WASHINGTON STATE SUPREME COURT

NO. 101149-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
(COA No. 37448-3-III)

DALTON M, LLC, a Washington limited liability company,

Plaintiff/Respondent,

v.

U.S. BANK NATIONAL ASSOCIATION, as Trustee; NORTH CASCADE TRUSTEE SERVICES, INC.; and DOES 1 through 10 inclusive,

Defendant/Appellant.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

On Appeal from Judgment of the Superior Court of Washington,
County of Spokane, Civil Case No. 18-2-00755-5
The Honorable John Cooney

Dennis P. Thompson, WSBA No. 24710
Kayla Goyette, WSBA No. 48032
T & G Attorneys, A Professional Services Corporation
823 W. 7th Avenue, Suite 101
Spokane, WA 99223
Telephone: (509) 323-4277
Facsimile: (509) 325-4979
Attorneys for Dalton M, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. IDENTITY OF RESPONDENT AND INTRODUCTION

Dalton M, LLC (Dalton) is the Respondent before this Court and was the Plaintiff-Respondent below. Dalton requests this Court deny discretionary review of the Division III Court of Appeals opinion, *Dalton M, LLC v. N. Cascade Tr. Servs., Inc.,* 20 Wash. App. 2d 914, 504 P.3d 834 (2022). Dalton further requests this Court decline to review the Division III Court of Appeals denial of US Bank's Motion for Reconsideration.

In short, the resounding theme throughout US Bank's Petition is the deprivation of a meaningful opportunity to defend itself because it was not aware of the claims being proffered against it. This is at best, disingenuous, and likely a blatant prevarication, but in either instance, is not a RAP 13.4(b) basis for review.

As this Court will see, US Bank has been aware of, and has chosen to disregard, the circumstances giving rise to Dalton's claims, for years. Only now, with hindsight as a guide, does US Bank contend it would have taken a different approach to this matter, had it been given the opportunity. There has been no unfair surprise, as alleged by US Bank.[1] In fact, at

[1] US Bank's bad faith has been an integral part of this litigation since its inception. For a comprehensive review of the extent to which bad faith has been litigated in this matter (pre-trial, at trial, on appeal, and in supplemental pleadings) *See* Respondent's Answer to Appellant's Motion for Reconsideration at 4-13 and CP 609-619.

every stage of the process, US Bank has had ample opportunity to address (and in some instances remediate) its bad faith; yet to date, has failed to do so.

US Bank's gross and ongoing mishandling of this issue for the past six years does not create a basis for this Court to review the Appellate Court's decision. No RAP 13.4(b) considerations warrant discretionary review of this matter. US Bank's Petition should be denied in its entirety.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

The Petition presents three issues:

1. Whether there is a conflict between the standard applied by the Court of Appeals and the Washington Supreme Court as to a finding of "malicious publication" in a slander of title claim, which would justify this Court's review of *Dalton M*? Short Answer: No.
2. Whether the Court of Appeals improperly exercised its authority under RAP 12.1(b) in awarding attorney's fees in *Dalton M*, such that this Court's review is necessary to address matters of substantial public import? Short Answer: No.
3. Whether there is a conflict between *Dalton M* and Washington Supreme Court precedent and/or published Division I precedent

relative to equitable bases for attorney's fees, which necessitates this Court's review? Short Answer: No.

III. COUNTERSTATEMENT OF THE CASE

The Court of Appeals opinion accurately summarizes the facts in this case. *Dalton* M, 504 P.3d at 834-845. In addition, a detailed statement of the case is set forth in Dalton's Initial and Supplemental Briefing before the Appellate Court (at 1-11 and 1-4 respectively). Therefore, the following is a short summary.

In December 2011 Mark and Tracy Faulkes purchased Parcel 26071.0402 (Parcel 0402) at a Tax Foreclosure Sale from the Spokane County Treasurer's Office. (Ex 1 and Ex 2). It is undisputed that the Faulkes' purchased Parcel 0402 free and clear of any liens and encumbrances by and through the Tax Foreclosure Sale process. *See Petition for Review* at 5. Subsequently the Faulkes' transferred Parcel 0402 to their Limited Liability Company, Dalton M, LLC. (Ex 4).

Separately, U.S. Bank became the Note holder for the loan which was securitized by Parcel 26071.9008 (Parcel 9008) and had previously been securitized by Parcel 0402. (Ex 13, Bates 269-270). This was accomplished via Assignment of the Deed of Trust, originally recorded on August 1, 2012, and corrected on January 5, 2016 in Spokane County, as

Document No. 6463398. (Ex 13, Bates 214-216). At the time of the assignment to U.S. Bank (both original and corrective), Parcel 0402 had already been purchased by the Faulkes. (Ex 2). Therefore, at no time did U.S. Bank ever have any interest in Parcel 0402. (Ex 2; Ex 13, Bates 269-270).

U.S. Bank utilized loan servicing company Ocwen Loan Servicing, LLC (Ocwen) to service its loans, including what has been commonly referred to as the Fleck Loan. (Ex 13, Bates 59, 535-540; RP 131:21-25, 134:3-5). As part of the U.S. Bank/Ocwen relationship, U.S. Bank gave Ocwen a Power of Attorney to act on its behalf. (Ex 13, Bates 535-543). Both Ocwen and U.S. Bank's attorney during the relevant period, was Robinson Tait, P.S. *Dalton* M, 504 P.3d at 840.

In late 2016, Mr. Faulkes was informed that Parcel 0402 had been listed for sale through an online real estate auction platform (RP 70, 71:1-6). In investigating how this could have occurred, Mr. Faulkes learned that U.S. Bank and its agents had recently initiated a nonjudicial foreclosure proceeding, utilizing North Cascade Trustee Services (North Cascade)[2] as trustee, which purported to foreclose upon both Dalton's property and the adjoining, but separate, Parcel 9008. (RP 78-79; Ex 5; Ex 6) At the

[2] A named Defendant in the initial proceedings, but uninvolved due to its Bankruptcy filing.

Trustee Sale, on August 12, 2016 both parcels were purchased by U.S. Bank at a default bid of $300,000.00 and were conveyed via Trustee's Deed to U.S. Bank. (Ex 6; Ex 13, Bates 69-70). U.S. Bank was, from that day forward, indicated as the Owner of Dalton's property. (Ex 10; Ex 13, Bates 103).

Upon recognizing an improper foreclosure had taken place relative to Parcel 0402, Dalton immediately contacted North Cascade and now defunct Robinson Tait, P.S. (attorneys for U.S. Bank and owners of North Cascade) to request corrective action. (RP 79, 81, 82:1-9). The record demonstrates that Mr. Faulkes persistently reached out to Robinson Tait, more than a dozen times in six months, in an attempt to have this matter resolved prior to retaining counsel. (RP 79-83; CP 760-761; Ex D-106, Unnumbered by Defendants, *See* Responses Pg. 21-22, RFP Response 1, 5, and 6). In fact, Mr. Faulkes specifically requested US Bank's direct contact information and its attorney, Robinson Tait, refused to provide it, at US Bank's direction**.** (RP 80; CP 760-761, Ex D-106, Unnumbered by

Defendants, *See* Responses Pg. 21-22, RFP Response 1, 5, and 6)[3] Furthermore, during the subject time period, Robinson Tait and US Bank's servicer, Ocwen, were in regular contact relative to this issue, pursuant to their phone logs. (CP 108-138; RP 211-213). In short, substantial evidence in the record directly contradicts US Bank's position that it was unaware of an issue and that Dalton should have done more to resolve the same.

Finally, eleven months after initially contacting North Cascade/Robinson Tait, with no redress in sight, Dalton retained counsel to attempt to remediate the situation. (CP 88). Dalton's counsel was met with similar assurances, and similar lack of follow through, by both Robinson Tait, and after serving the subject suit on January 19, 2018, by Wright Finlay & Zak LLP; US Bank's first set of litigation attorneys. (CP 83-87).

After significant pretrial motion practice and ongoing discovery, a bench trial took place on December 17, 2019 in Spokane County Superior Court. (CP 1014-1015). At trial, testimony was heard from witnesses,

[3] Testimony at trial suggested that US Bank expected Mr. Faulkes to ignore the explicit directive of US Bank's attorney (Robinson Tait), somehow obtain loan documentation for a loan that he was not a party to (i.e. the Fleck loan), and "use online searching" through the MERS website "to try to find an updated servicer" for the Fleck loan in order to determine that Ocwen was the current loan servicer and make contact with Ocwen to resolve the matter, post-foreclosure. (RP 154: 7-12). Contrastingly, Ocwen asserts that they, as loan servicer, should not even be obligated to review ***the actual documents in their possession*** prior to institution of a foreclosure proceeding, nor to promptly rectify a wrongful foreclosure they instituted. The hypocrisy is astounding.

including Mr. Faulkes, Harrison Whittaker from Ocwen (appearing as the Corporate Representative of U.S. Bank), and Frank Moulton from the Spokane County Assessor's Office. (RP 130:23-25, 2779:21-25). In lieu of testimony from two witness of Dalton, the parties entered factual stipulations. (e.g. recorded documents being relied upon in determining chain of title, U.S. Bank's indicated ownership of Parcel 0402, and Parcel 0402's resultant unmarketability.) (RP 274: 19-25, 275, 276:1-6). Additionally, in excess of 700 pages of exhibits were entered into evidence, largely comprised of documents obtained from U.S. Bank during discovery, which established, amongst other things, multiple title reports and other documentation in US Bank's possession over the course of two years prior to institution of the foreclosure proceeding which evidenced Dalton's ownership of Parcel 0402. (Ex 1-13; Ex 101-107). At the conclusion of trial, Judge Cooney took the matter under advisement and made his ruling on January 10, 2020. (RP 315).

After a thorough review of the testimony and evidence provided at trial Judge Cooney found in favor of Dalton with respect to its Quiet Title and Slander of Title claims and in favor of U.S. Bank with respect to the Unjust Enrichment claim. (RP 326:24-25, 327:1-2, 328:21-22, 329:7-8). Judge Cooney's Findings and Conclusions were specific as they relate to

US Bank's bad faith. *Dalton* M, 504 P.3d at 859. Judge Cooney further awarded Dalton its attorney's fees and costs. (RP 329:9-17).

In April 2020, after submission of pleadings by both parties and review of the same, Judge Cooney awarded attorney's fees and costs to Dalton in the amount of $81,673.98. (CP 842-844) The Order on attorney's fees and costs is supported by Findings and Conclusions entered on April 3, 2020. *Id.*

US Bank filed its first appeal March 3, 2020 and a second appeal July 22, 2020 with an expanded set of issues. (CP 827-828, 847-868). During the pendency of this process, Dalton was forced to undergo additional judicial process in order to prompt US Bank to post a supersedeas bond, as it refused to do so voluntarily. (CP 1040-1047, 1029-1032, 1035-1038, CP 1055-1058).

After reviewing the briefing and submissions of the parties, the Appellate Court requested additional briefing on three questions of the court. *See November 8, 2021 Letter of Div. III Clerk* Both parties submitted comprehensive briefing on the topics requested. Thereafter, the Appellate Court issued a published opinion, ultimately filed on February 17, 2022.

US Bank filed a Motion for Reconsideration on March 9, 2022. Dalton filed its Answer thereto on May 9, 2022. The Appellate Court denied the

Motion on July 7, 2022. US Bank filed this untimely Petition on August 9, 2022.

IV. ARGUMENT AS TO WHY REVIEW SHOULD BE DENIED

None of the grounds proffered by US Bank under RAP 13.4(b) justifies review by this Court. Though it makes bare citations to the Rule within its Issues Presented section, thereafter US Bank makes little effort to articulate or analyze the RAP 13.4(b) bases upon which discretionary review should be granted by this Court.[4] Instead, ironically, US Bank dedicates its Petition primarily to lamenting the position it finds itself in as a result of the purportedly unreasonable conduct of Dalton, the trial court, and the Appellate Court.[5] Fundamentally, this position is not unlike US Bank's approach throughout the litigation; US Bank continues to use the judicial

[4] Notably, US Bank does not present any new authority for this Court's consideration. Rather, US Bank relies entirely on recycled authority from its previous briefing in this matter. This demonstrates that: (1) contrary to its assertions, US Bank has been presented the opportunity to make its arguments previously and (2) the focus of US Bank's briefing to this Court is a rehashing of its prior arguments, rather than an analysis of the RAP 13.4(b) considerations and whether this Court's review would be appropriate. Ultimately, US Bank's arguments in its Petition are virtually identical to those set forth in its denied Motion for Reconsideration.

[5] For instance, US Bank complains of the Appellate Court's "needlessly disparaging tone…" and critique of "megacorporations." *See Petition for Review* at 14.

process in an attempt to justify its indefensible conduct and to avoid any responsibility for a clear and obvious issue of its own making.

a. The Appellate Court Followed Appropriate and Controlling Precedent Relative to Its Determination That a Malicious Publication Took Place in This Matter.

US Bank argues, as it did unsuccessfully at trial, and on appeal, that its actions and more importantly, its inactions, do not constitute malice. US Bank continues to misinterpret or misunderstand the malice standard relative to a slander of title claim, as evidenced in its briefing. However, as correctly applied by the trial court and Appellate Court in this matter, the definition of malice in a slander of title claim is specific and unique. *Rorvig v. Douglas,* 123 Wn.2d 854, 863-864, 873 P.2d 492 (1994). Malice occurs in slander of title where the "slanderous statement is not made in good faith **or** is not prompted by a reasonable belief in its veracity." *Id* at 860 (emphasis added). Certainly, intentional acts coupled with undisputed actual knowledge could meet this standard (as was the case in Rorvig). *Id.* In addition, malice can be established through the exercise of bad faith. For instance, in the subject case, as set forth in the trial court's findings of fact and the Appellate Court's opinion, US Bank acted with malice when it proceeded to foreclose, despite having in its possession multiple documents indicating that Dalton M and/or Mark Faulkes was

the owner of Parcel 0402. *Dalton* M, 504 P.3d at 840-845; (CP 772-773). US Bank's (and its agents') failure to review the information, or alternatively, decision to proceed despite the information, in either case, was made in bad faith and/or without a reasonable belief in the veracity of its statements.[6]

US Bank's argument that it did not comprehensively review the documentation in its possession (despite evidence to the contrary) does not serve to negate US Bank's malice. Willful blindness or intentional ignorance does not eliminate liability – where the information is there to be seen, acting in a detrimental and contrary manner is clearly acting in bad faith and without a reasonable belief in the veracity of the statement. *New York Times Co. v. Sullivan*, 376 US 254, 84 S. Ct. 710 (1964) (where a defendant acts with reckless disregard of the

[6] In its Petition, US Bank utilizes the malice standard for public figure defamation, citing *Duc Tan v. Le* for the proposition that the malice standard was improperly applied in the subject case. *Duc Tan v. Le*, 177 Wn.2d 649, 699, 300 P.3d 356 (2013). Even viewed through the lens of the more stringent actual malice standard (which is a significantly heightened standard and not correctly applied to a slander of title claim), US Bank would be liable here. "A defendant acts with malice when he knows the statement is false **or** recklessly disregards its probable falsity." *Id citing New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710 (1964) (emphasis added). Where US Bank and its agents had within their possession ample documentation (including title reports, specifically ordered to address potential title issues; information from the Spokane County Assessor showing ownership status of the two parcels at issue; and chain of title "due diligence" all spanning *years* prior to the 2016 wrongful foreclosure) US Bank clearly acted with reckless disregard to the probably falsity of its statements when it proceeded with its foreclosure and the publications related thereto in 2016 in spite of the same. *See supra* for further analysis of the malice standard.

probable falsity of his statements, he acts with malice). *Margoles v. Hubbart*, 111 Wash.2d 195, 200, 760 P.2d 324 (1988) (Malice can be inferred from circumstantial evidence, including failure to properly investigate). *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn. App. 147, 225 P.3d 339, 349 (2010) (Reckless disregard for truth or falsity is the equivalent of the actual malice requirement).

Further, after the wrongful foreclosure was unquestionably brought to its attention, repeatedly, US Bank did nothing (absent proffering empty promises of resolution), which subsequently forced Dalton to institute this litigation. *Dalton* M, 504 P.3d at 858-859. Again, acting in bad faith and epitomizing the circumstances for which the bad faith equitable exception to the American Rule was created. *Id* at 857-858.

Both the trial court and the Appellate Court appropriately and properly concluded US Bank met the malicious publication element of slander of title, consistent with applicable precedent. As such, no RAP 13.4(b) consideration permits review of the Appellate Court's decision with regard to malicious publication.

b. The Appellate Court Acted Properly and Within Its Discretion When Applying RAP 12.1(b). Further, US Bank Raises No Issue(s) of Substantial Public Import in its Petition.

It is undeniable that this case discusses a topic of substantial public interest. Specifically, the Appellate Court created clearer guidance for

both consumers and corporations relative to the application of the existing prelitigation bad faith exception. *Dalton* M, 504 P.3d at 850-859. As noted in *Dalton M,* "the American rule seeks to promote the cause of the poor, who might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Id* at 857 citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). "This rationale does not apply when the fee shifting rule operates only against one side. The cause of the poor is advanced, not hindered, by a ruling in favor of Dalton M." *Id* at 857. The Appellate Court's opinion in *Dalton M* is a positive step forward for access to our court systems, completely in comport with the intent of the American Rule, and in favor of the ordinary citizen in Washington. *Id.*

Nevertheless, the mere fact that an issue of public import exists in this case does not make it ripe for this Court's review. Instead, RAP 13.4(b)(4) requires the "*petition* involve[] an issue of substantial public interest *that should be determined by the Supreme Court*." *RAP 13.4(b)(4)* (emphasis added). RAP 13.4(b)(4) clearly provides the most subjective consideration under which this Court may permit discretionary review. Here, however, US Bank's Petition asserts that the issue of substantial public interest, which warrants review of this matter, is a deprivation of US Bank's due process rights as a result of the Appellate Court's use and application of

RAP 12.1(b). *Petition for Review* at 18. This assertion is without factual or legal merit. *See RAP 12.1(b) analysis Infra.*

Because US Bank's Petition for Review does not include "an issue of substantial public interest that should be determined by the Supreme Court" as required, this Court should not entertain review of the matter on such a basis. *RAP 13.4(b)(4).* Nevertheless, assuming *arguendo,* that this Court interpreted US Bank's Petition to raise the issue of public interest that *does* exists in this case (as discussed above), the same was determined in comport with precedent and in accordance with applicable Court Rules; leaving no need for this Court to intervene or provide review.

Finally, US Bank's contention that the Appellate Court exceeded its authority under RAP 12.1(b), and thus violated US Bank's right to due process, is wholly unsupported by the Court Rules and applicable case law. For decades it has been clearly established that the appellate rules permit the applicable court to raise issues not briefed by the parties. *RAP 12.1(b).* In fact, this Court "ha[s] repeatedly held that RAP 12.1(b) means exactly what it says: this court may raise issues sua sponte and may rest its decision thereon." *Greengo v. Pub. Employees Mut. Ins. Co.,* 135 Wn. 2d

799, 813 (1998) (En Banc).[7] Further, as is typical, but not required, the Appellate Court requested supplemental briefing of the parties, thus allowing both parties to fully address the issues raised and thereby eliminating any perceived prejudice. *State v. Aho,* 137 Wn. 2d 736, 741, 975 P.2d 512 (1999). Finally, contrary to US Bank's assertions, bad faith has been an integral part of this litigation, from discovery, through trial, and continuing throughout the appeal. *See, e.g. Supra Pg. 1, n.1; Pg. 3-8.*

In short, the Appellate Court's use of RAP 12.1(b) does not create or support any RAP 13.4(b) basis under which this Court could review the *Dalton M* decision.

c. The Appellate Court Correctly Analyzed Existing Precedent and Appropriately Applied Available Case Law When Determining That US Bank Engaged in Pre-Litigation Bad Faith and Further, That Equitable Relief Was Available to Dalton Based on US Bank's Conduct.

The Appellate Court's opinion in *Dalton M* is consistent with case law in Washington State, which has recognized prelitigation bad faith as a viable exception to the American Rule for many decades. *See, e.g. In re Recall of Pearsall-Stipek,* 136 Wash.2d 255, 267, 961 P.2d 343 (1998); *State ex. rel. Macri v. City of Bremerton,* 8 Wash.2d 93, 105, 111 P.2d 612

[7] See also, *Obert v. Environmental Research & Development Corp.* 112 Wn. 2d 323, 333 (1989) (This Court was dismissive of defendant's assertion that it "should not entertain a legal argument not raised at the trial court or Court of Appeals" and held that RAP 12.1(b) "would be rendered meaningless" by virtue of such a ruling.)

(1941); *State v. S.H.*, 95 Wash.App. 741, 977 P.2d 621 (1999). As such, this Court's review is not warranted pursuant to RAP 13.4(b).

First, the Appellate Court undertook a painstaking and thorough analysis with respect to this Court's opinion in *Maytown*, including those cases relied upon by this Court in *Maytown*. *Dalton M*, 504 P.3d at 851-859. In so doing, the Appellate Court carefully reviewed the history of the American Rule, bad faith as an exception thereto, and how various courts (including this Court) have applied bad faith exceptions over the course of time. *Id*. Specifically, the Appellate Court recognized this Court's holding in *Maytown* and understood the distinction between the facts in *Maytown* and the facts in *Dalton* M, noting the *Maytown* case arose from an administrative process, not "an obstinate refusal to respect a valid claim that forced the plaintiff to file suit." *Id* at 855.[8] After its comprehensive nine-page analysis regarding "the prevailing American view on fees…and the policies behind denying or awarding reasonable attorney fees in various situations…", the Appellate Court concludes, "a plaintiff may recover fees incurred because of the defendant's prelitigation bad faith refusal to recognize the plaintiff's indisputable claim and forcing the

[8] The Appellate Court also specifically noted its obligation to follow the precedent of *Maytown* in its analysis, stating "because we are subordinate and subservient to the Washington Supreme Court, we must respect *Maytown Sand & Gravel, LLC v. Thurston County*." *Dalton M*, 504 P.3d at 855.

plaintiff to file suit." *Id* at 858. The Appellate Court's opinion correctly analyzed the existing precedent and appropriately applied the same to the facts in *Dalton M,* providing guidance with respect to the narrow circumstances in which prelitigation bad faith attorney's fees are recoverable. *Id.*

In addition, US Bank attempts to point this Court to a conflict between Division I precedent (*Greenbank Beach*) and *Dalton M*, where none exists. Pointedly, in *Greenbank Beach,* the defendants advanced several unsuccessful arguments at trial. *See generally, Greenbank Beach and Boat Club v. Bunney,* 168 Wn. App. 517, 280 P.3d 1133 (2012) (Specifically, defendants argued abandonment by selective enforcement and unclear method of measurement cause the height restrictions within the HOA to be inapplicable). However, "significantly, the trial court did not find that the [defendant's] losing arguments were frivolous." *Id* at 1139. As such, the court in *Greenbank* concluded "litigants are not ordinarily required to pay attorney fees for making losing arguments." *Id.*

While as a general rule, this is perhaps true, the facts of *Dalton M* are substantially distinct; US Bank did not proffer losing (but potentially meritorious) arguments relative to the status of Dalton's title. Rather, it forced Dalton into litigation only to concede the issue at the conclusion of

trial without any argument at all.[9] "Dalton M possessed an undisputable right to clear title, while US Bank forced Dalton M to come to court to clear title." *Dalton M*, 504 P.3d at 858. "US Bank never disputed that it should lift the cloud to title…nevertheless, its answer denied that Dalton M was entitled to any relief." *Id.* "…US Bank forced Dalton M to filed suit to enforce its rights only to concede at trial that Dalton M was entitled to relief." *Id* at 859.

Additionally, in a recent opinion from Division I, the court, relying heavily on its opinion in *Greenbank*, once again acknowledges, "bad faith can warrant a claim for attorney fees" particularly where the claim arises out of one of five causes of action, including "slander of title," as here. *Universal Life Church Monastery v. R.L.K., LLC*, No. 80505-3-I, at 5 (Div. I, 2021) (Unpublished). Division I recognized that, through *Rorvig*, this Court "added slander of title to [the] short list" of claims which create an avenue for "bad faith prelitigation misconduct attorney fees" because "'attorney fees incurred in removing the cloud from the title and restoring the vendibility are necessary expenses of counteracting the effects of slander.'" *Id* at 7, citing *Rorvig*.

[9] Ultimately, amounting to a frivolous defense.

While the Appellate Court here found the "pending purchase or sale" element of slander unmet, the remainder of the claim (most importantly, malicious publication) was proven. *Dalton M*, 504 P.3d at 846. Therefore, those components of a slander of title action that justify the equitable exception to the American Rule are present in subject case. *Id* at 858-859. Attorney's fees are permitted in a slander of title action as equitable relief, *because* the bad faith of the defendant necessitates the litigation. *Rorvig*, 123 Wn.2d at 861-862. It is by application of this same logic that fees are permitted on the equitable basis of prelitigation bad faith.[10] The Appellate Court's decision in *Dalton M* is further supported by the grant of attorney's fees at the trial court level, which arose as a form of equitable relief, permitted specifically to counterbalance US Bank's bad faith. *Dalton M*, 504 P.3d at 843-844, *See also, Rorvig*, 123 Wn. 2d 854. As the Appellate Court reasoned, a ruling in favor of Dalton M is congruent with *both* the underlying purpose of the American rule and the equitable exceptions thereto. *Dalton M*, 504 P.3d at 850-859.

The *Dalton M* opinion is mindful of, and consistent with, Washington Supreme Court and published Appellate Court precedent.

[10] The court's "inherent equitable powers to authorize the award of attorney's fees in cases of bad faith" (including pre-litigation bad faith) have been recognized in Washington case law for decades. *See, e.g. In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267 (Wn. App 1998); Rogerson Hiller Corp., v. Port of Port Angeles*, 96 Wn. App. 918, 927 (1999); *Gunn v. Riely*, No. 48701-2-II (Div. II, 2017) (Unpublished).

V. DISCUSSION AS TO WHY THIS COURT SHOULD AWARD DALTON ITS ATTORNEY'S FEES

Dalton requests this Court award its reasonable attorney's fees and expenses incurred in conjunction with the preparation and filing of this Answer, pursuant to RAP 18.1. *RAP 18.1(a), RAP 18.1(b), RAP 18.1(j).* This matter arises largely out of a dispute as to attorney's fees liability. Both at the trial court level and on appeal, US Bank has been determined liable for Dalton's attorney's fees under an equitable exception to the American Rule (Slander of Title and prelitigation bad faith). Dalton has incurred significant attorney's fees in the continued litigation relative to this matter. Notably, from the inception of this suit, Dalton has been consistent in its demands to US Bank – it simply wanted the return of clear title to its property and to be made whole with respect to attorney's fees it was forced to expend as a result of US Bank's utter obstinance. (*See, e.g.* Respondent's Brief at 3, CP 609-619).

Nevertheless, US Bank continued to litigate this matter, through trial, appeal, reconsideration, and now, to this Court, expending considerable resources (including judicial) to do so. Dalton has timely and thoroughly responded and has substantively prevailed. Dalton now

renews its ongoing request and asks this Court to grant its attorney's fees, as permitted pursuant to RAP 18.1.

VI. CONCLUSION

For the reasons set forth herein, no articulated RAP 13.4(b) considerations warrant review of the Appellate Court's opinion in this matter. Therefore, Dalton respectfully requests that this Court deny US Bank's Petition for Review in its entirety.

I hereby certify, in compliance with RAP 18.17, that the number of words contained in this document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and the signature blocks is 4737 words.

Dated this 14th day of September 2022.

/s/ Kayla Goyette

Kayla Goyette, WSBA No. 48032
T & G Attorneys
823 W. 7th Avenue, Suite 101
Spokane, WA 99223
Phone: (509)323-4277
Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. My business address is 823 W. 7th Avenue, Spokane, WA 99223.

I certify that on the 14th day of September 2022 I caused to be served a true and correct copy of the attached RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW by US Mail, electronic filing system, and by sending a copy electronically, to the following addressee:

Houser LLP
Emilie Edling
Robert W. Norman, Jr.
9600 SW Oak Street, Suite 570
Portland, OR 97223

Houser LLP
Emilie Edling
Robert W. Norman, Jr.
600 University St, Ste 1708
Seattle, WA, WA 98101

eedling@houser-law.com

Executed this 14th day of September 2022 at Spokane, Washington.

/s/ Kayla Goyette
Kayla Goyette

DENNIS P. THOMPSON, P.S.

September 14, 2022 - 11:34 AM

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Sender Name: Kayla Goyette - Email: office@tandgattorneys.com
Address:
823 W 7TH AVE STE 101
SPOKANE, WA, 99204-2850
Phone: 509-323-4277

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