community/sections/cd/resources/creditor-debtor-rights-section-summer-2019-newsletter.pdf?sfvrsn=af5e0cf1_4#:~:text=In%20contrast%20to%20Edmundson

state appellate cases have repeated the federal interpretation, they are also in error.

The Edmundsons signed an installment note secured by a DOT in July 2007. Edmundson, 194 Wn. App. at 923. They failed to pay the November 1, 2008 installment, and never made another payment. Id. The Edmundsons filed for Chapter 13 bankruptcy in June 2009. Id. Their bankruptcy plan was confirmed, and they were discharged on December 31, 2013. Id. The lender filed a notice of default on October 23, 2014 and a trustee sale was scheduled to satisfy the unpaid monthly obligations under the note and DOT. Id.

The Emundsons sought to restrain the trustee's sale and quiet title to the property. Id. at 924. They argued the bankruptcy discharge of their personal liability on the note rendered the deed of trust unenforceable. Id. This court rejected the premise that the lien was discharged, stating, "In sum, nothing in this record and nothing under either federal or state law supports the conclusion that the discharge of personal liability on the note also discharges the lien of the deed of trust securing the note. The deed of trust is enforceable." Id. at 927.

The Edmundsons also argued under the Walcker case that the statute of limitations had begun to run on the deed of trust as of their first missed payment on the note on November 1, 2008. Id. at 929. And, since the statute of limitations had run before the lender attempted to enforce the note, the DOT was no longer enforceable. Id. However, we rejected the Edmundsons' and the trial court's

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%20and,limitations%20under%20an%20installment%20note [https://perma.cc/7MPA-GE24].

reliance on Walcker for the proposition that the statute of limitations had run. Id. at 928. The Walcker case concerned failure to pay on a demand note. 79 Wn. App. at 741. We noted that Walcker applied the six year statute of limitations, running from the date of execution of the note, and found the lender's efforts to foreclose on the deed of trust were barred as untimely. Edmundson, 194 Wn. App. at 928-9. But, because the Edmundsons' debt was an installment note, Walcker was inapplicable. Id. at 929.

We also rejected the Edmundsons' argument that no resort to remedies under the deeds of trust act, ch. 61.24 RCW, had occurred before the statute of limitations had run. Id. at 930. We concluded that the October 23, 2014 written notice of default was evidence of resort to remedies under the act. Id. Under the Edmundsons' theory, the statute of limitations began running November 1, 2008 and would have expired on October 31, 2014. Id. Thus, even under their timeline, the action on the deed of trust was not untimely. Id. at 931.

And, we rejected the Edmundsons' premise that the statute of limitations began to run on the full amount of the note from the first missed payment. Id. at 931-32. That argument contradicted settled law from the Washington Supreme Court: "'[W]hen recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.'" Id. at 930 (quoting Herzog, 23 Wn.2d at 388). Missing a payment in an installment note does not trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature.

We then applied this rule to the individual payments the Edmundsons missed beginning with the November 1, 2008 payment and every successive payment due prior to the bankruptcy discharge that ended their personal liability on the note. Id. at 931. Because the nonjudicial foreclosure commenced October 23, 2013, "each of these missed payments accrued within six years of the resort to the remedies under the deeds of trust act. The statute of limitations did not bar enforcement of the deed of trust for these missed payments." Id. at 931. Therefore, in the pending in rem nonjudicial foreclosure action, no portion of the debt was rendered unenforceable by the statute of limitations.

The trial court apparently believed that either the lender or the Edmundsons' bankruptcy had accelerated the note and triggered the statute of limitations on the entire debt. Id. But, "[d]efault in payment alone does not work an acceleration." Id. at 932. While acceleration of the maturity of the note was an option for the creditor under the Edmundsons' DOT, we determined "there was no evidence that the lender had accelerated the maturity date of the note," and "to the extent that the trial court ruled that some event during the bankruptcy proceeding triggered [the acceleration] provision, the court is wrong." Id. at 931-32. "Accordingly . . . the statute of limitations for each monthly payment accrued as the payment became due." Id.

The Edmundson opinion addressed the various issues through application of settled law. But, subsequent courts have interpreted Edmundson as announcing a new rule. The first manifestation of a new rule of law attributed to Edmundson came in Jarvis v. Federal National Mortgage Association, No. C16-

5194-RBL, 2017 WL 1438040 (W.D. Wash. Apr. 24, 2017), aff'd, 726 F. App'x 666 (9th Cir. 2018). It observed,

> The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation.

Id. at 2. This much is settled Washington law. The decision goes on to say,

> It also occurs at the payment owed immediately prior to the discharge of a borrower's personal liability in bankruptcy, because after discharge, a borrower no longer has forthcoming installments that he must pay.[9] See Edmundson, 194 Wn. App. at 931; see also Silvers v. U.S. Bank Nat['l] Ass'n, [No. 15-5480 RJB], 2015 WL 5024173, at *4.
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> . . . .
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> Because the Edmundsons owed no future payments after the discharge of their liability, the date of their last-owed payment kickstarted the deed of trust's final limitations period. . . .
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> . . . .

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[9]The mistaken idea that bankruptcy starts the clock on enforcement of the DOT appears to have originated with a lender's argument to the court in Silvers, No. 15-5480 RJB, 2015 WL 5024173, at *4. In its motion to dismiss, U.S. Bank acknowledged "there can be no doubt that the Deed of Trust lien survived the Chapter 7 bankruptcy." Without citation to supporting law, U.S. Bank made the assertion that the statute of limitations "began running the last time any payment on the Note was due," which was the payment immediately prior to discharge in bankruptcy. The court accepted U.S. Bank's argument and concluded,

> The statute of limitations on the right to enforce the Deed of Trust began running the last time any payment on the Note was due. The Plaintiffs remained personally liable on the Note (and successive payments continued to be due) until January 1, 2010, when they missed that payment; they received their Chapter 7 discharge on January 25, 2010. Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run on January 1, 2010.

Silvers, No. 15-5480 RJB, 2015 WL 5024173, at *4. Silvers was cited to in briefing in the Edmundson case, but not mentioned, let alone adopted in Edmundson. And, Silvers could not have established new law as federal courts have no authority to decide Washington law. In re Estate of Stoddard, 60 Wn.2d 263, 270, 373 P.2d 116 (1962).

> The Court agrees with Silvers'[s] and Edmundson's holdings. The discharge of a borrower's personal liability on his loan—the cessation of his installment obligations—is the analog to a note's maturation. In both cases, no more payments could become due that could trigger RCW 4.16.040's limitations period. . . .
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> . . . .
>
> . . . The court's conclusion was not dicta [because] it was necessary to deciding whether the creditor could foreclose on the Edmundsons' home, or whether they could sustain an action for quiet title.

Id. at 2-3 (some internal citations omitted).

However, we did not purport to announce such a rule in Edmundson. We merely applied Herzog to the facts of the case. The Edmundsons missed monthly payments from November 1, 2008 through December 31, 2013 when their personal liability to make the payments ceased. Edmundson, 194 Wn. App. at 931. Our decision focused on whether any of those payments was no longer enforceable in the foreclosure action. The Edmundsons had not asserted that the bankruptcy discharge triggered the running of the statute of limitations on the entire debt. It would have done them no good. The foreclosure was commenced less than a year after the discharge in bankruptcy. It simply was not an issue before the court. And, we did not decide the issue expressly nor in dicta.[10] Such a rule only exists in the inferences drawn and stated in the federal decisions.

[10] Nor did we discuss the policy implications of such a rule in Edmundson. Such a rule implicates a number of policies that do not arise from nonpayment in a nonbankruptcy setting. The debtor may benefit by a shorter window in which the lien may be extinguished, or by living in the property for free while the lender foregoes foreclosure. As title holder, the debtor may be able to take advantage of market changes to sell the property for more than the lien amount if the lender is not forced for foreclose rapidly. The stability of land title records may be a concern. The debtor remains on the title pending foreclosure. The debtor can execute a deed in lieu of foreclosure to remove themselves from title. The sanctity of contract

Such a rule would attribute to a bankruptcy discharge of the debtor more than relief from personal liability. It would mean the option of the lender to accelerate or not to accelerate the maturity date of the note was eliminated. It would mean that the payment schedule no longer applied and the maturity was accelerated. Affecting the lender's rights in a negative manner is not necessary to effect the purposes of the bankruptcy discharge. The federal district court decisions do not rely on any provision in the bankruptcy code as requiring such a result. We can find no bankruptcy provision that would do so.

Moreover, Jarvis's explanation of the rule is totally at odds with our rejection of the notion that the maturity of the loan was accelerated by the lender or by bankruptcy discharge. Edmundson 194 Wn. App. at 932. Our opinion did not announce an "analog" rule. Rather, the federal district court arrived at this result through its misinterpretation of Edmundson.[11]

In 2019 another federal district court case added to the error. Hernandez v. Franklin Credit Mgmt. Corp., No. BR 18-01159-TWD, 2019 WL 3804138 (W.D.

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is raised by determining that discharge of personal liability on the installment note eliminates the lender's contraction option, it is a choice to accelerate or not to accelerate the maturity of the debt. The lender may find changing economic conditions make it more favorable to ultimate recovery to delay enforcement, though some portion of the debt may become uncollectable. This is not exhaustive of potential policy concerns. The important point is that we undertook no such policy analysis in Edmundson as would have been expected when announcing a new rule.

[11] The next case chronologically, cites to Jarvis and Edmundson for the rule, but does not comment on it. Taylor v. PNC Bank, Nat'l Ass'n, No. C19-1142-JCC, 2019 WL 4688804, at *2 (W.D. Wash. Sept. 26, 2019) ("the six-year statute of limitations period for enforcing a deed of trust payable in installments begins to accrue on each date that a borrower defaults on a payment until the borrowers' personal liability is discharged in a bankruptcy proceeding, as after that point no future installment payments will be due.").

Wash. Aug. 13, 2019), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020). It observed,

> In Edmundson, the Washington State Court of Appeals ruled that the six-year statute of limitations for enforcing a deed of trust payable in installments begins to accrue on each month that a borrower defaulted on a payment, until the borrowers' personal liability is discharged in a bankruptcy proceeding. The court of appeals reasoned that the statute of limitations does not continue to accrue after discharge because, at that point, installment payments are no longer due and owing under either the note or deed of trust. Several courts have adopted this legal rule from *Edmundson*. See U.S. Bank NA v. Kendall, [No. 77620-7-I] slip. op. at 4 (Wash. Ct. App. [July 1,] 2019) [(unpublished), http://www.courts.wa.gov/opinions/pdf/776207.pdf] (noting that although a deed of trust's lien is not discharged in bankruptcy, the limitations period for an enforcement action "accrues and begins to run when the last payment was due" prior to discharge); Jarvis v. Fed. Nat'l Mortg. Ass'n, []No. C16-5194-RBL, []at 6 (W.D. Wash. 2017), aff'd mem., 726 Fed. App'x. 666 (9th Cir. 2018) ("The final six-year period to foreclose runs from the time the final installment becomes due . . . [which] may occur upon the last installment due before discharge of the borrower's personal liability on the associated note").

Id. at *3 (emphasis added) (some internal citations omitted). Hernandez's source for the rule is clearly Jarvis, but the emphasized language is its own addition to the error.[12] No such statement is found in the Edmundson opinion.

[12] Notably, two unpublished Court of Appeals cases have picked up on the interpretation given to Edmundson by the federal district court. The first in time cited to Jarvis for the rule. U.S. Bank v. Kendall, No. 77620-7-I, slip. op. at 9 (Wash. Ct. App. July 1, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/776207.pdf (noting that a deed of trust's lien is not discharged in bankruptcy but the limitations period for an enforcement action "accrues and begins to run when the last payment was due" prior to discharge), review denied, 194 Wn.2d 1024, 456 P.3d 394 (2020). The parties accepted that Edmundson stated the appropriate statute of limitations rule. Ultimately, the decision in the case did not turn on the issue.

The second cited to Jarvis and Hernandez and incorporated language from those cases purporting to explain the rule. Luv v. W. Coast Servicing, Inc, No. 81991-7-I, slip. op at 4-5 (Wash. Ct. App. 2d August 2, 2021) (unpublished) https://www.courts.wa.gov/opinions/pdf/819917.pdf ("the six-year statute of

In Edmundson, this court did not say that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. We did not say that the discharge kickstarts the running of the deed of trust's final statute of limitations period. We did not say that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation. We did not say we were announcing any new rule. Rather, we simply applied settled law from Herzog, that the statute of limitations runs on each installment of a promissory note from the date it is due. Edmundson, 194 Wn. App. at 931.

The federal district court cases rely solely on the Edmundson decision as the basis for the state law they apply. Their interpretation of Edmundson is erroneous.

Edmundson does not stand for the proposition that bankruptcy discharge of personal liability of the debtor accelerates the obligation on an installment note or commences the statute of limitations on both the outstanding balance of the note and on enforcement of the DOT. The trial court erred in relying on Edmundson for such a proposition.

E. The Statute of Limitations in this Case

Under Herzog and Edmundson, the statute of limitation on Kurtz's installment debt would have begun to run on each payment individually from its due date. Bankruptcy would not toll the statute of limitations. Hazel v. Van Beek, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998); Merceri, 2 Wn. App. 2d at 148. Here,

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limitations on the note was triggered on March 1, 2009, the date that Luv's last payment was due prior to his bankruptcy discharge"). The outcome of that opinion is contrary to the outcome here.

the SCRA applied and tolled the statute of limitations until Shawn no longer had personal liability on the note. That occurred on July 13, 2011, the date of the discharge of his personal liability on the debt. The statute of limitation began to run on all of the past due installments from that date.

There is no evidence the lender exercised an option and accelerated the installment note. The trial court erroneously relied on Edmundson to conclude that Shawn's bankruptcy accelerated the note or triggered the statute of limitations on enforcing the DOT. The bankruptcy eliminated only Shawn's personal liability on the note. The debt, the note, and the payment schedule remain unchanged. The notice of nonjudicial foreclosure was given on October 20, 2019 prior to the November payment coming due. Any outstanding installments prior to November 2013, are not enforceable in the foreclosure action due to the six year statute of limitations. But, enforcement of the DOT was not barred as to the remainder due under the note.

The trial court erred by quieting title in Copper Creek.

II. Attorney Fees

The trial court awarded Copper Creek attorney fees and costs for the summary judgment and quieting title under multiple rules: RCW 4.84.185 for frivolous defenses advanced without reasonable cause, the contractual attorney fee provision in the DOT (RCW 4.84.330 and RCW 4.28.328 for prevailing in a defense of a lis pendens), and equity based on Selene/Wilmington's "bad faith and misconduct shown repeatedly and throughout this case." Selene/Wilmington

argues the trial court erred by awarding attorney fees and costs to Copper Creek for its defense of the case and for responding to the motions to dismiss.

"Under Washington law, a trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity." Gander v. Yeager, 167 Wn. App. 638, 645, 282 P.3d 1100 (2012). The question of whether there is a legal basis for award of attorney fees is an issue of law we review de novo. Id. at 646.

The DOT contains a mandatory attorney fee provision, "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security instrument." RCW 4.84.330 makes this provision reciprocal: "[T]he prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

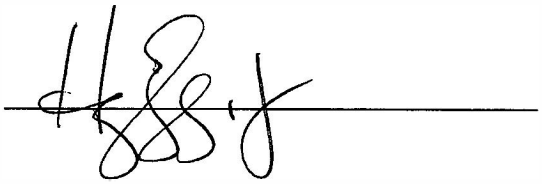
As a result of our decision, Copper Creek is no longer the prevailing party and cannot recoup attorney fees under the terms of the DOT. The court's additional reasons for the attorney fee award—RCW 4.84.185, 4.28.328, and bad faith and misconduct—also fail based on our decision in favor of Selene/Wilmington.

Copper Creek acquired its interest from Kurtz through the deed in lieu of foreclosure and is subject to the terms of the DOT. Selene/Wilmington is entitled to attorney fees as the prevailing party under the DOT. A contractual provision for an award of attorney fees at trial also supports an award of attorney fees on appeal.

Edmundson, 194 Wn. App. at 920. Therefore, we award attorney fees to Selene/Wilmington as prevailing party in this appeal.

Reversed and remanded for proceedings consistent with this opinion.

WE CONCUR:



SUPPLEMENTAL
APPENDIX B

NO. 82083-4-I

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

SELENE FINANCE LP AND WILMINGTON SAVINGS FUND SOCIETY, FSB,

Appellants,

v.

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Respondent.

MOTION TO RECONSIDER

BARKER • MARTIN, P. S.
701 Pike Street, Suite 1150
Seattle, WA 98101
(206) 381-9806

Samantha Brown, WSBA # 48131
Marlyn Hawkins, WSBA # 26639
Attorneys for Respondent

I. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Respondent Copper Creek (Marysville) Homeowners Association (the "Association") seeks partial review of the Court's January 18, 2022, opinion that reversed the trial court's fee award (the "Opinion"). Respondent Appendix In Support of Respondent's Motion to Reconsider "R. App.", 52. The Court erred when it reversed the trial court's November 18, 2020, Judgement and Award of Attorneys' Fees and Costs ("Fee Award")[1] and is being asked to reconsider that decision. The Fee Award was imposed by the trial court as a sanction against Appellants for their "improper behavior" and therefore, should have been reviewed under the abuse of discretion standard. The award cannot be reversed merely because Appellants prevailed on appeal. Thus, the Association requests that this Court reconsider this reversal and uphold the Fee Award.

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[1] R. App. 1-3.

II. STATEMENT OF THE CASE

A. Attorney Fees were Awarded as Sanctions.

After prevailing on Summary Judgement to Quiet Title, the Association moved for an award of fees, citing multiple bases for those fees. On November 18, 2020, the trial court declined to award the full amount requested, instead providing a handwritten breakdown of those fees specifically associated with Appellants' "improper behavior", which the court then awarded:

> The Court Awards fees for the following months: July - $17,423.05; June- $22,815.54; August - $12,941.23; September- $ 23,001.97; October- $ 17,164.85; and November- $3,432.85. *The Court further finds that these fees were associated with the improper behavior described above* – the total is $96,779.09. [2]

(Emphasis added). The trial court further reiterated that these fees were awarded as sanctions when it denied a supersedeas bond on the Fee Award and allowed immediate execution. The

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[2] R. App. 3.

trial court stated that the Fee Award was, "an *equitable fee award* granted to Plaintiff due to Defendants' Improper Behavior. Plaintiff may execute on this judgment in any legal manner available." R. App. 6.

Appellants sought this Court's review of the order denying a supersedeas bond in its Motion and Objection to Trial Court Supersedeas Decision. R. App. 7-26. That motion was denied. R. App. 27-30. In support of its motion, Appellants argued that it had a right to stay enforcement of a money judgment through a supersedeas bond under RAP 8.1(b)(1). R. App. 7-26. The Association responded that these were sanctions for improper behavior such that the stay was discretionary under RAP 8.1(b), (b)(3). R. App. 43-45. In upholding the trial court's decision, this Court found:

> An attorney fee award is usually a money judgment. But the trial court awarded attorney fees as an "equitable" remedy and made an equitable decision that the Association should be able to immediately enforce the

award. In view of the record, Selene and Wilmington fail to show an abuse of discretion in that decision.[3]

I. ARGUMENT

A. The Court Erred When It Failed to Review the Fee Award for Abuse of Discretion.

Respondent requests that the Court reconsider its reversal of the Fee Award because it misunderstood the basis of that Fee Award and treated it as a prevailing party award rather than as the sanction it actually was. A review of the trial court record shows that the Fee Award was imposed as a sanction against Appellants for their "improper behavior." As such, the standard of review is abuse of discretion, as acknowledged by this Court when Appellants attempted to stay the execution of the Fee Award – *twice.* This Court did not apply that standard of review and instead, in a single sentence, reversed the Fee Award based on principles of prevailing party, which simply do not apply. Thus, the reversal of the Fee Award was in error and should be reconsidered.

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[3] R. App. 27-30.

1. This Court Misunderstood the Basis for the Fee Award.

Despite Respondent's significant briefing on the Fee Award, this Court reversed the Fee Award based solely on prevailing party status with almost no analysis. The entire Fee Award discussion in the Opinion is as follows:

> As a result of our decision, Copper Creek is no longer the prevailing party and cannot recoup attorney fees under the terms of the DOT. The court's additional reasons for the attorney fee award- RCW 4.84.185, 4.28.328, and bad faith and misconduct- *also fail based on our decision in favor of Selene/Wilmington.*[4]

This language suggests that all of the bases for the Fee Award depend upon prevailing party analysis, but that is simply not the case.

The Court did not address the extensive arguments on the multiple bases for the sanctions that would not be properly overturned on the basis of the prevailing party. R. App. 118-126. This brief mention of the Fee Award demonstrates that this Court misunderstood the basis of that award and that that

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[4] Emphasis added, R. App. 52.

Respondent was awarded fees solely as prevailing party, even though that determination is wholly unsupported by the record.

Where fees are awarded as sanctions for "improper behavior," as they were here, they cannot be reversed simply because the party whose fees were paid is no longer considered the prevailing party. As sanctions the Association is entitled to keep the Fee Award regardless of the reversal of other issues. See, Andren v. Dake, 14 Wn. App. 2d 296, 322, 472 P.3d 1013, 1029 (2020). In *Andren* this Court held that a non-prevailing party was entitled to attorneys' fees as "equitable sanctions" for "inappropriate and improper conduct" because, "it would defeat the purpose of that award and let [defendants] profit from the misconduct of [their] counsel". *Id.* at 322. The Andren decision extends previous holdings that, "Fees awarded as sanctions should ensure that the wrongdoer does not profit from the wrong." *Id.* at 322, citing *Washington State Physicians Insurance Exchange and Association v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (2013); and, *Gammon v. Clark*

Equip. Co., 38 Wn. App. 274, 282, 686 P.2d 1102, 1107 (1984). As well as extending a generally accepted societal concept of not offering rewards for bad behavior.

It cannot be disputed that many of the attorney fees and costs incurred by the Association would have been avoided but for Appellants' refusal to engage in discovery, even after being ordered to do so by the trial court. It is also abundantly clear that the Association was forced to respond to the same issues and motions repeatedly because of Appellants' unnecessary, duplicative, and repetitive motions at the trial court. Had Appellants been honest about the facts from the beginning, provided the necessary discovery, and allowed adjudication on the merits instead of repeatedly filing CR 12 motions, this case could have been resolved in one set of competing CR 56 motions for a fraction of the incurred costs.

Similarly, in the present case, the Fee Award was granted for "improper behavior" and even though the Association lost on appeal, Appellants should not be allowed to profit from their

misconduct in the trial court. The converse of that is that the Association should not be punished for Appellants' bad faith behavior by being left with the excessive bills necessitated by Appellants' misconduct at the trial court.

This Court was clearly viewing the basis for the Fee Award as the prevailing attorney fee provision, instead of as sanctions for improper behavior like the trial court intended. This not being the case, reconsideration is appropriate.

2. The Fee Award was a Sanction for "Improper Behavior."

The trial court made it abundantly clear that they viewed the Fee Award as sanctions. First, as mentioned above, the trial court limited its award of fees to those "associated with the improper behavior." Instead of awarding the Association all of its fees, the trial court reduced the award to fees incurred related to sanctions. R. App. 3. If the trial court had been awarding these fees based on prevailing party status, it would have awarded all fees. Instead, it took the time to calculate and write

in the totals of fees that it found were related to Appellants' improper behavior and awarded only those fees.

The trial court reinforced that the Fee Award was awarded as sanctions when it denied Appellants' request for a supersedeas bond on the Fee Award. In denying the bond and allowing the Association to execute on the Fee Award immediately, the trial court stated that the Fee Award was, "an equitable fee award granted to Plaintiff due to Defendants' Improper Behavior. Plaintiff may execute on this judgment in any legal manner available." R. App. 6. If the trial court had awarded the Fee Award on the basis of prevailing party, a supersedeas bond would have been appropriate. Thus, by denying the bond and allowing immediate execution, the court was reiterating that the Fee Award was a sanction.

Even more compelling is the fact that this Court denied Appellants' motion to stay the execution of the Fee Award because it recognized that these were not prevailing party attorney fees but rather equitable fee awards in its January 5,

2021, notation ruling. This Court specifically found that "Selene and Wilmington fail to show an abuse of discretion in that decision." R. App. 29. Unfortunately, the final Opinion, drafted almost a year later, did not repeat these previous findings. R. App. 27-30. Nonetheless, the record is clear that the Fee Award was imposed against Appellants as a sanction and should only be reviewed as such.

3. Sanctions are Reviewed Only for Abuse of Discretion.

The standard of review for the trial court's imposition of sanctions is abuse of discretion. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075 (1993). In *Washington State Physicians Ins.*, the Washington Supreme Court stated:

> [S]anction rules are, 'designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to reduce the reluctance of courts to impose sanctions.... If a review de novo was the proper standard of review, it could thwart these

> purposes; it could also have a chilling effect on the trial co'rt's willingness to impose ... sanctions.'[5]

The mere fact that the trial court awarded fees as a matter of equity and sanctions is reason for even more deference to the trial court. "Since the right to award attorneys' fees in limited, special situations springs from our inherent equitable powers, we are at liberty to set the boundaries of the exercise of that power" *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915, 917 (1974). When reviewing sanctions for abuse of discretion this Court should only disrupt the award if it finds the trial court's discretion was, "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Reid Sand & Gravel, Inc. v. Bellevue Properties*, 7 Wn. App. 701, 705, 502 P.2d 480, 483 (1972).

Judge Lucas was in the best position to make equitable determinations as he had firsthand knowledge of the actions

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[5] *Cooper v. Viking Ventures*, 53 Wn.App. 739, 742–43, 770 P.2d 659 as cited by the Supreme Court in *Washington State Physicians Ins.Exchange v. Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054, 1075 (1993).*

prompting the Fee Award. That is why sanctions are reviewed for abuse of discretion.

This Court did not apply the abuse of discretion standard to the Fee Award and thus, it committed error. Respondents request that that error be corrected on reconsideration and the Fee Award reviewed for abuse of discretion.

B. The Fee Award was Not an Abuse of Discretion.

The trial court is given broad discretion over awards in equity and sanctions because it is often impossible to portray the full extent of a parties' improper behavior on review. *E.g., Washington State Physicians Ins* at 339. Here, while this Court may be aware of some of the abhorrent behavior that Judge Lucas witnessed, the law recognizes that the trial court has not only the advantage of witnessing the behavior first-hand, but also the inherent power to manage its own courtroom.

When reviewing the Fee Award for abuse of discretion, Appellants "[bear] the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or

manifestly unreasonable." *In re Custody of Smith*, 137 Wn.2d 1, 22, 969 P.2d 21, 31 (1998). Appellants did not, nor can they, meet their burden of proof, despite multiple chances to respond to the Association's argument to the Court.

II. CONCLUSION

For all the above reasons, the Association respectfully requests that this Court reconsider its reversal of the Fee Award, review the Fee Award for abuse of discretion only, and uphold the trial court's Fee Award as sanctions for improper behavior.

In compliance with RAP 18.17(b) and relying on the word count calculated by the word processing software, there are 2,046 words used in this motion.

Respectfully submitted this 7th day of February, 2022.

BARKER MARTIN, P.S.

Samantha Brown, WSBA #48131
Attorney for Respondent

BARKER MARTIN, P.S.

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