

70895-3

70895-3

No. 708953-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

Robert Dahlgren, Respondent

v.

Northwest Trustee Services, Inc.,  
and Chase Home Finance LLC,  
successor by merger to  
Chase Manhattan Mortgage, Defendants,

and

Omega Paulite, Appellant

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 FEB 28 AM 10:22

---

OPENING BRIEF OF APPELLANT

---

Omega Paulite, Pro Se  
P.O. Box 7265  
Bellevue, WA 98008  
(425) 351-1066  
megpaulite@hotmail.com

## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	INTRODUCTION	3
III.	STATEMENT OF THE CASE	4
IV.	ARGUMENT	
	A. Summary Judgment Hearing, October 2011	
	1. The trial court erred in awarding a partial summary in favor of Dahlgren on the basis of unjust enrichment, in that this cause of action was not previously pled; the net effect of the trial court's ruling was to allow Dahlgren to amend his complaint against Paulite without leave of court and without proper notice to Paulite.	9
	2. The trial court erred in awarding a partial summary judgment in favor of Dahlgren, as Dahlgren was not entitled to a judgment as a matter of law.	21
	a. The facts as alleged, and the reasonable inferences drawn therefrom in a light most favorable to Paulite, do not support a finding of unjust enrichment.	21

- b. Dahlgren failed to prove the damages element in its claim against Paulite. 22
- c. Dahlgren failed to prove the causation element in its claim against Paulite. 26

B. Award of Attorney Fees, March 2013

- 3. The trial court erred when it summarily awarded more than \$175,000 in attorney fees to Dahlgren. 32
  - a. The trial court erred in awarding attorney fees as Dahlgren was not a prevailing party. 32
  - b. The trial court erred in awarding attorney fees as counsel for Dahlgren failed to establish the attorney fees requested were reasonable. 33
  - c. The trial court erred when it failed to perform the appropriate analysis to determine the reasonableness of the fees requested. 34
  - d. The trial court erred in failing to make an adequate record for review of its fee award decision, whether through findings of fact and conclusions of law, or otherwise. 40

C. Summary Judgment Hearing, April 2013

4.	The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Dahlgren did not meet its initial burden of showing the absence of an issue of material fact.	43
5.	The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Paulite, by and through her Declaration, established the existence of material fact.	46
6.	The trial court erred in awarding summary judgment in favor of Dahlgren, in that reasonable minds could have reached more than one conclusion as to the amount of damages.	48
7.	The trial court erred in allowing extraneous language regarding “setoff” to be included as a part of the summary judgment Order.	49
V.	CONCLUSION	50

## TABLE OF AUTHORITIES

### CASES CITED

<u>Atherton Condo. Apartment–Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.</u> , 115 Wn.2d 506, 799 P.2d 250 (1990)	25, 45
<u>Anderson v. Hiker</u> , 38 Wash. 632, 80 P. 848 (1945)	47
<u>Ayers v. Johnson &amp; Johnson Baby Prods. Co.</u> , 117 Wash.2d 747, 818 P.2d 1337 (1991)	26
<u>Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.</u> , 61 Wash.App. 151, 810 P.2d 12, 814 P.2d 699 (1991)	21
<u>Baughn v. Honda Motor Co Ltd</u> , 107 Wash.2d 127, 727 P.2d 655 (1986)	26
<u>Bentzen v. Demmons</u> , 68 Wash.App. 339, 842 P.2d 1015 (1993)	40
<u>Blue Diamond Group Inc. v. KB Seattle</u> , 163 Wash.App. 449, 266 P.3d 881 (2011)	13
<u>Blum v. Stenson</u> , 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)	33
<u>Bordynoski v. Bergner</u> , 97 Wash.2d 335, 644 P.2d 1173 (1982)	28
<u>Bowers v. Transamerica Title Ins. Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983)	35, 36
<u>Colbert v. Moomba Sports</u> , 163 Wn.2d 43, 176 P.3d 497 (2008)	27
<u>Dewey v. Tacoma School District</u> , 95 Wash.App. 18, 974 P.2d 847 (1999)	19

<u>Dowler v. Clover Park Sch. Dist. No. 400</u> , 172 Wash.2d 471, 258 P.3d 676 (2011)	13
<u>Hadley v. Baxendale</u> , 9 Exch. 341, 156 Eng.Rep. 145 (Court of Exchequer 1854)	28
<u>Hartley v. State</u> , 103 Wash.2d 768, 698 P.2d 77 (1985)	27, 28
<u>Hash v. Children's Orthopedic Hospital</u> , 49 Wn.App. 130, 741 P.2d 584 (1987)	13
<u>Hensley v. Eckerhart</u> , 461 U.S. 424 (1983)	35
<u>Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.</u> , 4 F.3d 819, 822 (9th Cir.1993)	32
<u>Kirby v. City of Tacoma</u> , 124 Wn. App 454, 98 P.3d 827 (2004)	19
<u>LaPlante v. State</u> , 85 Wash.2d 154, 531 P.2d 299 (1975)	28
<u>Lewis v. Bell</u> , 45 Wash.App.192, 724 P.2d 425 (1986)	19
<u>Lewis v. Bours</u> , 119 Wn.2d 667, 835 P.2d 221 (1992)	48
<u>Mathers v. Stephens</u> , 22 Wash.2d 364, 156 P.2d 227 (1945)	28
<u>In re the Marriage of Lutz</u> , 873 P.2d 566 (Wash.Ct. App. 1994)	15, 16, 19
<u>In the Matter of the Estate of Morris</u> , 89 Wash.App. 431, 949 P.2d 401 (1998)	34
<u>Mahler v. Szucs</u> , 135 Wash.2d 398, 957 P.2d 632 (1998)	32, 35, 40, 41

<u>Manning v. Mount St. Michaels Seminary of Philosophy and Science</u> , 78 Wn.2d 542, 477 P.2d 635 (1970)	16
<u>Marincovich v. Tarabochia</u> , 114 Wn.2d 271, 787 P.2d 562 (1990)	48
<u>Mayer v. City of Seattle</u> , 102 Wash.App. 66, 10 P.3d 408 (2000)	34, 35, 41
<u>Molloy v. Bellevue</u> , 71 Wash.App. 382, 859 P.2d 613 (1993)	19
<u>Nathanson v. United States</u> , 630 F.2d 1260 (8 <sup>th</sup> Cir. 1980)	13
<u>Northwest Mfrs. V. Department of Labor</u> , 78 Wn.App. 707, 899 P.2d 6 (1995)	26
<u>Nordstrom v. Tampourlos</u> , 107 Wash.2d 735, 733 P.2d 208 (1987)	34, 35
<u>Rhinehart v. Seattle Times</u> , 59 Wash.App. 332, 798 P.2d 1155 (1990)	40
<u>Schooley v. Pinch's Deli Market, Inc.</u> 134 Wn.2d 468, 951 P.2d 749 (1998)	27
<u>Scott Fetzer Co. v. Weeks</u> , 122 Wash.2d 141, 859 P.2d 1210 (1993)	33, 35
<u>Sintra, Inc. v. City of Seattle</u> , 131 Wash.2d 640, 935 P.2d 555 (1997)	32
<u>Sleasman v. City of Lacey</u> , 159 Wash.2d 639, 151 P.3d 990 (2007)	33
<u>Smith v. Dalton</u> , 58 Wash.App. 876, 795 P.2d 706 (1990)	40
<u>State v. Watson</u> , 146 Wash.2d 947, 51 P.3d 66 (2002)	33
<u>State Farm Mutual Auto Insurance Co. v. Johnson</u> , 72 Wash.App. 580, 871 P.2d 1066 (1994)	40

<u>Steel v. Johnson</u> , 9 Wash.2d 347, 115 P.2d 145 (1941)	47
<u>Stoneman v. Wick Constr. Co.</u> , 55 Wash.2d 639, 349 P.2d 215 (1960)	26
<u>Wachovia SBA Lending v. Kraft</u> , 165 Wn.2d 481, 200 P.3d 683 (2009)	33
<u>Young v. Young</u> , 164 Wash.2d 477, 191 P.3d 1258 (2008)	20, 21, 22

#### STATUTES CITED

RCW 4.84.330	32, 33
--------------	--------

#### RULES CITED

CR 8(a)1	19
CR 15(a)	21
CR 56(c)	13, 14, 29

#### OTHER AUTHORITIES

Black's Law Dictionary (8 <sup>th</sup> Ed. 2004)	33
Dictionary.com. <a href="http://dictionary.reference.com">http://dictionary.reference.com</a> (1 February 2014).	24
James M. Fischer, <i>Understanding Remedies</i> , 2 <sup>nd</sup> Ed (2006)	19
Findlaw Legal Dictionary, <a href="http://dictionary.findlaw.com">http://dictionary.findlaw.com</a> (1 February 2014)	43, 44, 45
Restatement (Second) of Contracts, Section 351	28
Washington Pattern Jury Instructions, Civil, Section 15.01	26

## I. ASSIGNMENTS OF ERROR

- A. Assignments of Error – Summary Judgment, October 2011
1. The trial court erred in awarding a partial summary judgment in favor of Dahlgren on the basis of unjust enrichment, in that this cause of action was not previously pled; the net effect of the trial court's ruling was to allow Dahlgren to amend his complaint against Paulite without leave of court and without proper notice to Paulite.
  2. The trial court erred in awarding a partial summary judgment in favor Dahlgren, as Dahlgren was not entitled to a judgment as a matter of law.
    - a. The facts as alleged, and the reasonable inferences drawn therefrom in a light most favorable to Paulite, do not support a finding of unjust enrichment.
    - b. Dahlgren failed to prove the damages element in its claim against Paulite.
    - c. Dahlgren failed to prove the causation element in its claim against Paulite.
- B. Assignments of Error – Award of Attorney Fees, March 2013

3. The trial court erred when it summarily awarded more than \$175,000 in attorney fees to Dahlgren.
  - a. The trial court erred in awarding attorney fees as Dahlgren was not a prevailing party.
  - b. The trial court erred in awarding attorney fees as counsel for Dahlgren failed to establish the attorney fees requested were reasonable.
  - c. The trial court erred when it failed to perform the appropriate analysis to determine the reasonableness of the fees requested.
  - d. The trial court erred in failing to make an adequate record for review of its fee award decision, whether through findings of fact and conclusions of law, or otherwise.

C. Assignments of Error – Summary Judgment, April 2013

4. The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Dahlgren did not meet its initial burden of showing the absence of an issue of material fact.

5. The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Paulite, by and through her Declaration, established the existence of material fact.
6. The trial court erred in awarding summary judgment in favor of Dahlgren, in that reasonable minds could have reached more than one conclusion as to the amount of damages.
7. The trial court erred in allowing extraneous language regarding "setoff" to be included as a part of the summary judgment Order.

## **II. INTRODUCTION**

Omega Paulite, Appellant herein, is appealing three separate rulings of the trial court: the first ruling was in October 2011, and awarded a partial summary judgment in favor of Dahlgren, and 1) imposed a constructive trust on Paulite's homestead, which allowed Dahlgren to sell it, and; 2) found for Dahlgren on the limited issue of liability. Paulite moved to vacate this Order, but was denied without much consideration. The second ruling, held without oral argument, was in March 2013, and ordered Paulite to pay over \$176,000 in Dahlgren's attorneys fees.

A significant portion of this amount was paid from the equity when Paulite's property was sold pursuant the constructive trust imposed in October 2011. The third and final ruling was another summary judgment in April 2013, which awarded money damages to Dahlgren in the amount of \$56,306.

What is apparent from a review of the record herein is that Paulite was routinely denied her "day in court" throughout the proceedings in the trial court. Summary judgments are universally considered to be an extreme measure, yet two were entered in the case at bar.

Paulite asks this court to conclude after its de novo review of these summary judgments that the trial court erred in its award(s), and the matter(s) should have gone to trial. The award of over \$176,000 in attorney fees is equally as troubling. Paulite asks this court to conclude that the trial court abused its discretion in making such an award, and should reverse and remand this decision for further proceedings.

### **III. STATEMENT OF THE CASE**

Paulite entered into a Property Settlement Agreement ("PSA") with Dahlgren, now the ex-husband of Paulite, in 2007. As a part of the PSA, Paulite was given the real property located at

15959 N.E. 1<sup>st</sup> Street, Bellevue, WA 98008 (“subject property”), which was encumbered by a first deed of trust in favor of Chase Home Finance LLC (“Chase”). Paulite was able to keep the loan payments current for several years, and even paid more than was due under the promissory note, until a catastrophic event occurred in her life which resulted in her losing her business. Unable to pay the mortgage payment, Paulite went into default, causing Chase to initiate a non-judicial foreclosure action in late 2010.

In November 2010 Dahlgren filed a “Complaint for Damages and Injunctive Relief” against Northwest Trustee Services, Inc. and Chase Home Finance LLC (“Chase”). CP 1. Paulite was not named as a party defendant in this Complaint. The Complaint alleges that Chase wrongfully refused to release Dahlgren from liability under the promissory note/deed of trust. Because of this, according to the Complaint, Chase could not prove a default against Dahlgren, and therefore could not foreclose upon any interest Dahlgren had in the subject property. In Count 2 of the Complaint Dahlgren sought injunctive relief against Chase to stop the foreclosure. The other three causes of action set forth in the Complaint allege that Chase is liable for money damages to Dahlgren under several theories, including breach of contract, the

Consumer Protection Act, and the Fair Debt Collection Practices Act.

In February 2011 Dahlgren amended his complaint to include Paulite as a party defendant, alleging a single count against Paulite for Breach of Property Settlement Agreement and Decree of Divorce, and Covenant of Good Faith and Fair Dealing. CP 9. In this Amended Complaint Dahlgren asked for the imposition of a constructive trust so as to allow him to sell the subject property. Dahlgren also alleged that he had been damaged by the actions of Paulite's breach of the PSA, but did not allege either how or how much.

Paulite, appearing pro se, filed a one paragraph general denial to the Amended Complaint in July 2011. CP 19. At that time, Paulite thought that her appearance in this matter was sufficient to force the matter to trial. Paulite has acted in a pro se capacity in every part of this proceeding, not by choice, but by limited financial resources.

In September 2011 Dahlgren filed a Motion for Partial Summary Judgment, which was heard on October 7, 2011. Not being familiar with civil practice and procedure, Paulite did not appear at the hearing and a partial summary judgment was entered

against her which imposed a constructive trust, and found against her on the limited issue of liability. CP 29. Four days thereafter Paulite filed a Reply with the Court, which was not considered. CP 37. Paulite later filed a Motion to Vacate the Partial Summary Judgment, which was summarily rejected by the Court without oral argument.

Over the next 12 months Paulite strongly resisted Dahlgren's aggressive efforts to evict her from her own home. This included filing for Bankruptcy, and contesting the various eviction actions brought by Dahlgren. As of October 28, 2012, the subject property was turned over to Dahlgren.

In December 2012 an Order was entered appointing a custodial receiver to effectuate the sale of the subject property. In January 2013 this court-appointed receiver entered into a contract for the sale of the subject property.

The first time Paulite received any notice that the subject property had been sold was on Friday, March 1, 2013 (CP 40), when she received notice from Dahlgren's Attorney that a hearing had been scheduled for March 5, 2013, to approve the sale of the subject property and apportion the proceeds therefrom. CP 42. This hearing was ultimately postponed by the court until Monday,

March 11, 2013, with the court set a deadline for submitting briefs as Friday, March 8, 2013.

On March 11, 2013, without oral argument, the court entered an order authorizing the Receiver to close the sale of the subject property. CP 63. As to the proceeds from the sale, the court held that payment was to be made to Dahlgren, as follows:

Plaintiff Dahlgren is entitled to full reimbursement of his Attorney fees in the total amount of \$176,891.57, as reimbursement for Payments made to Enhance the Collateral which shall be charged against and paid out of the receivership, and shall be entitled to a first and paramount lien against the Property in the same manner as the Receiver's fees and costs. CP 66.

No proceeds remained after the payment of Dahlgren's attorney fees, rendering as moot Paulite's claim for a homestead exemption in the sale proceeds.

On March 27, 2013 Dahlgren filed a Motion for Summary Judgment (CP 69), along with his declaration. On April 15, 2012 Paulite filed her response to Dahlgren's motion (CP 89), along with her declaration.

On April 10, 2013, Paulite filed a Motion for Discretionary Review with the Court of Appeals, Division 1, number 701959, seeking a review of the March 2013 Order. CP 81.

On April 26, 2013, a summary judgment Order was entered in favor of Dahlgren for damages in the amount of \$56,306. CP 96.

On May 23, 2013, Paulite filed another Motion for Discretionary Review with the Court of Appeals, Division 1, number 704303, seeking review of the April 2013 Order. CP 104.

On August 12, 2013, a final judgment and order of dismissal was entered. CP 120.

On September 9, 2013, this appeal was filed with the Court of Appeals. CP 128.

#### **IV. ARGUMENT**

##### **A. SUMMARY JUDGMENT HEARING, OCTOBER 2011**

Though Dahlgren would like this court to believe otherwise, this case was never about forcing Paulite to sell the subject property: while the subject property was awarded to her in a division of community property, Paulite knew she wasn't making the payments on the note secured by the subject property, and also knew that a court would not allow her to keep it.

Certainly, if this case were simply about a forced sale, Dahlgren could have accomplished his objective via other remedies, like a contempt action with the court that handled the dissolution proceeding, or by seeking some form of less intrusive

injunctive relief. After all, a forced sale would have resulted in Dahlgren being taken off the promissory note, could have been accomplished at a fraction of the cost of the route taken by Dahlgren, and required no more proof than non-payment of the promissory note by Paulite.

The remedy elected by Dahlgren in this case was a constructive trust. Just like the remedies identified above, a constructive trust would force the subject property to be sold. Unlike these other remedies, a constructive trust would have the net effect of forever divesting Paulite of any right, title or interest in or to the subject property. This would mean that the equity in the subject property would become Dahlgren's to keep.

When he elected the remedy of constructive trust, Dahlgren's burden of proof increased dramatically, especially at the summary judgment phase where all inferences are (or should have been) resolved in Paulite's favor. No longer was Dahlgren just trying to sell the subject property; now he trying to take away the equity in the subject property that had already been given to Paulite in the property settlement.

According to Dahlgren, the reason why he was entitled to Paulite's equity was because of damages he sustained by Paulite

not paying the note. His logic is as follows: the non-payment resulted in derogatory entries on Dahlgren's credit report, which caused his FICO score to go down, which caused existing and prospective clients not to hire him, which caused a loss of business, which caused a loss in business income. It should be noted that at no time in this case has Dahlgren produced one shred of evidence of any lost business and/or lost income because of his credit score.

Unfortunately for Paulite, it wasn't until after the October 2011 hearing that Paulite was alerted to the fact that Dahlgren was seeking to steal her equity in the subject property. By that time it was too late...the constructive trust had been imposed. Paulite's attempt to vacate the order imposing the constructive trust was unsuccessful.

The facts of this case are not complicated. Dahlgren's cause of action against Paulite is as set forth in a pleading entitled "Plaintiff's Amended Complaint for Damages, Injunctive Relief and Appointment of Trustee/Receiver". Section VII, Count 5 of the Amended Complaint, which is the only section which applies to Paulite, is entitled "Breach of Property Settlement Agreement, Decree of Divorce and Covenant of Good Faith and Fair Dealing".

Paulite filed a general denial to Plaintiff's Amended Complaint in July 2011, after which Dahlgren immediately moved for a partial summary judgment. As Paulite did not appear at the summary judgment hearing, the hearing went on without her.

#### THE SUMMARY JUDGMENT HEARING

The hearing got off to a rather rocky start for Dahlgren, as it is uncertain what relief Dahlgren was seeking, as the following excerpt reflects:

MR. CLAUSEN: Thank you, Your Honor. Just a couple of points. First, we're not here -- we're on the summary judgment calendar, but it's not a summary judgment motion, and so ***you don't have the same summary judgment rules*** (emphasis added) that you would otherwise have. And even if you did, there isn't any conflicting evidence here. The facts are essentially undisputed. And –

THE COURT: I'm unclear when you say we're not here for summary judgment. Your motion is titled Partial Summary Judgment.

MR. CLAUSEN: Oh, I'm sorry. Okay.

THE COURT: Okay. So we'll treat it as a summary judgment. I don't know what it could be other than that.

MR. CLAUSEN: Okay. Even under the summary judgment standard, Ms. Paulite has not opposed it. She's the one with the ownership interest in the property. And Chase didn't dispute any of the substantive facts that would underlie the basis for the Court to make a decision. RP 12.

With the trial court adopting a "rose by any other name" approach, the hearing continued. The law seems to be very clear as to what was supposed to have happened at the hearing, assuming this was a summary judgment hearing: Dahlgren had the initial burden of showing the absence of an issue of material fact. Blue Diamond Group Inc. v. KB Seattle, 163 Wash.App. 449, 266 P.2d 881 (2011). Regardless of whether Paulite submitted affidavits or other evidence opposing the motion, summary judgment should not have been granted if Dahlgren did not sustain its initial burden. Hash v. Children's Orthopedic Hospital, 49 Wn.App. 130, 741 P.2d 584 (1987). Dahlgren must have been entitled to a judgment as a matter of law. CR 56(c). The court must have construed "all facts and reasonable inferences in the light most favorable to the non-moving party (i.e. Paulite). Dowler v. Clover Park Sch. Dist. No. 400, 172 Wash.2d 471, 484, 258 P.3d 676 (2011). Finally, summary judgment is an "extreme remedy and one which is not to be entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover ***under any discernible circumstances***". Emphasis added. Nathanson v. United States, 630 F.2d 1260, 1264 (8<sup>th</sup> Cir. 1980).

The difference between what was supposed to have happened and what actually happened at this hearing is astounding. What is apparent from the transcript cited above is that counsel for Dahlgren acknowledged that that the evidence he had submitted in support of whatever relief he was seeking did not rise to the level of a summary judgment, and whatever “rules” Dahlgren referred to at the hearing did not conform to the “rules” of procedure (CR 56(c)) for determining the appropriateness of an award of a summary judgment.

It is also apparent that Dahlgren placed substantial reliance on Paulite’s failure to appear at the hearing to help make his case. In actuality, Dahlgren still had to meet his burdens, and he still had to be entitled to a judgment as a matter of law.

The court’s reasoning at the hearing was equally problematic when it adopted the legal theory of unjust enrichment (RP 17), which Dahlgren had never pled or proved, to support the imposition of a constructive trust. For the court to come up with findings of “wrongfulness” or “unconscionability” (RP 17), it would have had to infer these elements from the facts alleged by Dahlgren; however, the court was mandated to construe all inferences in the light most favorable to Paulite.

In its ruling, the trial court relied heavily on the case of In re the Marriage of Lutz, 74 Wn. App. 356, 873 P.2d 566 (1994). RP 15. In the Lutz case, title to real property was “temporarily transferred” by Charles Lutz to his sister, Judy Siler, to preclude the wife of Charles Lutz from claiming an interest therein in an impending dissolution proceeding. Evidence showed that Siler agreed to transfer the property back to Lutz when he asked her to.

The court, in imposing a constructive trust as against Siler, found that “...Siler clearly would be unjustly enriched if she were permitted to keep the title to the property. A constructive trust is the proper means to prevent that inequitable result.” *Id.*, at 368.

The court also found that a constructive trust arose for the benefit of Tina Lutz. The reasoning of the court was that Charles Lutz “fraudulently attempted” to hide the property from his wife. *Id.*, at 370.

Paulite is not sure which of the parties the trial court equated her to in the Lutz case. If Paulite was being equated to Siler, clearly there was never an intent for the property to be Siler’s, and one could easily see how keeping it would have resulted in her unjust enrichment. In the case at bar, the subject property was given to Paulite as a fair and equitable disposition of community

property. After the subject property became hers, Paulite continued to make payments on the mortgage for several years, sometimes paying more than what was due. When her economic circumstances made it impossible to do so, Paulite did not maintain the mortgage payments.

If Paulite was being equated to Charles Lutz, that court found fraud, and a “clear element of unconscionability” from his conduct. Was Paulite’s inability to make mortgage payments wrongful, fraudulent, or to the level where it was unconscionable? There is nothing in the record to suggest that Paulite had the money to make the mortgage payments but declined to do so. Certainly, Paulite was not alone in her inability to pay her mortgage; as this court is aware through public information, millions of Americans defaulted on their mortgages and lost their homes to foreclosure during this difficult economic period.

The court in Lutz stated that the reasons for imposing a constructive trust “typically involve fraud, misrepresentation, bad faith, or overreaching. *Id.*, at 366. Citing Manning v. Mount St. Michaels Seminary of Philosophy and Science, 78 Wn.2d 542, 477 P.2d 635 (1970). There is nothing in the case at bar to support a finding of fraud, misrepresentation, bad faith, or overreaching. For

these reasons, the trial court's reliance on Lutz was misplaced, as it was neither supported by the pleadings nor the evidence.

At the close of the hearing, Dahlgren had a proposed Order which was so different from the court's ruling that it should have "shocked the conscience". The following dialogue took place:

THE COURT: All right. So you have an order now, or do you want to draft an order later?

MR. CLAUSEN: Well, we have an order. I was not comparing it to your comments, so I guess the question would be do you want me to go back and conform this if there are differences, or do you want to go through it now?

THE COURT: You can do it right now. I'll go in the back and let you folks look over the order. We might as well get it done and save a few bucks.

MR. CLAUSEN: Okay. Great. RP 18.

A reasonable interpretation of this dialogue is that the trial court was more concerned about the convenience of Dahlgren than the rights of Paulite. In any event, the record suggests that counsel took his proposed Order to the back of the courtroom to "conform" it to the court's ruling, after which it was presented to the court.

The proposed Order, in its original form, was devoid of any handwritten additions or deletions, and was consistent with what Dahlgren had pled in his Amended Complaint. The handwritten

changes were substantial, and advanced a theory which had never been advanced by Dahlgren prior to this hearing:

Paulite's refusal to cooperate and hold Dahlgren harmless were wrongful and led to her unjust enrichment. CP 31.

Paulite's retention of the property under these circumstances constitutes unjust enrichment. CP 32.

Paulite's conduct shocks the conscience + violates her (*unintelligible*) duty to her ex-spouse (*In re Lutz*). CP 32.

Paulite's conduct is unconscionable and justifies the imposition of a constructive trust. CP 34.

...a remedy for Paulite's unjust enrichment. CP 34.

The Court relies in particular on the decision in *In re Lutz*. CP 34.

The trial court ended up ruling on two separate issues: first, it granted a constructive trust in favor of Dahlgren on the theory of unjust enrichment, and; next, it found in favor of Dahlgren on the limited issue of liability for damages, while preserving the determination of amount of damages for a later time. It is Paulite's contention that the trial court erred when deciding both issues.

- 1. The trial court erred in awarding a partial summary judgment in favor of Dahlgren on the basis of unjust enrichment, in that this cause of action was not previously pled; the net effect of the trial court's ruling was to allow Dahlgren to amend his complaint against Paulite without leave of court and without proper notice to Paulite.**

Paulite understands that Washington is a notice pleading state, which merely requires a simple, concise statement of the claim and relief sought. Rule CR 8(a)(1). However, a complaint must at least “apprise the defendant of the nature of the plaintiff’s claims and the **legal grounds** upon which the claims rest.” Molloy v. Bellevue, 71 Wash.App. 382, 385, 859 P.2d 613 (1993), review denied, 123 Wash.2d 1024, 875 P.2d 635 (1994). “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” Lewis v. Bell, 45 Wash.App. 192, at 197, 724 P.2d 425 (citation omitted); Molloy v. City of Bellevue, *supra*. Although inexpert pleading is permitted, insufficient pleading is not. Dewey v. Tacoma School District, 95 Wash.App. 18, at 23, 974 P.2d 847 (1999).

The legal grounds which are used to support a claim for a constructive trust “typically involve fraud, misrepresentation, bad faith, or overreaching”. In re the Marriage of Lutz, *supra*, at 366. Other grounds include, but are not limited to, mistake, duress, coercion, and undue influence. James M. Fischer, *Understanding Remedies*, Second Edition (2006). A party should not be required to guess against which claims they would have to defend. Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004).

As stated previously, Dahlgren's cause of action against Paulite is as set forth in "Plaintiff's Amended Complaint for Damages, Injunctive Relief and Appointment of Trustee/Receiver", and Section VII, Count 5 reads "Breach of Property Settlement Agreement, Decree of Divorce and Covenant of Good Faith and Fair Dealing".

Conspicuously missing from Plaintiff's Amended Complaint is the term "unjust enrichment". Likewise, the *proposed* Partial Summary Judgment Order submitted by Dahlgren to the trial court in anticipation of the October 2011 hearing was also devoid of any mention of unjust enrichment.

Absent express language of unjust enrichment, inquiry then turns to whether the facts as alleged by Dahlgren would support an unjust enrichment claim, and provide to Paulite the "fair notice" to which she was entitled.

Washington Courts have held that a claim for unjust enrichment consists of three elements: (1) a plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge or appreciation of the benefit, and (3) the defendant's accepting or retaining the benefit without the payment of its value is inequitable under the circumstances of the case. Young v. Young, 164

Wash.2d 477, 191 P.3d 1258 (quoting Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wash.App. 151, 159–60, 810 P.2d 12, 814 P.2d 699, review denied, 117 Wash.2d 1029, 820 P.2d 511 (1991)). These elements are neither stated nor could be reasonably inferred from Dahlgren's Amended Complaint.

For the reasons set forth above, Dahlgren's Amended Complaint failed to give Paulite sufficient notice of the legal grounds upon which Dahlgren's claim for a constructive trust was based. The legal theory of unjust enrichment, which was first interjected by the trial court at the summary judgment hearing, had the effect of amending Plaintiff's Amended Complaint. According to CR 15(a), as Paulite had filed a responsive pleading, Dahlgren could amend his Amended Complaint "only by leave of court", upon motion and notice. The record shows that the Dahlgren neither asked for, nor received, leave of court in this case.

- 2. The trial court erred in awarding a partial summary judgment in favor Dahlgren, as Dahlgren was not entitled to a judgment as a matter of law.**
  - a. The facts as alleged, and the reasonable inferences drawn therefrom in a light most favorable to Paulite, do not support a finding of unjust enrichment.**

The trial court's rationale for awarding a constructive trust to Dahlgren was based on the theory that allowing Paulite to keep the subject property would result in her unjust enrichment.

Addressing the elements of unjust enrichment as set forth in Young v. Young, *supra*: (1) Did Dahlgren confer a benefit upon Paulite? No. The subject property was given to Paulite as a part of a property division. (2) Did Paulite have knowledge or appreciation of the benefit? No. Again, there was no "benefit", as Dahlgren was given an equal share of the community property. (3) Was Paulite retaining the benefit *inequitable* under the circumstances of the case? No. While allowing Paulite to keep the subject property under these circumstances would have been inequitable, that is not the issue in this case. Rather, the issue framed by Dahlgren's election of remedies is whether allowing Paulite to keep the **equity** in the subject property under these circumstances would have been inequitable. The answer to this inquiry is again no, for the reasons which follow.

**b. Dahlgren failed to prove the damages element in its claim against Paulite.**

The remedy chosen by Dahlgren was designed to claim Paulite's equity in the subject property. It wasn't enough to show

non-payment of the loan. To the contrary, his election of remedies resulted in a higher level of proof in the form of damages. Absent a clear and compelling showing of damages, the imposition of a constructive trust would be totally improper.

The trial court never once discussed the issue of damages, either by amount or causation, in rendering its opinion. The only reference to damages is as set forth in the October 2011 Order as drafted by Dahlgren, which reads as follows:

As a result of PAULITE'S actions, DAHLGREN has been damaged and had his business put in jeopardy. He may have lost business, or may lose future business, through no fault of his own, and with no ability to prevent such losses. The losses to DAHLGREN as a result of PAULITE'S breach are difficult to ascertain and cannot be completely remedied by money damages. CP 33.

The language of this Order was ambiguous at best as to what was meant by "...DAHLGREN has been damaged...". Whether this language refers to damage to reputation, damage to Dahlgren's credit report, or perhaps to other forms of compensatory, nominal, or punitive damages, is not certain.

Also ambiguous was the phraseology "As a result of PAULITE'S actions...". Herein lies the causation element of damages. The degree and extent of causation could run the spectrum from minimal to the sole cause, and everything in

between. What is *unambiguous* is that the Order stopped short of saying that any damages to Dahlgren were the ***proximate result*** of Paulite's breach.

A final point of ambiguity in the Order is the phraseology "He may have lost business, or may lose future business, ...". The word "may" is an auxiliary verb used to express possibility. Dictionary.com. <http://dictionary.reference.com> (1 February 2014). Using this commonly accepted definition, the most that can be taken away from the Order is that it was *possible* that Dahlgren lost business. Most remarkably, Dahlgren's damage claim is based upon lost income resulting from lost business! Without a finding that Dahlgren actually lost any business as a result of Paulite's breach, there can be no finding that Dahlgren lost any business *income*; and with no finding of lost business income, there can be no damages.

It is the position of Paulite that Dahlgren's proof of damages at the summary judgment hearing was insufficient to sustain an award of summary judgment on the issue of liability. In the unlikely event that Dahlgren sufficiently established that he was damaged, he did not prove that the damages were proximately caused by Paulite, or that the damages were foreseeable.

Reviewing this case de novo, this court engages in the same inquiry as did the trial court. After such a review, this court will see that Dahlgren did not offer any evidence that existing clients of Dahlgren's company, Jet Set Labs (JSL) either terminated the services of JSL, or failed to renew a contract with JSL, because of Dahlgren's credit report. This court will also see that Dahlgren did not offer any evidence that prospective clients of JSL refused to hire JSL because of Dahlgren's credit report. As such, Dahlgren did not offer any direct evidence of lost business or the income derived therefrom as a result of Paulite's breach of the Property Settlement Agreement.

Lacking direct evidence, the only way Dahlgren could meet his burden of proof would have been through inferences drawn from circumstantial evidence. It is well settled that all the facts submitted and the reasonable inferences from them are considered in the light most favorable to the nonmoving party. Atherton Condo. Apartment–Owners Assoc. Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990). If all inferences were considered in the light most favorable to Paulite, it is clear that summary judgment should not have been entered.

**c. Dahlgren failed to prove the causation element in its claim against Paulite.**

Proximate Cause: Under Washington law, a “breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. Northwest Mfrs. V. Department of Labor, 78 Wn.App. 707, 712, 899 P.2d 6 (1995). Even assuming, for the sake of argument only, that a finding of damages could somehow be justified, for Dahlgren to prevail, the court would have to find that the actions of Paulite (i.e. the nonpayment of a debt) proximately caused Dahlgren’s loss of business income.

The term “proximate cause” means a cause which in a direct sequence, unbroken by any superseding cause, produces the event complained of and without which such event would not have happened. Stoneman v. Wick Constr. Co., 55 Wash.2d 639, 349 P.2d 215 (1960). Washington Pattern Jury Instructions: Civil 15.01.

Proximate cause is composed of two distinct elements: (1) cause in fact, and (2) legal causation. Baughn v. Honda Motor Co Ltd, 107 Wash.2d 127, 727 P.2d 655 (1986). Both elements must be satisfied. Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wash.2d 747, 818 P.2d 1337 (1991).

Cause in fact refers to the “but for” consequences of an act, or the physical connection between an act and the resulting injury. Hartley v. State, 103 Wash.2d 768, 778, 698 P.2d 77 (1985).

Legal causation rests on policy considerations as to how far the consequences of a defendant's acts should extend. Colbert v. Moomba Sports, 163 Wn.2d 43, 176 P.3d 497 (2008). The focus is on whether the connection of the ultimate result and the act of the breaching party is too remote to impose liability. Schooley v. Pinch's Deli Market, Inc. 134 Wn.2d 468, 951 P.2d 749 (1998).

In the case at bar, to hold in favor of Dahlgren as to the issue of proximate cause, there would first have to be a finding “but for” Paulite’s breach of the property settlement agreement, Dahlgren would not have lost business and the income derived therefrom. As this could only be done by inference, and as all inferences are considered in the light most favorable to Paulite, Dahlgren did not meet the “but for” test. Even if the “but for” test were met, damages for lost business would be too remote to meet the policy considerations of legal causation.

Paulite contends that the determination of proximate cause was more appropriately left for trial, instead of being resolved at the summary judgment phase. To be determined on summary

judgment, Washington courts have held that the evidence must be “undisputed and only one reasonable conclusion is possible.” Hartley v. State, *supra*, at 775. LaPlante v. State, 85 Wash.2d 154, 159, 531 P.2d 299 (1975). Similarly, determination on summary judgment is appropriate “when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.” Bordynoski v. Bergner, 97 Wash.2d 335, 340, 644 P.2d 1173 (1982) (quoting Mathers v. Stephens, 22 Wash.2d 364, 370, 156 P.2d 227 (1945)).

It is the contention of Paulite that whatever facts the trial court would have relied on to find causation were capable of several conclusions, and capable of differences of opinion. As such, determination of proximate cause was not appropriate on summary judgment.

Foreseeability: The law is well settled that damages for breach of contract are not recoverable for a loss that the breaching party did not have reason to foresee as a probable result of the breach when the contract was made. Restatement (Second) of Contracts, Section 351; Hadley v. Baxendale, 9 Exch. 341, 156 Eng.Rep. 145 (Court of Exchequer 1854).

In this case, Dahlgren has not submitted any evidence to establish Paulite had knowledge of Dahlgren's business at the time the property settlement was entered into (2007), especially as relates to the potential impact damage to his credit report could have on his business. As such, damages for lost business income were not recoverable in that Paulite did not have reason to foresee such damages as a probable result of her breach when the agreement was made.

Paulite is aware of CR 56(c) which allows the trial court to rule on the issue of liability alone, although a genuine issue as to the *amount* of damages may have existed. Issues of causation and foreseeability certainly go to the issue of liability, and were not resolved in Dahlgren's favor at the summary judgment hearing. Paulite contends that Dahlgren still had to prove that he suffered actual damages – regardless of amount. This was a burden Dahlgren could not and did not carry. It bears repeating that the trial court made no finding that Dahlgren lost business as a result of Paulite's breach, even though Dahlgren's claim was for lost income resulting from lost business. Absent such a finding, there could be no damages for lost income.

In summary, as to the issue of damages, Paulite shows to this court that Dahlgren's proof at the summary judgment hearing failed to establish that he sustained any damage, regardless of amount, as a result of Paulite's breach. Even if there was a sufficient showing of damages, there was insufficient proof that such damages were proximately caused by Paulite's breach, and/or that any damages Dahlgren sustained were foreseeable.

With the issue of damages left unresolved, an award of a constructive trust, which was based in whole or in part thereon, was inappropriate at this stage of the proceedings. Also, with the issue of damages left unresolved, a partial summary judgment as to liability was also inappropriate.

#### **B. AWARD OF ATTORNEY FEES, MARCH 2013**

The first time Paulite received any notice that the subject property had been sold was on Friday, March 1, 2013. It was at this time that Paulite received notice that Dahlgren's Attorney had scheduled a hearing for March 5, 2013, to approve the sale and apportion the proceeds therefrom. CP 40. On March 4, 2013, given one day to respond, Paulite filed a Response to Plaintiff's Limited Objection. This hearing was ultimately postponed by the

trial court until Monday, March 11, 2013, but the court set a deadline for submitting briefs as Friday, March 8, 2013. On March 6, 2013, Paulite requested additional time to respond to the matters pending before the court; this request was rejected without comment. Put in the unenviable position of either responding within the unbelievably short deadline set by the trial court or risk being defaulted out, Paulite scrambled to put together a Memorandum attempting to address the court's concerns.

On March 11, 2013, without oral argument, the trial court entered an order authorizing the Receiver to close the sale of the subject property. As to the proceeds from the sale, the court made the following Order:

Plaintiff Dahlgren is entitled to full reimbursement of his attorney fees in the total amount of \$176,891.57, as reimbursement for Payments made to Enhance the Collateral which shall be charged against and paid out of the receivership, and shall be entitled to a first and paramount lien against the Property in the same manner as the Receiver's fees and costs. CP 66.

No proceeds remained after the payment of Dahlgren's attorney fees, rendering as moot any claim Paulite had in or to her equity/homestead.

- 3. The trial court erred when it summarily awarded more than \$175,000 in attorney fees to Dahlgren.**

As to the amount of an award for attorney fees, this is reviewed for an abuse of discretion. Mahler v. Szucs, 135 Wash.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). An abuse of discretion is “a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.” Int’l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir.1993). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Sintra, Inc. v. City of Seattle, 131 Wash.2d 640, 664, 935 P.2d 555 (1997).

Fee decisions are entrusted to the discretion of the trial court, but the appellate court will exercise its supervisory role to ensure that discretion is exercised on articulable grounds. Mahler v. Szucs, *supra*.

**a. The trial court erred in awarding attorney fees as Dahlgren was not a prevailing party.**

As to the issue of who is a prevailing party, Paulite relies on RCW 4.84.330, which specifically defines the term prevailing party as “the party in whose favor final judgment is rendered.”

The Court of Appeals, and on appeal the Washington Supreme Court, dealt with the issue of “final judgment” in the case

of Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009). The courts noted that the term “final judgment” is not defined in RCW 4.84.330, and found that, in the absence of a statutory definition, this court will give the term its plain and ordinary meaning.” State v. Watson, 146 Wash.2d at 954, 51 P.3d 66 (2002). In ordinary usage, a “final judgment” is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy.” Black’s Law Dictionary 859 (8th ed.2004). See Sleasman v. City of Lacey, 159 Wash.2d 639, 643, 151 P.3d 990 (2007), where a statute is unambiguous, resorting to dictionary is appropriate.

In the case at bar, there remained several issues still in controversy at the time of the March 2013 Order, to include the money judgment portion of Dahlgren’s lawsuit. As such, there had not been a “final judgment” by that time, and an award for attorney fees was premature and inappropriate.

**b. The trial court erred in awarding attorney fees as counsel for Dahlgren failed to establish the attorney fees being requested were reasonable.**

The attorney requesting fees bears the burden of proving the reasonableness of the fees. Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 151, 859 P.2d 1210 (1993) (citing Blum v. Stenson,

465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); In the Matter of the Estate of Morris, 89 Wash.App. 431, 434, 949 P.2d 401 (1998).

As to the quantum of proof needed to support this burden, the court has held that the attorney requesting fees does not meet this burden simply through the submission of fee affidavits or billing records. Nordstrom v. Tampourlos, 107 Wash.2d 735, 733 P.2d 208 (1987); Mayer v. City of Seattle, 102 Wash.App. 66, 10 P.3d 408 (2000).

In the case at bar, Dahlgren' attorneys submitted more than 125 pages in billing records as their sole offer of proof in their claim for attorney fees. It should be noted that nowhere in the information submitted to the court do Dahlgren's attorneys make any reference to their fees being reasonable and/or necessary. Applying the law handed down in Nordstrom and Mayer, *supra*, Dahlgren fell far short of meeting his burden as to reasonableness.

**c. The trial court erred when it failed to perform the appropriate analysis to determine the reasonableness of the fees requested.**

Trial courts must independently decide what represents a reasonable amount of attorney fees, and must take an active role in assessing the reasonableness of fee awards. Courts should not

simply accept unquestioningly fee affidavits from counsel or merely rely on the billing records of the prevailing party's attorney.

Nordstrom v. Tampourlos, *supra*; Mayer v. City of Seattle, *supra*.

The lodestar method has long been the rule in Washington for determining attorney fee awards. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). Courts must apply the lodestar method in calculating an award of reasonable attorney fees. Mayer v. City of Seattle, *supra*; Mahler v. Szucs, 135 Wash.2d 398, 957 P.2d 632 (1998).

Under the lodestar method, the court multiplies the total number of attorney hours reasonably expended by the reasonable hourly rate of compensation. Bowers v. Transamerica, *supra*. In some circumstances, the court may adjust the lodestar fee upward or downward based on a consideration of additional factors. Scott Fetzer Co. v. Weeks, *supra*.

The lodestar calculation, however, does not end the inquiry. See Hensley v. Eckerhart, 461 U.S. 424 (1983). If a plaintiff has achieved only "partial or limited success," this calculation may lead to an excessive amount of fees. *Id.* at 436. "This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* at 436. The court must limit the lodestar to

hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. Bowers v. Transamerica, *supra*.

In the case at bar, it is unclear what, if any, analysis the trial court conducted to determine the attorney fees award. As stated above, Plaintiff's motion was heard without oral argument, and the court signed Plaintiff's proposed Order without modification. The only evidence the trial court had before it when deciding the award for attorney fees was the 125+ pages of attorney billing records, which included every possible billing from the date Dahlgren's attorneys accepted the case in 2010 up until the March 2013 Order.

It is far beyond the scope of this appeal to dissect this stack of attorney billing records with a line-by-line analysis. By way of illustration only, Paulite provides the following examples of attorney fees which the trial court awarded to Dahlgren in the March 2013 Order which, under a lodestar analysis, should have been excluded.

#### Example of Unrelated Work

- Dahlgren's original "Complaint For Damages and Injunctive Relief" was filed against Chase, and did not even name Paulite as a party defendant. In this Complaint Dahlgren

alleges four causes of action, three of which have nothing to do with the sale of the subject property and enforcement of the PSA: Count 1 - Breach of Contract & Promissory Estoppel; Count 3 - Consumer Protection Act; and Count 4 – Fair Debt Collection Practices Act. Dahlgren spent a great deal of time, and thousands of dollars in attorney fees, pursuing money damages against Chase. The facts that Dahlgren relied on in his action against Chase are separate and distinct from those facts which gave rise to action against Paulite for enforcement of the PSA. This lawsuit against Chase resulted in a money settlement in favor of Dahlgren of a substantial amount.

- Also included in the award for attorney fees was work performed by Dahlgren's attorneys regarding a claim brought by Paulite against Dahlgren for failure to disclose assets in the PSA.
- Many of the tactics of Dahlgren's attorney(s) throughout this litigation went above and beyond the zealous representation of a client. In response thereto, Paulite filed complaints with the Washington State Bar Association ("WSBA") against both Attorney Mark Clausen and Attorney Morgan

Blackbourn. Included in the March 2013 Order was an award for attorney fees of approximately \$10,000 for time spent in responding to the WSBA. To Paulite's knowledge, Dahlgren's attorneys have no independent cause of action against Paulite for filing these complaints. In addition, it is probable that Dahlgren would not be responsible to pay for time his attorney(s) spent in defending claims of their unethical conduct.

Examples of Unrelated Work – No Final Judgment Entered

- Dahlgren's subsequent Amended Complaint brought Paulite into the lawsuit as a party defendant. In this Amended Complaint Dahlgren alleged a cause of action for money damages for lost business/income which resulted from damages to Dahlgren's credit report from derogatory items submitted to credit reporting agencies by Chase. Lost income/business is totally unrelated to the enforcement of the PSA. Equally as important, as of the March 2013 Order, Dahlgren had not prevailed on this claim.
- Dahlgren spent a substantial amount of time pursuing an Adversary Proceeding in Paulite's Bankruptcy, trying to except from discharge the money damages portion of

Dahlgren's superior court lawsuit. Under Bankruptcy law, such a debt is subject to discharge. As of the March 11 Order, Dahlgren had not prevailed in his attempt to get this debt excepted from discharge, yet attorney fees were awarded just the same.

#### Examples of Unnecessary or Unproductive Work

- Dahlgren's attorneys billed thousands of dollars to pursue contempt charges against Paulite, which Paulite successfully defended against. The net effect of the March 2013 Order was to award attorneys fees to the Dahlgren for this unsuccessful effort.
- Dahlgren's attorneys billed for work relating to extending a writ of restitution. This work was the result of mistakes made by the attorneys when they mistakenly omitted appropriate language within the original writ. It is unconscionable to think that Paulite, or even Dahlgren for that matter, should bear the cost of mistakes made by his attorney(s).

The unmistakable conclusion that must be drawn from the trial court's ruling in the case at bar is that the trial court's analysis as to the attorney fee award was cursory at best, and non-existent at worst. It is clear that the lodestar method was never considered.

It is crystal clear that all of Dahlgren's attorney fees had little to do with "payments made to enhance the collateral" as stated in paragraph "7" of the March 11 Order. Beyond much doubt, the trial court's inquiry started and ended with the billing records submitted by Dahlgren's attorney.

**d. The trial court erred in failing to make an adequate record for review of its fee award decision, whether through findings of fact and conclusions of law, or otherwise.**

Trial courts must create an adequate record for review of fee award decisions. Mahler v. Szucs, *supra*. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Smith v. Dalton, 58 Wash.App. 876, 795 P.2d 706(1990); Rhinehart v. Seattle Times, 59 Wash.App. 332, 798 P.2d 1155 (1990); Bentzen v. Demmons, 68 Wash.App. 339, 842 P.2d 1015 (1993); State Farm Mutual Auto Insurance Co. v. Johnson, 72 Wash.App. 580, 871 P.2d 1066 (1994); Mahler v. Szucs, *supra*; Mayer v. City of Seattle, *supra*.

The appellate court in Mahler, *supra*, identified the limitations imposed on it by an inadequate record created in the trial court:

We cannot discern from the record if the trial court thought the services...were reasonable or essential to the successful

outcome. We do not know if the trial court considered if there were any duplicative or unnecessary services. We do not know if the hourly rates were reasonable. Id at 652.

Quoting from Mahler, “not only do we affirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record. Id at 652.

In the case at bar, the only “record” that exists is the Order prepared by Dahlgren’s attorneys and approved by the trial court without oral argument. Nowhere is there a finding as to reasonableness and necessity by the trial court. Nowhere is there any indication that the trial court did any type of assessment or evaluation as to the reasonableness and necessity of attorney fees prior to making the award. To the contrary, every indication is that the trial court “rubber stamped” Dahlgren’s proposed Order without any inquiry at all.

### **C. SUMMARY JUDGMENT HEARING, APRIL 2013**

In his motion for summary judgment, Dahlgren argued “The court has already held that Paulite’s actions have caused damage to Dahlgren.” This argument was repeated at the summary judgment hearing. Paulite can only surmise that this argument was based upon the trial court’s Partial Summary Judgment Order

entered in October 2011. Dahlgren concluded that all that was left to be decided at the April 2013 summary judgment hearing was the *amount* of the damages.

At the close of the hearing the trial court entered a partial summary judgment Order in favor of Dahlgren, awarding him damages in the amount of \$56,306. No additional evidence as to causation was submitted by Dahlgren at this hearing.

Paulite is unsure how, why, or *if* the trial court ever found at the October 2011 hearing that Paulite's actions proximately caused the damages of which Dahlgren complained. A review of the transcript of the October 2011 hearing is devoid of any language from the trial court having to do with damages, either as to amount or as regards causation.

As argued previously, the trial court's ruling in October 2011 was insufficient to establish liability; lacking any additional evidence at the April 2013 hearing regarding proximate causation and foreseeability, the trial court erred in reaching any decision on the amount of damages.

Unlike the October 2011 summary judgment, Paulite opposed Dahlgren's April 2013 motion for summary judgment, and supported this opposition with a declaration. The facts contained

within this declaration went to the issue of proximate causation, in Paulite's desperate attempts to show the existence of other factors which could have affected the outcome of this case.

Paulite is aware of the legal term "dictum", which is "a view expressed by a judge in an opinion on a point not necessarily arising from or involved in a case *or necessary for determining the rights of the parties.*" Findlaw Legal Dictionary. <http://dictionary.findlaw.com> (1 February 2014).

While the trial court offered "lip service" to the issues raised in Paulite's declaration, such would appear to be purely dicta, as opposed to a holding, as the trial court had already ruled on the issue of causation and liability in October 2011.

**4. The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Dahlgren did not meet its initial burden of showing the absence of an issue of material fact.**

This is an action for damages arising out of a breach of a property settlement agreement. It is the contention of Dahlgren that Paulite's breach caused damage to his credit report, which in turn caused him to lose business, which in turn caused him damages in the form of lost income derived from the lost business.

To prove his case, Dahlgren submitted evidence as to his credit score, denials of extensions of credit, and tax returns showing a decline in adjusted gross income. Dahlgren did not offer any evidence that *existing clients* of Dahlgren's company, Jet Set Labs (JSL), either terminated the services of JSL, or failed to renew a contract with JSL, because of Dahlgren's credit report. Nor did Dahlgren offer any evidence that *prospective clients* of JSL refused to hire JSL because of Dahlgren's credit report.

The legal term "direct evidence" has been defined as "evidence that if believed immediately establishes the factual matter to be proved by it without the need for inferences." Findlaw Legal Dictionary. <http://dictionary.findlaw.com> (1 February 2014). Absent any evidence from existing or prospective clients, Dahlgren could not and did not offer to the trial court any direct evidence of lost business, and could not and did not offer to the trial court any direct evidence as to lost business income.

The legal term "circumstantial evidence" has been defined as evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue *can be reasonably inferred*. Findlaw Legal Dictionary. <http://dictionary.findlaw.com> (1 February 2014). The evidence

submitted by Dahlgren in support of his motion for summary judgment – credit scores, denials of credit, and tax returns, was circumstantial in nature. As such, Dahlgren attempted to meet his burden of proof through inferences drawn from circumstantial evidence.

As stated repeatedly throughout this brief, it is well settled that all reasonable inferences from the evidence is to be considered in the light most favorable to the nonmoving party, and any doubts about the existence of a genuine issue of material fact are resolved against the moving party. Atherton Condo. Apartment–Owners Assoc. Bd. of Dirs. v. Blume Dev. Co., *supra*.

If all inferences were considered in the light most favorable to Paulite, and any doubts as to the existence of a material fact were resolved against Dahlgren, there is no way that a partial summary judgment for damages should have been entered in favor of Dahlgren.

**5. The trial court erred when it awarded summary judgment in favor of Dahlgren, in that Paulite, by and through her Declaration, established the existence of material fact.**

Paulite submitted evidence in the form of her sworn declaration which created plausible inferences that Dahlgren's lost

business income was proximately caused by factors unrelated to Dahlgren's credit report.

#### **Evidence as to Brian Tosch.**

Mr. Tosch is a partner with Dahlgren in JSL. If Dahlgren's credit was a factor in obtaining or retaining business, it would logically follow that the credit of Mr. Tosch would also be relevant. Paragraphs 2(a) and 2(b) of Paulite's declaration reference statements made by Dahlgren to Paulite or in her presence about Mr. Tosch, about how Mr. Tosch was known to Dahlgren as having very bad credit.

#### **Evidence as to Alstom and Other Competitors**

Paragraphs 2(c) and 2(d) of Paulite's declaration reference statements made by Dahlgren to Paulite or in her presence about certain events which could result in lost business to Dahlgren. Paulite submitted this evidence as an admission of a party-opponent, and offered it to prove the existence of other factors which could negatively impact Dahlgren's business income.

#### **Information Derived from Official Government Publications**

Paragraph 3 of Paulite's declaration sets forth factual information derived from official government publications, such as the average U.S. credit score, the reduction in credit limits, and

tightened lending standards. These were all issues raised by Dahlgren.

Washington courts, in dealing with public records, have ruled that such reports are admissible, and an exception to hearsay, as long as they are prepared by a public official and contain facts, as opposed to conclusions or expressions of opinion. Steel v. Johnson, 9 Wash.2d 347, 115 P.2d 145 (1941). Weather bureau records are but one example of public records held admissible. Anderson v. Hiker, 38 Wash. 632, 80 P. 848 (1945)

As to the relevancy of this information, Dahlgren attempts to attribute lost business/income to his bad credit score of 679. In response, Paulite cited public record information that the average credit score at that time in the U.S. was 651. Dahlgren also alleged that he lost credit usage. In response, Paulite cited public record information about the prevalence of banks reducing credit limits and tightening lending standards at that time. Finally, Paulite cited public record information showing the unemployment rate at that time, the number of small business that closed their doors at that time, and the number of consumer and business bankruptcies at that time.

While Dahlgren conveniently blames Paulite for his business woes, the evidence submitted by Paulite, and the inferences drawn therefrom, allow for other factors to have played a “proximate” role in causing damage to Dahlgren. As such, other facts existed which could affect the outcome of this case, and the entry of a summary judgment was improper.

**6. The trial court erred in awarding a summary judgment in favor of Dahlgren, in that reasonable minds could have reached more than one conclusion as to the amount of damages.**

Applying Washington law, a motion for summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” Lewis v. Bours, 119 Wn.2d 667, 669, 835 P.2d 221 (1992), quoting Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990)). Dahlgren relied solely on inferences drawn from circumstantial evidence to prove the amount of damages. These inferences, when viewed in a light most favorable to Paulite, are capable of several conclusions. As such, the award of a summary judgment was improper.

**7. The trial court erred in allowing extraneous language regarding “setoff” to be included as a part of the summary judgment Order.**

Dahlgren's Motion for Summary Judgment was purposely vague when it referenced Paulite's "claim for damages." As Dahlgren well knew, this "claim" arose from Dahlgren fraudulently concealing assets from Paulite in the property settlement agreement. Paulite's claim was totally unrelated to the matters before the trial court, and would not be heard by the trial court.

Dahlgren incorporated the following language into the Summary Judgment Order:

The Court also finds that Dahlgren is entitled to a setoff of damages resulting from 2011 and 2012 wage loss and loss of credit capacity, to be proven in the event Paulite pursues any alleged damages from the property settlement agreement.

Dahlgren filed his Amended Complaint against Paulite in February of 2011. Dahlgren's income for 2011 and 2012 has not been pled or proved in any pleadings in the trial court, nor was it relevant to any matter properly before the trial court.

Through the incorporation of extraneous and inappropriate setoff language in the Order for Summary Judgment, Dahlgren successfully but improperly maintained jurisdiction with the trial court. The trial court erred when it did not strike this language from the partial summary judgment Order.

## CONCLUSION

Paulite has brought into questions three separate rulings of the trial court. First there was the October 2011 summary judgment hearing, where the Order was replete with so many changes that it is almost unintelligible. Next there was the March 2013 Order, which hastily awarded Dahlgren over \$176,000 in attorney fees. This Order was supported by nothing more than billing statements, was made without any finding of reasonableness, was made without utilizing any discernible analysis, and was made without any record. Finally, there was the April 2013 summary judgment hearing, which carried forward errors made in the October 2011 hearing, but still awarded Dahlgren \$56,306 in damages.

Paulite asks the Court of Appeals to reverse each of the three rulings identified in this appeal, and to remand the matters back to the trial court for further proceedings. She deserves her day in court, she deserves to be heard, but most of all, she deserves that her case be fairly decided.

Respectfully submitted this 28<sup>th</sup> day of February, 2014.

  
\_\_\_\_\_  
Omega Paulite, Appellant, Pro Se  
P.O. Box 7265  
Bellevue, WA 98008

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on February 28, 2014 I served a true and correct copy of "OPENING BRIEF OF APPELLANT" by hand delivering same to the following:

Clausen Law Office  
Attn: Mark A. Clausen  
Attn: Morgan Blackburn  
701 5<sup>th</sup> Avenue, Suite 7230  
Seattle, WA 98104  
*Attorneys for Respondent*

Signed in Bellevue, WA this 28<sup>th</sup> day of February, 2014.

  
\_\_\_\_\_  
Omega Paulite, Appellant, Pro Se

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 FEB 28 AM 10:22