

70895-3

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No. 70895-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

OMEGA P. PAULITE,
Defendant Appellant,

v.

Robert W. Dahlgren
Plaintiff Respondent

and

NORTHWEST TRUSTEE SERVICES, INC., and CHASE HOME
FINANCE LLC, successor by merger to CHASE MANHATTAN
MORTGAGE CORPORATION, successor by merger to CHASE
MORTGAGE COMPANY, a national banking corporation;
Defendants.

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RESPONDENT'S BRIEF

Mark A. Clausen, WSBA # 15693
Morgan R. Blackburn, WSBA #42179
Attorneys for Respondent
CLAUSEN LAW FIRM, PLLC
701 Fifth Avenue, Suite 7230
Seattle, Washington 98104
206-340-1550
mclausen@clausenlawfirm.com
mblackbourn@clausenlawfirm.com

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I. INTRODUCTION

Respondent Robert Dahlgren and Petitioner Omega Paulite were previously married. In a property settlement agreement fully executed and adopted by their divorce decree, Paulite agreed to take responsibility of the martial residence, including paying for and assuming liability for the mortgage note. Dahlgren agreed to execute a quit claim deed to Paulite, which he did. Paulite did not follow the property settlement agreement. She did not remove Dahlgren from liability for the note. She did not pay the mortgage. She did not defend and indemnify Dahlgren for her breaches of the agreement.

Dahlgren brought this action to stop the damage being done to his credit. At every turn in the litigation, Paulite has refused to follow court order. Instead she caused even more litigation in various jurisdictions. Even when Dahlgren had prevailed on every issue, Paulite continues to object and brought this appeal.

This appeal presents simple issues, which should not be lost in the complex and inefficient procedural context. The first issue concerns summary judgment when the nonmoving party has offered no evidence or only speculative evidence not based on personal knowledge. Paulite failed

to come forward with admissible facts to challenge a motion for summary judgment.

The second issue concerns the lower court's award of attorney's fees to Dahlgren. Dahlgren was entitled to attorney's fees, whether by prevailing in an action to enforce a contract with an attorney's fees clause; by incurring such costs and fees as an administrative expense in a receivership matter; by creating a common fund that benefitted creditors by getting property sold; and by the fact that the ruling simply enforced a prior order that is not appealed here. The amount of the fees awarded was reasonable given the tortured process that Paulite herself brought about as she attempted to subvert the Court's original order that Subject Property be sold and to use the Bankruptcy Court System to drag out the proceedings.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Assignment 1. Did the lower court err in granting partial summary judgment on liability for breach of a property settlement agreement when the motion was unopposed; and the validity of the agreement and the fact of breach were and are undisputed?

Assignment 2. Did the lower court commit reversible error by finding unjust enrichment as a basis for imposing a constructive trust, when the appellant does not assign error to the imposition of a constructive trust?

Assignment 3. Did the lower court abuse its discretion by awarding attorney's fees to a successful litigant forced to participate in four superior court and four bankruptcy court matters, when the lower court refused to award all of the fees requested and the fees not awarded are significantly more than the fees challenged on appeal?

Assignments 4-7. Did the lower court err in granting summary judgment on damages when the non-moving party presented no competent, admissible evidence establishing a material fact?

III. STATEMENT OF THE CASE

A. THE PARTIES' MARRIAGE ENDS IN DIVORCE, WITH PAULITE RECEIVING THE HOUSE AND AGREEING TO ASSUME SOLE RESPONSIBILITY FOR THE NOTE AND DEED OF TRUST.

Respondent-Plaintiff Robert Dahlgren and Appellant-Defendant Omega Paulite were married. Clerk's Papers ("CP"), p. 154. They owned a home at 15959 N.E. 1st Street (the "Subject Property") in Bellevue. *Id.* They borrowed money from Chase Home Finance ("Chase") to buy the home. CP, p. 154-155.

Dahlgren and Paulite decided to divorce in 2007. Their attorneys drafted a Property Settlement Agreement ("PSA"), dated July 31, 2007. CP, p. 177-193. The PSA called for Paulite to take over sole ownership of the house, to assume sole liability for the Chase debt, and for Dahlgren to

be released from liability. CP, p. 179, 182-183, 189, 191-192. The PSA was incorporated into the Decree of Dissolution filed on January 30, 2008. CP, p. 180. Dahlgren executed a quit claim deed in favor of Paulite on November 29, 2007. CP, p. 194, 196-200. The house had substantial equity at the time Dahlgren signed it over to Paulite. CP, p. 139, 155.

Paulite took no action to assume the Chase debt. In October 2008, Dahlgren contacted Chase to see if he had been released from liability. *Id.* He had not. *Id.* He asked Chase about the process for being removed from liability. *Id.* He was told to fill out the form, enclose a copy of the Dissolution Decree, and pay a fee for processing. *Id.* He followed this procedure. *Id.* In 2009, Dahlgren called Chase to check on his release from liability. *Id.* He was told that Chase had sent an application to Paulite to fill out but she had not returned it. *Id.* As a result, Chase did not release Dahlgren from liability. *Id.*

In late 2009, Dahlgren learned that Paulite had defaulted on the loan, and that Chase had reported the default negatively on Dahlgren's credit. CP, p. 139,215. Chase also started nonjudicial foreclosure proceedings which further damaged his credit. CP, p. 140. Dahlgren brought this action to stop the foreclosure sale. *Id.* After the lawsuit was filed, the sale date was stricken. CP, p. 12.

The negative credit rating was a great concern for Dahlgren. CP, p. 140. He works as a consultant on the nation's power grid, and a low credit rating can disqualify him from being awarded work. *Id.* Dahlgren's Credit Rating was above 800 before Paulite differed and declined to the mid-600s after the initiation of trustee's sale. CP, p. 655, 658-663. Some of his credit lines were reduced or cancelled altogether. CP, p. 215. As a result, he was unable to retain clients and his company was not able to bring in as much revenue. CP, p. 215-217. Dahlgren was also unable to purchase a home or expand his business, among other things. CP, p. 216, 657

B. DAHLGREN IS FORCED TO SUE PAULITE TO CLEAR THE NEGATIVE CREDIT REPORTING FROM HER DEFAULT.

On February 11, 2011, Dahlgren amended his lawsuit to sue Paulite for breach of the PSA and Decree; for imposition of a constructive trust and/or a receivership to sell the Subject Property and pay off Chase. CP, p. 9-18. On July 7, 2011, Paulite filed an answer containing only a general denial. CP, p. 19. She raised no affirmative defenses and made no counterclaim. *Id.* She listed a PO Box as the place of service. *Id.*

On September 7, 2011, Dahlgren filed a "Motion for Partial Summary Judgment Establishment of a Constructive Trust or in the Alternative, to Appoint of a Receiver." CP, p. 201-213. The motion was noted for October 7, 2011 and sent to Paulite at the PO Box she listed in

her answer. Sub No. 35, Affidavit of Service of Plaintiff's Motion for Partial Summary Judgment, to be supplemented when Index is provided. The title of the motion clearly stated that Dahlgren was moving for partial summary judgment. CP, p. 201. It also asked the Court to allow Dahlgren to take control of the Subject Property so that it could be sold. CP, p. 201-213. The papers also included an order with detailed findings and conclusions, which would be necessary to support the constructive trust and/or receiver holding. CP, p. 29-36.

Paulite did not respond prior to the hearing. CP, p. 37-39. She did not appear at the hearing. Verbatim Report of Proceedings ("RP"), October 7, 2011, p. 13. The Court granted Dahlgren's motion, but made a number of changes to the language of the Findings and Conclusions to clarify the bases for her ruling on the imposition of a constructive trust. VP, October 7, 2011, p.14-18. The partial summary judgment relief required a finding only of the validity of the Property Settlement Agreement and Paulite's breach of it, facts that were not and are not in dispute.¹ *Id.* see also, CP, p. 201-213. The summary judgment was only for liability. *Id.* Dahlgren made no request for any finding of the amount of

¹ Paulite has referred vaguely to an unstated reason she took no action to assume the debt or make payments, but never pleaded such a defense in her answer or presented any facts supporting it in any papers filed with the Court.

damages and the only evidence offered was to support the showing for injunctive relief. *Id.*

On October 11, 2011, Paulite filed what she termed a Reply, but she noted nothing for hearing. CP, p. 37-39. Paulite made no showing of the reason for her late response. *Id.* She offered no substantive evidence to dispute the factual allegations Dahlgren had made. *Id.* She remained in possession of the Subject Property despite the Court's order that she leave and stop her control of it.

C. PAULITE'S 2011 CHAPTER 13 BANKRUPTCY FILING IS DISMISSED.

Dahlgren gave Paulite a 20-day notice to vacate on the same day the Motion for Partial Summary Judgment was granted, October 7, 2011. CP, p. 266. She sought no relief in superior court. CP, p. 230. Instead, 20 days later, she hired an attorney and filed for Chapter 13 bankruptcy. CP, p. 267. Dahlgren appeared in the action and filed an adversary bankruptcy action as well. CP, p. 270-273. Dahlgren moved for relief from stay to prepare the property for sale, which Paulite opposed. *Id.* On February 8, 2012, the bankruptcy court granted Dahlgren's motion, but stayed its application under March 21, 2012 to give Paulite more time to remove Dahlgren from the Chase obligation. *Id.*

Paulite did nothing to remove Dahlgren. On March 21, 2012, the bankruptcy court ordered Paulite's case dismissed, and the dismissal occurred on April 6, 2012. CP, p. 274.

Dahlgren posted and sent another Notice to Vacate the day after the Bankruptcy Court ordered her case dismissed, March 22, 2012. CP, p. 275-277. Paulite did not vacate.² CP, p. 231. Instead, during this time it appears that she entered into written leases of the Subject Property with her family and innocent third parties. Sub No. 130, Order To Issue Writ of Execution. On April 6, 2012, Dahlgren brought an unlawful detainer action. CP, p. 282. On April 17, 2012, Paulite's new attorney filed an answer in the unlawful detainer action under a different cause number. CP, p. 283-287. Dahlgren requested a show-cause hearing for May 10, 2012. CP, p. 291. Dahlgren also asked Judge Prochnau for a CR 54(b) finding for the order granting partial summary judgment. Sub No. 101, Plaintiff's CR 54(b) Motion for Determination of no delay re: Summary Judgment. Paulite did not oppose it, and the Court granted it on May 3, 2012. Sub No. 110, Order Granting 56(b) Motion Re: Summary Judgment. Paulite has assigned no error to this order.

² On or about March 30, 2012, a letter was also sent to the tenants of the Subject Property informing them, pursuant to the Order entered by this Court, they needed to vacate and surrender the premises or deposit rents into the Court registry by April 5, 2012. CP, p. X.

D. PAULITE'S SECOND CHAPTER 13 BANKRUPTCY BRINGS MORE PROCEDURAL OBSTACLES.

Paulite found another attorney and filed for Chapter 13 bankruptcy again on May 9, 2012, again stopping the process of removing her from the Subject Property. CP, p. 293-295. The automatic stay for this second bankruptcy filing expired by statute after 30 days, meaning the state court action could proceed again after June 8. CP, p. 296. Dahlgren also again filed an adversary action related to Paulite's bankruptcy case³.

Dahlgren moved for a Writ of Execution on July 19, 2012. Sub No. 122, Motion for Writ of Execution. The lower court granted the motion and confirmed that Paulite had no right of possession and was a trespasser. Sub No. 130, Order To Issue Writ of Execution. When Paulite failed to vacate, Dahlgren moved for a finding of contempt, for violating writ of execution. Sub No. 135, Motion for Contempt and to Compel. When it became apparent that the contempt hearing would require extensive additional procedures and incurring of costs and fees, Dahlgren withdrew the contempt request. CP, p. 46. At the contempt hearing Paulite claimed to have a rental agreement for new housing starting October 1, 2012. CP,

³ An adversary case was necessary for Dahlgren to be able preserve his right to recover his damages and attorneys' fees from Paulite, pursuant to bankruptcy statute related to fraud and breach of property settlement agreement, instead of being discharged.

p. 232, 318-319. Dahlgren's counsel withdrew the motion for contempt when it appeared to create expensive additional procedures.

Dahlgren's counsel also requested a copy of this rental agreement but Paulite never produced one. CP, p. 232. Paulite continued to live at the Subject Property. CP, p. 320.

In August 2012, Paulite moved to vacate the lower court's October 7, 2011 Order. Sub No. 145, Order Setting Motion to Vacate Partial Summary Judgment. The Court denied the motion on September 28, 2012. Sub No. 151, Order Denying Motion To Vacate Partial Summary Judgment. Paulite did not appeal the Court's rejection of her motion to vacate, so it is not before the Court here.

On September 28, 2012, Dahlgren learned that Paulite claimed to have entered into written leases of the house with family members along with two innocent tenants and brought another unlawful detainer action. CP, p. 326-331, 336-337. A Writ of Resitution was granted against Paulite on September 28, 2012. CP, p. 323-325. Dahlgren worked with the innocent tenants so they could stay to the end of their term, consistent with their leases at the end of October, 2012. CP, p. 326-331. Paulite's family members were directed and failed to pay the lease payments to Dahlgren as required. CP, p. 336-337.

In the beginning of October Dahlgren took steps to execute the Writ of Restitution against Paulite who had still not moved out of the Subject Property. CP, p. 233. On instructions from the Sheriff, Dahlgren's counsel visited the premises on October 7, 2012, to find out if Paulite and her family had already vacated. *Id.* Paulite actively resisted these actions. *Id.* The lower court granted Dahlgren a Writ of Restitution for the family members on October 18, 2012⁴. CP, p. 243-244.

Paulite then resorted to the Washington State Bar Association to retaliate against Dahlgren and both attorneys representing him. Sub No. 214, Declaration of Mark Clausen in Support of Motion for Attorney's Fees. Defending against the ethical allegations required time and resources. *Id.* The Bar dismissed the allegations. *Id.* Paulite also hired multiple attorneys to make demands against Dahlgren independent of the subject litigation⁵. CP, p. 354-357.

Paulite's second bankruptcy action also was active in October 2012. CP, p. 234. The bankruptcy trustee moved to dismiss the action since Paulite had failed to meet the bankruptcy code requirements. CP, p. X. Dahlgren joined, and on October 18, 2012, the bankruptcy court agreed

⁴ The ejectment of Paulite's family required two unlawful detainer actions. The first resolved with allowing them to stay when it became apparent the claimed written leases. The second was brought because they failed to pay according to those agreements.

⁵ Even though her bankruptcy was still pending, Paulite had not received permission from the Trustee to pursue any action against Dahlgren or any other party.

to dismiss the case. *Id.*, see also CP, p. 350. At the request of Paulite's bankruptcy counsel, however, the Court instead converted the case to a Chapter 7. CP, p. 351. This had the effect of prolonging the bankruptcy proceedings and requiring additional attorney's fees in the future. See discussion below.

E. PAULITE'S EVICTION IS FINALLY ACCOMPLISHED, YET THE SUBJECT PROPERTY STILL MUST BE SOLD AND DAHLGREN MADE WHOLE.

By the end of October, 2012, Dahlgren had obtained writs of restitution for Paulite and her family, and the innocent tenants had moved out. He paid for cleaning and repairs to bring the house to a saleable condition. CP, p. 487-504. Once it was ready for sale, Dahlgren moved for the appointment of a receiver, which was necessary for the property to be sold free and clear of the numerous judgment liens against Paulite. Sub No. 161, Application to Appoint Custodial Receiver. On January 8, 2013, the Court granted the motion and appointed Resource Transition Consultants, LLC to act as receiver. Sub No. 166, Order Appointing Custodial Receiver. In granting the receivership, the lower court entered findings and conclusions that Dahlgren was entitled to reimbursement for the expenses, costs and attorney's fees incurred in getting Paulite out of the Subject Property and getting it ready for sale. *Id.* Paulite did not oppose it. She has not appealed this Order and it is not before this Court.

On January 17, 2013, the Bankruptcy Court confirmed that the Subject Property was not part of the bankruptcy estate, entering an order clearly stating that the Subject Property had been abandoned and could be sold in the state court receivership proceedings. CP, p. 352-353. Paulite, through her attorney, opposed this. CP, p. 507. This cleared the way for the Receiver to list the Subject Property for sale. After it was listed, it sold quickly.

On January 31, 2013, the Receiver moved for authorization to sell the Subject Property based on an acceptable purchase and sale agreement. Sub No. 169, Receiver's Motion to Authorize Sale. Dahlgren responded on March 1, 2013. CP, p. 42. He agreed to the sale on the condition that his expenses, costs and attorney's fees were paid in accordance with the Court's prior order on disbursements. *Id.* The Receiver inadvertently did not serve Paulite, but she filed an objection to the motion on March 8, 2013. CP, p. 55-62.

The lower court requested briefing on March 6, 2013 whether the bankruptcy limited its power to approve the sale. CP, p. 55. Paulite and Dahlgren each responded. CP, p. 55-62; 505-653. Paulite, after communicating with the Receiver, withdrew her objection to the sale. On March 11, 2013, the Court approved the sale. CP, p. 63-68. It found that bankruptcy law did not prevent the Receiver's ability to sell the Subject

Property. *Id.* As part of the Order, the Court awarded Dahlgren \$176,000, as well as direct costs in preparing the property for sale. *Id.* Dahlgren only received approximately \$95,000 from the sale. Sub No. 214, Declaration of Mark Clausen in Support of Motion for Attorney's Fees, p. 7. Paulite filed a Notice for Discretionary Review of this Order, although she has only assigned error to the award of attorney's fees to Dahlgren. CP, p. 81-88.

Several matters were still unresolved. The Court had entered partial summary judgment on liability but Dahlgren's damages were not addressed. On March 25, 2013, Dahlgren moved for summary judgment on certain damages he suffered in 2010, and the ability to offset more uncertain damages against any future claims by Paulite, should they be brought. CP, p. 69-80. He argued that the damage to his credit as reflected in credit reports, meant that he lost a major customer and was unable to compete for other work. *Id.*, *see also* CP, p. 654-657. He detailed how his customers used a vendor's personal credit score to determine whether they had the proper security clearance to work on the power grid. CP, p. *Id.*

Paulite responded, albeit late. CP, p. 89-95. She offered only her own declaration, about her knowledge of the business affairs of Dahlgren that she had heard from conversations during her marriage. CP, p. 679-681. She offered no current knowledge and offered no competent evidence

based on personal knowledge, business records, or other information concerning the business in 2010, years after she and Dahlgren had divorced. *Id.*

The lower court carefully considered the components of damages alleged by Dahlgren. RP, p. 33-40. On April 26, 2013, the Court found that Dahlgren had suffered \$56,306 in damages for 2010. CP, p. 96-98. Paulite again filed a Notice for Discretionary Review of this Order. CP, p. 208. Dahlgren applied for and the Court rejected Dahlgren's second motion for the \$17,946.12 attorney's fees and costs incurred after the sale of the Subject Property where the court held adequate fees had been ordered previously. CP, p. 886-888.

On August 8, the Court granted final judgment to Dahlgren. CP, p. 120-127. It entered detailed findings of fact and conclusions of law that confirmed the prior rulings on liability, damages and attorney's fees. *Id.* Paulite appealed this order. CP, p. 128-137. When this Court received the notice of appeal, it closed the petitions for review and consolidated the issues in this appeal.

**F. LITIGATION CONTINUES AFTER THIS CASE IS
DISMISSED AND JUDGMENT MADE FINAL.**

On August 15, Dahlgren moved in the adversary bankruptcy court action for the judgment to be found to be non-dischargeable⁶. Appx. A. While the motion was pending Paulite, still represented by counsel, moved on October 2 to have the case re-converted to a Chapter 13, in an effort to avoid the judgment. Appx. B. On October 7, 2013, the bankruptcy court and found the judgment was nondischargeable. Appx. C. On November 12, 2013, the Bankruptcy Court denied Paulite's motion to reconvert. Appx. D. Paulite's case was dismissed without discharge on November 25, 2013. Appx. E.

IV. SUMMARY OF ARGUMENT

Although the case below was complex, this appeal is simple. The case below involved three superior court cases, four bankruptcy court actions, two Bar Association complaints, and two motions for discretionary review before final judgment. The only issues here, however, are (1) whether the lower court granted summary judgment when there were no legitimate issues of fact; and (2) whether the lower court properly awarded attorney's fees to Dahlgren.

The lower court granted summary judgment on liability in 2011 because Paulite did not (and does not) dispute the validity of the Property

⁶ Without a finding of non-dischargeability, Dahlgren's judgment would have been discharged and Paulite would have been free to continue pursuing Dahlgren for unrelated claims.

Settlement Agreement or that she breached it. She neither acted to release Dahlgren from liability for the loan on the marital property nor did she maintain the payments. This seriously damaged Dahlgren's credit, which cost him significant business losses. The argument about unjust enrichment has nothing to do with whether Paulite breached the PSA. Unjust enrichment only pertained to the imposition of a constructive trust, which is not addressed in this appeal. The lower court granted summary judgment on damages for breach of the PSA in 2013 because Paulite offered no competent contrary evidence. Her own speculation, derived from her limited knowledge of the business before 2007, did not create an issue of material fact concerning losses occurring in 2010.

This Court must consider the tortured and tortuous procedural history below to understand the basis for and reasonableness of the lower court's award of partial attorney's fees. Paulite used every legal lever at her disposal to obstruct Dahlgren's efforts to get the former marital property sold and his credit repaired. Paulite forced Dahlgren to spend an extraordinary amount on attorney's fees, which the lower court recognized. This Court can and should affirm the lower court based on (1) the PSA language allowing the prevailing party to recover attorney's fees; (2) the fact that Dahlgren did (at great cost) what some creditor would had to have done to get Paulite out of the house, creating a common fund for

creditors; (3) the fact that the amount of attorney's fees awarded simply confirmed prior awards not appealed to this court; and/or (4) Paulite consistently acted in bad faith in failing to cooperate to pay off a loan that she was unwilling to maintain. For the same reasons, Dahlgren is entitled to recover costs and attorney's fees for this appeal.

V. ARGUMENT

A. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DAHLGREN IN 2010 AND 2013 BECAUSE PAULITE NEVER CREATED ANY ISSUES OF MATERIAL FACT.

1. Applicable Authority Requires That Paulite Come Forward with Admissible Evidence to Avoid Summary Judgment.

This Court reviews summary judgment rulings *de novo*. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.2d 283 (2008)(citations omitted). In reviewing the trial court's decision, the Court of Appeal must confine itself to the issues the parties have raised and which the trial court considered. *See* RAP 12.1(a); *Babcock v. State*, 116 Wn.2d 586, 606, 809 P.2d 143 (1991)(citations omitted).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 28 P.2d 799 (2001)(citing CR 56(c); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

The initial burden is on the moving party to make a prima facie showing of entitlement. *PNSPA v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006). “Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact.” *Id.* (quoting *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005)).

A party seeking to avoid summary judgment cannot simply rest upon the allegations of the pleadings; she must affirmatively present the factual evidence upon which she relies. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490, cert. denied, 464 U.S. 894, 104 S. Ct. 241, 78 L. Ed. 2d 231 (1983). Similarly, “a nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, **the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.**” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13,721 P.2d 1 (1986)(emphasis added; citations omitted).

Conclusory opinions are not material facts that require a trial. *Vicwood Meridian Partnership v. Skagit Sand & Gravel*, 123 Wn. App.

877, 98 P.3d 1277 (2004)(citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365, 753 P.2d 517 (1988)). If the nonmoving party cannot meet her burden, the court properly grants summary judgment. *Id.*

2. Paulite Does Not Dispute that She Breached the Property Settlement Agreement, so Summary Judgment on Liability in 2011 Was Appropriate.

a. Paulite Breached the Property Settlement Agreement by Failing to Make Any Effort to Have Dahlgren Released from Liability and Defaulting on the Loan.

A community property agreement in a marital dissolution is a contract subject to the general rules of contract interpretation. *In re Estates of Wahl*, 99 Wn.2d 828, 664 P.2d 1250 (1983)(citations omitted). The intention of the parties will be given great, if not controlling, weight in construing a contract. *Id.* “The intention of parties to a written contract is normally to be ascertained largely from the language of the contract.” *Id.* (citing *Hastings v. Continental Food Sales, Inc.*, 60 Wn.2d 820, 823, 376 P.2d 436 (1962)).

Dahlgren set forth facts to support his motion. They included evidence that Paulite (1) failed to keep the obligation to Chase current; (2) failed to take any action to remove Dahlgren from the Note; (3) failed to notify Dahlgren when Chase started to foreclose; and (4) failed to defend, indemnify and hold him harmless from the Chase claim. These allegations

were sufficient for Dahlgren to meet his initial burden of showing no issue of material fact.

The burden then shifted to Paulite to refute these allegations. She could not just rest on her general denial answer. She was required to affirmatively present evidence. Paulite failed (and fails here) to show material facts in dispute. There are no reasonable inferences to resolve in her favor. Paulite agreed to take on the liability for the note herself. She also agreed to defend, indemnify and hold harmless Dahlgren for any liability against him resulting from her failure to meet these obligations. . CP, p. 179, 182-183, 189, 191-192 “Spouses owe each other ‘the highest fiduciary duties’”. *In re Marriage of Lutz*, 74 Wn. App. 356, 369, 873 P.2d 566 (1994). Since Paulite failed to submit any evidence facts supported the contention that she breached the property settlement agreement. The PSA clearly set forth Paulite’s duties. The trial court was correct in granting partial summary judgment on liability.

Paulite admits in her brief that she knew she was not making payment on the Mortgage Note held by Chase. See App. Brief, P. 9. There can be no dispute regarding Paulite’s breach of the PSA, nor her liability for the breach.

It is not surprising that Paulite chose not to submit any responsive papers or to show up at the October 2011 hearing. She filed a brief after

the motion was decided, but submitted no affidavit or declaration. In fact, at no time has Paulite presented any evidence or argument that the PSA is invalid or that she complied with its terms.

Similarly, Paulite did not raise any issues concerning her liability before the trial court when the Order was made final pursuant to 54(b). Where propriety of motion for final judgment in action involving multiple parties *was not challenged in the trial court, it would not be considered on appeal. Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 687 P.2d 804 (1983)(emphasis added). In fact, Paulite did not respond in any way to the motion. Further she has not appealed this order, so it is not properly before the Court.

Similarly, when Paulite brought her motion to vacate the October 2011 order, the lower court denied it. Paulite does not appeal this Denial and therefore it is not properly before this Court.

Paulite made vague statements below that she had some kind of unspecified difficulty making payment. She never submitted any competent evidence of this. Further, the house had substantial equity. If she was financially unable to make the payment, the rational choice was to sell the house and relieve herself and Dahlgren of the financial damage of a home loan in default. Regardless of her financial condition, nothing prevented her from taking the steps with Chase to have Dahlgren removed

before she was in default. At no point did she take any effort to have Chase release Dahlgren. At no point did she advise Dahlgren of any problem with her handling of the loan. At no point did she take any step to mitigate the damage to Dahlgren. The undisputed material facts are that the PSA was and is valid. Paulite breached it by failing to act to get Dahlgren released from liability for the loan on the former marital house, and by failing to make the loan payments. Paulite's liability under the PSA, therefore, was clear and the lower court's summary judgment of liability was proper.

b. The Lower Court Did Not Rely on Unjust Enrichment in Granting Summary Judgment.

Paulite argues extensively that the lower court erred in granting summary judgment based on unjust enrichment. The argument misreads the lower court's October 2011 decision. The summary judgment was based on Paulite's breach of the PSA. Paulite assigns error to a decision Dahlgren did not ask for and the lower court did not make.

The lower court focused on Paulite's unjust enrichment to show, in part, the basis for imposing a constructive trust. Paulite assigns no error to the lower court's imposition of a constructive trust, so the Court need not consider the argument. *Bruce v. Bruce*, 48 Wn.2d 229, 230, 292 P.2d 1060 (1956). The remainder of this discussion only responds to Paulite's

assumption that unjust enrichment somehow pertains to Dahlgren's summary judgment on liability. If the Court understands that unjust enrichment is not a basis for the October 2011 summary judgment, it can move beyond the remainder of this section.

“Washington courts will impose a constructive trust ‘when there is clear, cogent, and convincing evidence of the basis for impressing the trust.’” *Consulting Overseas Management v. Shitkel*, 105 Wn. App. 80, 87, 18 P.3d 1144 (2001)(citing *Baker v. Leonard*, 120 Wn.2d. 538, 547, 843 P.2d 1050 (1993)).

“[T]he primary purpose of a constructive trust is to prevent unjust enrichment.” *Consulting Overseas Management*, 105 Wn. App. at 87 (2001)(citing *Scymanski v. Dufault*, 80 Wn.2d. 77, 88-89, 497 P.2d 1050 (1971)). A finding of fraud, misrepresentation, bad faith or overreaching, is common but not required for imposition of a constructive trust. *Id.* (citing *Manning v. Mount St. Michael's seminary of Phil. & Sci.*, 78 Wn.2d 542, 546, 477 P.2d 635 (1970)). It may also occur “in broader circumstances not arising to fraud or undue influence,” where retention of the property would result in the unjust enrichment of the person retaining it. *Id.* (citing *In re Marriage of Lutz*, 74 Wn. App. at 368 (1994)) The lower court made it clear that constructive trusts are those which arise

purely by construction of equity the intent of a party is irrelevant. *In re Marriage of Lutz*, 74 Wn. App. at 368.

Paulite agreed to pay the Mortgage Note held by Chase when agreeing to the property settlement agreement. By failing to pay the mortgage, yet retaining the residence, Paulite was unjustly enriched with retention of an asset without paying for it. Additionally, Paulite did not return the form had been sent to her for her consent to release Dahlgren from liability of the note and that she failed to notify him of the foreclosure initiated. In essence, Paulite was able to benefit from Dahlgren being stuck as a maker of the Note without having any title to or benefit from the Subject Property.

The lower court properly found that Paulite was obtaining the benefit of the Subject Property without paying anything for it, and was ruining Dahlgren's credit in the process. Judge Prochnau imposed the constructive trust so that Dahlgren could take the necessary steps to prepare the house for sale. A sale was necessary one way or another because Paulite could not/would not make the required payments. The finding and conclusion that Paulite was unjustly enriched are both obvious and a reasonable basis for the Order. It appeared in later proceedings that she was collecting rent and pocketing the money while Chase and

Dahlgren suffered. The lower court's decision, finding and conclusion were proper.

c. The Court Granted Summary Judgment Only on Liability, Not Damages, in October 2011 and the Damages Discussion Pertained to the Injunctive and Constructive Trust Holdings.

Clearly the court analyzed the breach of the property settlement agreement as well as how that breach may have impacted or damaged Dahlgren. However, since this was a partial summary judgment, proving liability for breach of the Property Settlement Agreement and the means necessary to stop the ongoing breach were the only issues before the court. Since no specific damages were alleged or before the court, it properly used the word "may" to address the potential damages Dahlgren could be suffering as a result of the breach. Specific causation of each piece of damage as well as certainty of each piece of damage was not before the court and was properly address in the partial summary judgment motion in April, 2013. See discussion below.

Paulite also has alleged some form of impropriety of the handwritten additions that Judge Prochnau added to the form order. A review of the hearing shows that the handwritten addition are reflections of the findings made by the court that day. They specifically address the supporting findings and conclusions needed for the constructive trust. The handwritten additions show no reversible error.

3. Paulite Failed to Raise an Issue of Material Fact as to Dahlgren's Showing of Damages in the 2013 Summary Judgment Motion.

When the lower court established Paulite's liability under the PSA in October 2011, the only remaining issue on that claim was for damages. The same authority cited above governs the partial summary judgment on damages as well. The fact damage to Dahlgren is undisputed. Paulite admitted Dahlgren's credit was affected by the foreclosure of the house in multiple ways. CP, p. 91.

a. Dahlgren Established that Paulite's Breach Caused Financial Damages to Him.

In a breach of contract claim for damages, a claimant must show the breach proximately caused the damages claimed. *Northwest Mfrs. v. Dep't of Labor*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). "Damages recoverable for a breach of contract are those which may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from [the] breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 446, 815 P.2d 1362 (1991)(citation omitted).

The lower court took a conservative approach, awarding damages in only the most obvious of many categories. Dahlgren made his

declaration on personal knowledge. He operates his own consulting business and is competent to testify about his business, his tax returns, and why his income declined in 2010. Paulite neither objected to any of Dahlgren's evidence nor made a motion to strike below. Indeed, Paulite admits that the facts regarding Dahlgren's damaged credit score are true. CP, p. 91 Paulite admits Dahlgren has been denied extension of credit since damage to his credit and lost over \$20,000 in credit usage. See CP, p. 91-92. Paulite admits a decline in Plaintiff's income. See CP, p. 92. Therefore, neither the admissibility nor the validity of the damage to Dahlgren is at issue. Paulite's only argument is that her declaration created some other material factual issues.

Paulite's declaration was a combination of speculation, hearsay and irrelevant material. The lower court extensively analyzed the declaration and found no credible, admissible evidence about Dahlgren's damages. In addressing each allegation by Paulite, the Court orally found:

- Undisputed facts:
 - Before Paulite defaulted, Dahlgren's credit was in the 800s;
 - Dahlgren's credit plummeted to the mid 600's after Paulite's default;
 - After foreclosure was stopped, Dahlgren's credit score improved to the mid 700's;

- Dahlgren's available credit had been reduced;
 - Dahlgren has been denied extensions of credit since damage to his credit;
 - Dahlgren lost over \$20,000 in credit usage;
 - Dahlgren's company could not pursue hiring because of Dahlgren's reduction in available credit;
 - Dahlgren's tax returns reflect declining income in 2010;
 - Dahlgren stood ready to work and there was no alternate explanation for the decline.
- Paulite's assertions regarding Mr. Tosh are inadmissible concerning Dahlgren's damages in 2010, and are without context of time period or nature of assertions
 - Paulite's assertion regarding Dahlgren's worries regarding his business are without time context and irrelevant.
 - Paulite makes no connection between Dahlgren's worries and the repercussions on his business.
 - Paulite's assertion regarding Dahlgren's business are without time context and irrelevant.

[Cite]

Paulite concludes her declaration with data concerning national statistics not tied to Dahlgren or his income. Paulite's evidence requires

much more than reasonable inferences; it requires wild speculation. The lower court properly granted summary judgment as to Dahlgren's damages.

Paulite also raises an issue about setoff. This, however, has nothing to do with any assigned error or decision of the trial court. Therefore, this Court has no basis evaluate or act on a discussion regarding any set-off.

The Order granting Dahlgren's motion for Partial Summary Judgment of Constructive Trust and for other Relief reveals the court extensively analyzed Paulite's actions, liability and potential for damages. Finding of Fact, paragraph 4 found Paulite breached the property settlement agreement when she did not cooperate with removing Dahlgren from the mortgage note. Finding of Fact, paragraph 5 found Chase reported the nonpayment of the Note negatively upon Paulite and Dahlgren's credit ratings. Finding of Fact, paragraph 6 found Dahlgren's job required him to maintain excellent credit rating and any failure to do so jeopardized Dahlgren's ability to attract and keep clients. Finding of Fact, paragraph 10 found Paulite did not show any excuse for failing to make payment to Chase or comply with the terms of the property settlement agreement. Therefore the lower court found that Dahlgren had been damaged.

b. Paulite Could Have Foreseen Dahlgren Would Be Damaged by Her Default on the Home Loan.

Paulite objects to the foreseeability of the damages Dahlgren encountered. She argues in this appeal that Dahlgren did not prove that she could foresee the damages her breach caused. This argument should not be considered by the Court here as she failed to raise it with the lower court. See RAP 12.1 (a). A more detailed analysis of this legal standard can be found in Section B.3 below.

Even if considered, Paulite's analysis is incorrect. The inquiry is not whether the party in fact foresaw the damages her action would cause but whether a **reasonable person in the same position would reasonably foresee the damages at the time of the agreement.** *Lewis v. Jensen*, 39 Wn.2d 301, 235 P.2d 312 (1951). In other words, would a spouse who claimed to be familiar with her husband's small business could reasonably foresee that he would suffer losses in his financial and business affairs from damaged credit because of her default? Paulite, in her own declaration, claims to know a great deal of Dahlgren's business during their marriage. In 2007, she reasonably could have foreseen that Dahlgren would be damaged by her dragging his credit rating down by her failure to release him from the home loan, and then defaulting on it. This conclusion requires no great powers of deduction. Paulite raised no

material facts on this point. Her evidence, in fact, supports a finding of foreseeability. Dahlgren's damages were foreseeable.

c. Dahlgren Established that His Damages Were Certain.

Paulite asserts that Dahlgren's damages are uncertain and therefore improper. She relies on the language in the October 7, 2011 Order which cites the difficulty of ascertaining all of the potential damage to Dahlgren by Paulite's actions. As discussed above, the lower court was looking at the difficulty of ascertaining Dahlgren's damages as a reason to act injunctively to order the sale of the house.

Further, Paulite confuses the standard of two different lines of inquiry. The Court's analysis in the October 7, 2011 Order established the basis for injunction and constructive trust. Nothing in the Order decided whether any particular item or class damages were or were not recoverable. In fact, as of 2011, Dahlgren's damages were difficult to quantify. By 2013 they were not particularly the damages awarded for loses in 2010.

Paulite interprets the inherent difficulty in establishing the exact amount of damages in 2011 to preclude the recovery of any damages. This argument incorrectly interprets the October 2011 Order. The language by the lower court merely confirms that it will be hard, if not impossible for Dahlgren to be **fully compensated** by money damages for Paulite's

continuing breach, not that he is precluded from compensation. Paulite's argument fails.

B. THE AWARD OF ATTORNEY'S FEES IN MARCH 2013 WAS PROPER.

An attorney's fee award will only be overturned for an abuse of discretion. *Progressive Animal Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). "A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993)(citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)).

This "abuse of discretion" standard of review applies in cases of fees awarded in a receivership as well. *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548 (1895). Therefore the court should review the lower court's award to Dahlgren only for an abuse of discretion. This court has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award. *Progressive Animal*

Welfare Soc'y. 114 Wn.2d at, 688-89 (citing *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987)). The Court of Appeals, however, does not micromanage the determination of the reasonable amount of attorney's fees.

As discussed above, any issues not before the trial court cannot be reviewed by the appellate court. The following issues were never before the trial court and are therefore exempt from review:

- Reasonableness of attorney's fees
- Issues regarding who is the prevailing party
- Exclusion of claimed unrelated work
- Exclusion of claimed unrelated work
- Exclusion of claimed unnecessary/unproductive work
- Notice of Sale
- Whether Paulite was entitled to Oral Argument

Despite the fact that these issues are raised for the first time on appeal and can be resolved on that basis, Dahlgren will address these arguments below.

1. The Lower Court Properly Awarded Dahlgren His Fees As Prevailing Party under the Property Settlement Agreement.

The PSA provides for the prevailing party to recover attorney's fees. The Property Settlement Agreement states, "If any such action

becomes necessary, whether at law or in equity, to enforce the terms of this Agreement, **the prevailing party shall be entitled to an award of attorney's fees and suit costs reasonably incurred in such enforcement action.**" See CP, p. 181 (Emphasis Added). The lower court decided the issue of liability in granting Dahlgren's motion for partial summary judgment on October 7, 2011. Specifically, the court held Paulite "violated her obligations under the Property Settlement Agreement by failing to cooperate in retuning the form to allow Chase to proceed with removing Dahlgren as a Maker of the note."

In granting Dahlgren's motion for partial summary judgment on October 7, 2011, the court also appointed Dahlgren Constructive Trustee of the house. At the request of Dahlgren, the trial court appointed a receiver of the property to have it sold on January 8, 2013. Dahlgren is clearly the prevailing party, as it is undisputed and final that Paulite breached her obligations under the property settlement agreement and decree. Dahlgren has prevailed in all claims he raised. Paulite has not prevailed on any claim

2. Paulite's Analysis Fails to Address the True Basis for the Court's Decision.

- a. Paulite's Petition Focuses on Amount of Fees, Not the Basis of Entitlement.

The October 7, 2011 Order made detailed findings and conclusions in granting Dahlgren injunctive relief and creating a constructive trust, including the following Conclusion of Law:

Dahlgren is empowered by this Court to take such steps as may be necessary so that the Subject Property can be sold as set forth in this Order. This includes, but is not limited to:

a. Instituting an unlawful detainer action against persons occupying the Subject Property without legal authority; and/or changing the locks to gain access;

...

d. To be compensated for his time, costs and fees as an administrative expense;

...

h. To take such other actions as are necessary or incidental to carry out the powers set forth in this Order.

(Emphasis Added).

In fact, the detailed Findings and Conclusions of October 7, 2011 Order justify the award to Dahlgren in the March 11, 2013 Order. They had formed the basis for the Court's orders for more than two years in this case. Paulite assigns no error to any Finding of Fact or to the above Conclusion of Law.

The January 8, 2013 Order Appointing Custodial Receiver further confirmed Dahlgren's right to recover his attorney's fees and costs. It states the following, in pertinent part:

2.36 To the extent Plaintiff has made or will make Payments to Enhance the Collateral, any and all such payments 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.

Based upon the Order of October 7, 2011 and January 8, 2013, it is undisputed that Dahlgren is entitled to his costs and fees as administrative expenses which are in the same priority as payment of the receiver. Unlike statutes imposing a “reasonable” attorney’s fees standard, the Court’s prior findings, conclusions and orders allow for recovery of all attorney’s fees. Paulite did not appeal or argue those findings, conclusions or orders, so they provide undisputed support for the lower court’s award of Dahlgren’s costs and fees.

b. The Trial Court’s Award is Not Solely Justified as a Lodestar Award.

Paulite cites authority under a Lodestar analysis, however Lodestar is not the only basis for the fee award to Dahlgren. The lower court’s award would be proper under a lodestar analysis, since she had evidence of the hours spent and reasonable hourly rate, and entered numerous findings and conclusions to justify the award. The lower court’s Order of Dismissal reaffirms its prior holdings, including attorney’s fees, and found them reasonable. The lower court specifically held that many of the issues were novel, difficult and time-consuming such that they were unusual, if not unique to the case. Therefore, the attorney’s fees awarded clearly satisfy Lodestar.

The lower court's award is justified on other authority as well. The first is that Dahlgren's action created a common fund. "While the lodestar method is generally preferred when calculating *statutory* attorney fees, the percentage of recovery approach is used in calculating fees under the common fund doctrine." *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993)(citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d ,1301, 1311 (1990); *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984)). "The primary explanation for this distinction is that *statutory* attorney fees are separately assessed against the defendant while common fund attorney fees are taken directly from the recovery obtained by the plaintiffs." *Id.* The present case is a common fund case because the court has found Dahlgren was acting not only for himself, but the benefit of others. Someone had to take on Paulite to get the equity in the Subject Property. Until a creditor fought his/her way through Paulite's defenses, bankruptcy filing, using family member to forestall eviction and other tactics, the house could not be sold to a third party and equity released. The proceeds created a fund for creditors.

In common fund cases, the size of the recovery constitutes a suitable measure of the attorneys' performance. *Bowles*, 121 Wn.2d at 72

(citing *In re GNC Shareholder Litig.: All Actions*, 668 F. Supp. 450, 451-52 (W.D. Pa. 1987)).

The following is undisputed from the record:

- Dahlgren acted for the benefit of himself, Chase and (before Paulite wasted the equity in the house with procedural delays and obstruction) others, as found in Finding of Fact 13 in the October 7, 2011 Order.

- Dahlgren is entitled to fees and costs under this theory, as undisputed Conclusion of Law 6(d) in the October 7, 2011 Order states.

- Dahlgren was entitled to sell the house as of October 7, 2011, however Paulite opposed him at every turn

- Paulite filed two bankruptcies and converted one in attempt to prevent Dahlgren from selling the property

- Multiple Unlawful Detainer Actions were necessary to evict Paulite, her family and innocent tenants of the property.

- The Subject Property sold for \$383,500.

Therefore, this Court can affirm the lower court under either a Lodestar standard, and a common fund standard.

Twenty to thirty percent of the recovery is a benchmark used in awarding attorney fees under the common fund doctrine, but that figure can be adjusted based on the circumstances of the case. *Bowles*, 121

Wn.2d at 72. The trial court has broad discretion in determining the proper recovery in a common fund case. *Bowles*, 121 Wn.2d at 71-72. The trial court abuses its discretion when its ruling is “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.” *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

The court in *Bowles* cited *Arizona Citrus Growers*, in laying out the special circumstances which a court will consider in a determination that whether the percentage of recovery would be either too small or too large in relation common fund doctrine. *Bowles*, 121 Wn.2d at 72. The court in *Arizona Citrus Growers* considered the hours devoted and other factors including the results achieved, risks taken, duration of the case, and the degree to which the attorney had to forego other work. *Arizona Citrus Growers*, 904 F.2d at 1311.

In *Bowles*, the Supreme Court rejected the appellants’ arguments that that attorney fees were unreasonable because the arguments advanced were primarily under the Lodestar approach. The Supreme Court stated, “this being a common fund case, we apply the percentage of recovery approach.” The Court went on to clarify, however that “an award of fees under the percentage of recovery theory is not improper merely because it is three times the lodestar amount.” *Id.* (quoting *In re GNC Shareholder Litigation*, 668 F. Supp. at 451).

Dahlgren's attorney's fees are clearly reasonable. Paulite failed to act to remove Dahlgren when the loan was current. She allowed the property to fall into default. Instead of selling the property herself to satisfy the debt, she went to great lengths to prevent its sale and to cause Dahlgren to spend huge amounts in legal fees. Dahlgren attempted to reclaim and sell the subject property from October 7, 2011 until over a year and a half later when it was finally sold.

It is undisputed that Paulite filed multiple bankruptcy petitions. Dahlgren had to file multiple Unlawful Detainer actions to evict Paulite and her family from the house. The court has issued several findings of fact and conclusions of law in various Orders which establishes understanding of the complexities of the case. These show Paulite's outright refusal to follow Court Order as well and her blocking any action taken by Dahlgren to restore his credit with the sale of the house. Importantly, the attorneys' fees spanned not only this litigation, but the Bankruptcy Court, the Bar complaints and various unlawful detainer actions. No manifest injustice can be found in the Trial Court's award.

Dahlgren actually received approximately \$95,000 for his attorneys' fees and costs out of the sale after Chase, Chase's attorney's fees and costs and the receiver were paid. The Court can note that 30% of the sales proceeds, or common fund in this case, of \$383,500 is \$127,833.

As noted above, other factors may increase the amount awarded. Paulite's extreme opposition and obstruction was the source of both Chase and Dahlgren's increased attorney's fees. Her outright refusal to follow Court orders was worthy of an order of contempt. The total award of \$176,891.57 was clearly reasonable.

3. The Attorneys Fees and Costs Awarded to Dahlgren Are Also Proper Because of Paulite's Bad Faith.

The lower court can be affirmed on any available legal basis on appeal. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Although the lower court did not specifically grant Dahlgren his legal fees based on Paulite's bad faith, the court did find such bad faith and it forms the basis for affirming the award of attorney's fees.

"CR 11 and [the court's] inherent equitable powers authorize the award of attorney fees in cases of bad faith." *Greenbank Beach and Boat Club v. Bunney*, 168 Wn. App. 517, 524, 280 P.3d 1133 (2012)(citing *In re Recall of Pearsall-Stipek*, 136 Wn.2d at 266-67, 961 P.2d 343 (1998)). There are three recognized types of bad faith conduct, 1) prelitigation misconduct; 2) bringing a frivolous or harassing claim, known as substantive bad faith; and 3) vexatious conduct during the course of litigation, known as procedural bad faith. *Id.* (citing *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-29, 982 P.2d 131 (1999)),

Since Paulite made no claims, only prelitigation misconduct and procedural bad faith, are applicable.

a. Paulite's Prelitigation Misconduct Support the Award of Attorney's Fees and Costs.

Prelitigation misconduct occurs when a party's obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right. *Rogerson Hiller Corp.*, 96 Wn. App. at 927-29 (citing Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 632 (1983)). Further, prelitigation misconduct may serve as the basis for an award of fees in cases of "enforcement of judicial authority, as where misconduct of a party amounting to contempt of court has caused the opposing party to incur counsel fees, or where a person retains possession of property after a judicial determination of the wrongful character of his possession, thus forcing the party wronged to the expense of further proceedings to recover possession or otherwise enforce his rights." *Greenbank Beach and Boat Club*, 168 Wn. App. at 526 (citing *Guay v. Bhd. Bldg. Ass'n*, 87 N.H. 216, 177 A. 409, 413 (1935)).

Here, it is clear that Paulite's prelitigation tactics clearly amount to bad faith misconduct deserving of an award of attorney's fees and costs. Paulite retained possession of the Subject Property without paying for it or removing Dahlgren from the mortgage Note. Further, she refused even to

return the necessary form when prompted by Chase to remove him. Even after Dahlgren started litigation, Paulite refused to honor her duties. As a result Dahlgren was forced to incur significant attorney's fees to recover and enforce his rights.

As discussed above, Paulite, owed Dahlgren the highest fiduciary duty. In *Hsu Ying Li v. Tang*, the court analyzed the breach of fiduciary duty in the context of a partnership. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976). The court found, "Respondent's negligent breach of his fiduciary duty to petitioner is tantamount to constructive fraud" because Petitioner necessarily instituted the lawsuit to compel Respondent to carry out his fiduciary duties. *Id.*, 87 Wn.2d at 800-801 (1976)(citations omitted).

Hsu Ying Li is directly on point and controlling here. Dahlgren was forced to institute this action—and multiple others—to compel Paulite to carry out her duties to him.

b. Paulite's Procedural Bad Faith Support the Award of Attorney's Fees and Costs.

Procedural Bad Faith arises when a party delays or disrupts litigation. *State v. S.H.*, 95 Wn. App. 741, 747, 977 P.2d 621 (1999)(citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Sanctions may be appropriate if an act affects "the integrity of

the court and, [if] left unchecked, would encourage future abuses." *Id.* (citing *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594, 600 (1995)).

The record is full of Paulite's dilatory and disruptive litigation tactics. Frequently she refused to follow court rules RP, p. 26-27. Paulite repeatedly refused to follow court order. She even admits in her appellate brief that she continued to prevent Dahlgren from executing Court Orders. The lower court found on multiple occasions that Paulite failed to follow its orders. These instances include the Court Order of October 7, 2011, the Order Directing Issuance of Writ or Execution on July 19, 2012, the Writ of Restitution on September 28, 2012, and the Order Granting Motion and Notice for Presentation of Judgment on August 8, 2013. CP, p. 29-36, Sub No. 130, Order To Issue Writ of Execution, 323-325 and 120-127 Starting in October 2011, Paulite was ordered to allow the sale of the subject Property. Instead, she refused to vacate and even used her family as the legal equivalent of "human shields" to prevent Dahlgren taking possession to ready the Subject Property for sale.

Specifically, the Order Directing Issuance of Writ or Execution on July 19, 2012, written personally by the Judge Prochnau, found as follows:

Despite defendant Paulite's current claims, she has failed to cooperate with plaintiff Dahlgren in selling the property. She has shown herself to be obstreperous. It is time for Ms.

Paulite and her family and/or tenants to vacate the residence so that the property may be sold and any remaining equity be appropriately distributed. Mr. Dahlgren is entitled to possession of the property and to bring an unlawful detainer action against any tenants and/or residents. Ms. Paulite has no right of possession under the Court's orders and is at best a resident occupying the property without permission of the trustee, Mr. Dahlgren, under RCW 59.12.0301 or is a trespasser subject to ejectment under these proceedings.

Sub No. 130, Order To Issue Writ of Execution, p. 2.

Despite the Court's holding, Paulite continued to oppose Dahlgren at every turn, causing unlawful detainer actions to be brought, opposing Dahlgren in the bankruptcy court and even filing bar complaints against Dahlgren's counsel. There can be no dispute that Paulite is guilty of procedural bad faith, therefore supporting the attorney's fees and costs awarded by the court.

4. Under Any Theory, the Attorney fee Award is Reasonable.

a. The Court's Orders Show the Award of 100% of Fee is Reasonable.

Paulite's egregious actions since the dissolution warrant the lower court's award of the entire fees incurred. Paulite even admits in her brief that she "strongly resisted" Dahlgren's efforts to effectuate the trial court's orders which included filing for bankruptcy and contesting the various unlawful detainer actions brought by Dahlgren. In fact, the court below chose not to award Dahlgren 100% of the fees, even though such an award would have been justified. The court acted reasonably.

- (i) The Court has held Paulite breached the settlement agreement, made Dahlgren a constructive trustee and put the property into receivership per his request.

Finally, the trial court reaffirmed its prior awards, findings of fact and conclusions of law in its Order Granting Presentation of Judgment. Paulite has not specifically challenged these findings. Therefore the grounds upon which the court granted its attorney's fees are well documented.

- (ii) Dahlgren's claims against Chase, the Unlawful Detainers, and fees from the bar complaints all flowed from Paulite's breach.

Paulite's actions were intentional and calculated to cause Dahlgren to incur attorney's fees. Paulite failed to remove Dahlgren from the mortgage note which Chase held. Dahlgren had to file this action against Chase and Paulite as a result of her breach. If Paulite had acted promptly to get Dahlgren removed from the Note, there would have been no attorney's fees and no dispute with Paulite or Chase. If she had sold the house when she could no longer pay the mortgage, there would have been no need for attorney's fees. If she would have moved out when ordered to do so in October 2011, the attorney's fees would have been far lower. If she had not filed two bankruptcy petitions when Dahlgren was ready to evict her, the attorney's fees would have been lower. If she had not placed her family members into the house as "tenants" the attorney's fees would

have been much lower. All of the attorney's fees relate back to Paulite's acts and omissions. This Court has no basis for relieve her from responsibility for her own acts.

5. The Debate About Attorney's Fees Is Moot Because The Award Does Not Take Into Account Attorney's Fees Incurred After The Award Date, Yet Incurred And Awardable Under The Property Settlement Agreement.

Paulite's petition neglects the fact that Dahlgren received only a fraction of the attorney's fees he would have been entitled to under the PSA. Any alleged error by the lower court is harmless and the decision is moot. An appeal without a remedy is moot. *Mony Life Insurance Co. v. Cissne Family LLC*, 135 Wn. App. 948, 148 P.3d 1065 (2006)(citing *In re Detention of V.B.*, 104 Wn. App. 953, 959, 19 P.3d 1062 (2001)(When a court cannot fashion a remedy that will directly affect the appellant, the case is moot)). Washington Courts have held, "Generally, we will dismiss an appeal if the issues are moot." *Mony Life Insurance Co.*, 135 Wn. App. 948 (2006)(quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

If this Court accepted every item raised by Paulite in her motion, Dahlgren still would be entitled to all of the funds disbursed to him. The issues with the amount of fees awarded has been rendered moot by Dahlgren not receiving attorney's fees for the additional litigation Paulite

forced him to engage in after the initial attorney's fee award. In reviewing all of the litigation and opposition that Paulite forced Dahlgren to go through, clearly the court can find a justifiable basis for the attorney's fees award to be upheld.

The amount of attorney's fees awarded to Dahlgren is moot because he did not collect attorney's fees for any of the litigation he conducted since the sale. After the sale, Dahlgren proceeded to litigate Dahlgren's damages as well as issues in the bankruptcy case. Dahlgren made a motion in the Bankruptcy Adversary action, and Paulite vigorously defended, for the trial Court's judgment to be declared nondischargeable. On top of this, Dahlgren had to fight Dahlgren's attempt to circumvent the award by reconverting her Chapter 7 plan back to a Chapter 13 plan. In other words, Dahlgren received only a portion of his attorney's fees and costs incurred.

C. DAHLGREN IS ENTITLED TO HIS ATTORNEY'S FEES INCURRED IN THIS APPEAL BECAUSE THE PROPERTY SETTLEMENT AGREEMENT AUTHORIZES ATTORNEY'S FEES AND RAP 18.1 EXTENDS THIS TO AN APPELLATE SETTING.

Dahlgren is entitled to and requests his attorney's fees in this Petition pursuant to RAP 18.1 and all of the authority cited above. Since Dahlgren is entitled to attorney's fees in the PSA, he entitled to attorney's fees arising from this petition and the prior petition, as well as the other

grounds available to the lower court. In any order, this Court should award all additional attorney's fees and costs incurred as a result of Paulite's petitions and appeal. *See, e.g.*, RAP 7.1.

VI. CONCLUSION

For the above reasons, the Court should affirm the Superior Court Final Judgment in favor of Dahlgren and reject Paulite's appeal.

DATED this 14 day of April, 2014.

Respectfully submitted,

CLAUSEN LAW FIRM PLLC

By:



Mark A. Clausen, WSBA # 15693
Morgan R. Blackburn, WSBA # 42179
Clausen Law Firm, PLLC
701 Fifth Avenue, Suite 7230
Seattle, Washington 98104
(206) 223-0335
mclausen@clausenlawfirm.com
mblackbourn@clausenlawfirm.com
Attorneys for Respondent Dahlgren

APPENDIX

- A. Creditor Dahlgren's Motion for Summary Judgment Regarding Nondischargeability of Claim made in Adversary Bankruptcy case 12-01772-TWD.
- B. Notice and Motion to Re-Convert from Chapter 7 to Chapter 13 made in Bankruptcy case 12-14935-TWD.
- C. Order Regarding Motion for Summary Judgment made in Adversary Bankruptcy case 12-01772-TWD.
- D. Order Denying Motion to Re-convert from Chapter 7 to Chapter 13 Bankruptcy case 12-14935-TWD.
- E. Notice of Case Closed Without Discharge Bankruptcy case 12-14935-TWD.

The Honorable Timothy W. Dore
Chapter 13

September 13, 2013

9:30 am

Response Date: September 6, 2013

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re:

Omega Paulite,

Debtor(s).

No. 12-14935-TWD

ROBERT W. DAHLGREN, a single man,

Plaintiff,

v.

OMEGA P. PAULITE, A SINGLE WOMAN,

Defendant.

No. 12-01772-TWD

CREDITOR DAHLGREN'S MOTION
FOR SUMMARY JUDGMENT
REGARDING
NONDISCHARGEABILITY OF
CLAIM

I. RELIEF REQUESTED

Creditor Robert Dahlgren respectfully requests this court find the Debt owed by Debtor Omega Paulite to Creditor Dahlgren is nondischargeable pursuant to 11 U.S.C. § 523(a)(15), and priority pursuant to 11 U.S.C. § 507(a)(1)(A). Creditor Dahlgren has incurred substantial legal fees and damages as a result of Debtor Paulite's breach of the Property Settlement Agreement and Dissolution Decree, and her failure to hold Dahlgren harmless as those documents require. 11 U.S.C.

APPENDIX A

**CREDITOR DAHLGREN'S MOTION FOR SUMMARY
JUDGMENT REGARDING NONDISCHARGEABILITY OF
CLAIM- 1**

CLAUSEN LAW FIRM PLLC
MARK A. CLAUSEN WSBA 15693
701 FIFTH AVENUE • SUITE 7280
SEATTLE, WASHINGTON 98104
(206) 223-0335 • FAX (206) 223-0337
E-Mail: mclausen@clausenlawfirm.com

1 § 523(a)(15) clearly provides that Paulite's debt to Dahlgren is exempt from dischargeability,
2 therefore the Bankruptcy Court should grant this motion.

3 **II. FACTS**

4 Prior to January 2008, DAHLGREN was married to Defendant Omega P. Paulite.
5 DAHLGREN and Paulite owned a home located at 15959 N.E. 1st Street, Bellevue, WA 98008 ("the
6 Subject Property.") Chase Home Mortgage was the beneficiary of a Deed of Trust on the Subject
7 Property. Declaration of Robert W. Dahlgren, dated March 1, 2011 ¶2, Exhibit 1. ("Dahlgren Due
8 Diligence Declaration").

9 A Decree of Dissolution between DAHLGREN and Omega Paulite was filed on or about
10 January 30, 2008. A true and correct copy is attached hereto Dahlgren Due Diligence Declaration,
11 Exhibit 4. The Decree incorporated a property settlement agreement executed on July 31, 2007.
12 Pursuant to the terms of that Property Settlement Agreement ("PSA"), Paulite was awarded the sole
13 title to the subject property, as well as the liability for the Note and Deed of Trust thereon, and
14 DAHLGREN executed a Quit Claim Deed of his interest in the subject property to Paulite on or
15 about November 29, 2007. See Dahlgren Due Diligence Declaration, Exhibit 3. Additionally, the
16 PSA contained the following provision:

17
18 **IV**
19 **WARRANTY OF PARTIES**

20 Both parties hereby warrant to each other that they have not incurred and
21 hereby covenant that they will not in the future incur any liabilities or obligations for
22 which the other is or may be liable except as have been expressly set forth herein;
23 each hereby covenants and agrees that if any claim, action or proceedings shall
24 hereafter be brought seeking to hold the other liable on account of any such
25 debt, liability, act or omission of each, he or she will, at his or her sole expense,
defend the other against any such claim or demand, whether or not well-founded
and that each will hold the other harmless therefrom.

1 *Id.* [Emphasis added]. The applicable agreements further provided that the prevailing party
2 is entitled to attorney's fees incurred as a result of a breach.

3 In October 2011, Dahlgren obtained a Order Granting Partial Summary Judgment of
4 Constructive Trust, and for Other Relief, which sets forth the facts supporting this motion Clausen
5 Declaration, Exhibit 1. A summary of the October 7, 2011 findings include the following: Dahlgren
6 and Paulite were married for years and owned a house in Bellevue with substantial equity. *Id.* Upon
7 divorce, Dahlgren quit-claimed his interest in the house, and Paulite agreed to have the Note and
8 Deed of Trust with Chase Home Mortgage ("Chase")¹ transferred into her name. *Id.* Paulite never
9 took any steps to remove Dahlgren from the Note and when contacted by Chase denied any desire to
10 do so. *Id.* Paulite also attempted to deny Dahlgren the opportunity for notices from the lender by
11 changing his address back to the marital home. *Id.* She defaulted on the Note, which caused Chase to
12 foreclose. *Id.* When Dahlgren learned of the foreclosure he sued to stop the sale. He later joined
13 Paulite and raised claims against her for, among other claims, damages to his credit and for placing
14 the former marital home in a constructive trust. *Id.* The Court granted Dahlgren summary judgment
15 establishing Paulite's breach, and appointed Dahlgren a constructive trustee to sell the Subject
16 Property. *Id.* It also held that Dahlgren was entitled to attorney's fees, and costs as administrative
17 expenses for his efforts. *Id.* The Court made this Order final under CR 54(b) on May 3, 2012.
18 Clausen Decl., Ex. 2.

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21 Immediately after the October 7, 2011 Order, Dahlgren had posted a Notice to Vacate at the
22 Subject Property. Clausen Declaration, Ex. 3. On or about October 27, 2011 Paulite filed for Chapter
23 13 bankruptcy, staying this case and efforts to evict her. Clausen Declaration, Ex. 4. On February 8,
24 2012 the Bankruptcy Court granted Dahlgren's motion for relief from stay, but delayed its effective
25

1 date until March 21, 2012 so Paulite had time to remove Dahlgren from the Note and Deed of Trust.
2 Clausen Declaration, Ex. 5. On or about March 21, 2012 the Bankruptcy Court ordered Paulite's case
3 dismissed, which occurred on April 6, 2012. Clausen Declaration, Ex. 6.

4 On or about March 22, 2012, Dahlgren had posted on the premises a Three Day Notice to
5 Vacate by March 26, 2012. Clausen Declaration, Ex. 7. On April 6, 2012, Dahlgren served a
6 summons and complaint for unlawful detainer. Clausen Declaration, Ex. 8. On April 17, 2012,
7 Attorney Michele McNeill appeared and answered for Paulite, denying all allegations. Clausen
8 Declaration, Ex. 9. Dahlgren then had served an Order to Show Cause for hearing on April 30, 2012.
9 Clausen Decl. ¶ 11.

10 Paulite once again filed Chapter 13 Bankruptcy, on May 9, 2012, again staying all state court
11 actions. Clausen Declaration, Ex. 10. This stay was lifted June 8 pursuant to Title 11 U.S.C. §
12 362(c)(3)(A), which limits the automatic stay for debtors filing sequential bankruptcies Paulite made
13 no further effort to obtain a stay in bankruptcy court.
14

15 Dahlgren filed a Motion for Writ of Execution, which was granted by Judge Prochnau on July
16 19, 2012. Clausen Declaration, Ex. 11. The Order stated, "Ms. Paulite has no right of possession
17 under the Court's orders and is at best a resident occupying the property without permission of the
18 trustee, Mr. Dahlgren, under RCW 59.12.030 or is a trespasser subject to ejectment under these
19 proceedings" *Id.* A Twenty Day Notice to Vacate followed, demanding surrender of the premises by
20 August 13, 2012. Clausen Decl. ¶ 14.
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¹ Chase and Dahlgren settled and Chase is not a party to this Appeal. Neither is the Receiver.

1 Pursuant to the Writ of Execution, Dahlgren filed a Motion for Contempt which was not
2 heard. Clausen Decl. ¶ 15². After the motion for contempt, and in the hearing, Paulite informed the
3 Court and Dahlgren's counsel that she had a rental agreement in place starting October 1, 2012.
4 Clausen Decl. ¶ 16. Dahlgren's counsel told her that if she could produce adequate proof of a new
5 rental agreement then an agreement could be worked out. *Id.* Paulite never produced anything for
6 Dahlgren's counsel. *Id.*

7 Dahlgren brought another Unlawful Detainer action against Paulite, and the tenants/family
8 members residing at the Subject Property and a Writ of Restitution against Paulite on September 28,
9 2012. Clausen Declaration, Ex. 12. Dahlgren's counsel worked with innocent tenants to allow them
10 to stay in the house through the end of October. Clausen Decl. ¶ 18. Other tenants were family of
11 Paulite. *Id.* In August 2012, Paulite moved to Vacate the October 7, 2011 Order. Judge Prochnau
12 denied this motion on September 27, 2012. Clausen Declaration, Ex. 13. The Court granted the Writ
13 of Restitution against Paulite and allowed the tenants to stay pursuant to their rent agreement.
14 Clausen Declaration, Ex. 14. Dahlgren did not receive proper rent from Paulite's family members.
15 Clausen Decl. ¶ 20. On October 18, 2012, Judge Prochnau granted a Writ of Restitution against
16 Paulite family members Benfa Magluyan, Fritz Magluyan, Maria Pe Magluyan Yu, and Felix Yu.
17 Clausen Declaration, Ex. 15. At the sheriff's request, Dahlgren's counsel personally attended the
18 eviction of these all "tenants". Clausen Decl. ¶ 23.

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20
21 Shortly after Paulite and her family were evicted from the Subject Property, Paulite filed bar
22 complaint against Mark Clausen and Morgan Blackburn, Dahlgren's attorneys. Clausen Decl. ¶ 24.
23 The Bar dismissed both complaints but Paulite appealed, causing significant additional attorney's
24

25 ² Dahlgren chose not to pursue the motion for contempt because all proceedings would have had to be stayed while Paulite was appointed an attorney. Dahlgren chose to continue to pursue evicting Paulite to preserve attorney's fees.

1 fees to be incurred in the defense. Clausen Declaration, Ex. 16. Paulite also hired two attorneys to
2 raise claims against Dahlgren in letters for allegedly breaching the property settlement agreement,
3 despite never raising such a claim in two years of litigation or in four bankruptcy actions. Clausen
4 Declaration, Ex. 17.

5 In Paulite's second bankruptcy, the trustee moved to dismiss her plan; Dahlgren joined in the
6 motion. Clausen Decl. ¶ 27. On October 18, the Court agreed with the trustee and Dahlgren, but at
7 Paulite's request converted the case to Chapter 7. Clausen Declaration, Ex. 18. On January 17, 2013,
8 the Bankruptcy Court granted Dahlgren's motion to abandon the bankruptcy estate's interest in the
9 Property. Court agreed with the trustee and Dahlgren, but at Paulite's request converted the case to
10 Chapter 7. Clausen Declaration, Ex. 19.

11 On January 8, 2013, the trial Court granted Dahlgren's Application for Appointment of
12 Receiver. Clausen Declaration, Ex. 20. In the Courts Findings of Fact and Conclusions of Law
13 supporting the Order, the Court found receivership was proper and Dahlgren was entitled to
14 reimbursement for his efforts to get the Subject Property sold in the same priority as the Receiver. *Id.*

15 The Court Granted the Motion for Authorization to Sell Property Free and clear, finding that
16 no Bankruptcy Law Prohibits the Sale and Granting Dahlgren's Limited Objection on Disbursement
17 on March 11, 2013. Clausen Declaration, Ex. 21. This order awarded Dahlgren \$176,000 for his
18 attorney's fees and costs as administrative costs of the sale, as well as \$6,493.65 as administrative
19 expenses for the direct costs Dahlgren incurred. *Id.* After disbursal, Dahlgren received \$88,381.52,
20 which was all that was left. *Id.* On April 26, 2013, the Trial Court granted Dahlgren's Motion for
21 Summary Judgment on Damages, awarding him \$56,306 for lost income in 2010 and entitling
22 Dahlgren to a setoff of damages resulting from 2011 and 2012, should Paulite pursue any alleged
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24
25

1 damages against him. Clausen Declaration, Ex. 22. On August 8, 2013 the State Court Granted
2 Dahlgren's Motion and Notice for Presentation of Final Judgment. Clausen Declaration, Ex. 23.

3 **I. ISSUES**

- 4 1. Is a debtor's debt dischargeable when it arises from a property settlement agreement which
5 requires the debtor to hold the creditor harmless and the debtor failed to do so causing the
6 debt to be incurred?
7 2. Is a debtor's debt dischargeable when it has been caused by the debtors willful and malicious
8 refusal to comply with a property settlement agreement at various points in time and follow
9 multiple court orders?

10 **II. EVIDENCE RELIED UPON**

11 Declaration of Mark A. Clausen, with exhibits.

12 Declaration of Robert Dahlgren, original previously filed in King County Superior Court,
13 with exhibits.

14 **III. ARGUMENT**

15 When a debtor files Chapter 7 bankruptcy, she is generally entitled to discharge of unsecured
16 debts. Certain debts can be exempted from discharge under 11 U.S.C. §523. Section 523(a)(15)
17 addresses debts arising from a property settlement agreement between spouses and Section 523(a)(6)
18 addresses debts which were created by willful and malicious conduct. Both apply here.

19 **A. THE DEBT INCURRED BY PAULITE AROSE OUT OF HER FAILURE TO
20 FOLLOW THE PROPERTY SETTLEMENT AGREEMENT BETWEEN
21 CREDITOR DAHLGREN AND HERSELF.**

22 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),
23 specifically provided that a property settlement obligation incurred pursuant to a divorce is
24 nondischargeable under 11 U.S.C. § 523(a)(15). *In re Gollo*, 393 B.R. 56 (2008). Specifically,
25 section 523(a)(15) provides that a discharge under the Bankruptcy Code does not discharge an
individual debtor from any debt:

1 to a spouse, former spouse, or child of the debtor and not of the kind described in
2 paragraph (5) **that is incurred by the debtor in the course of a divorce or**
3 **separation or in connection with a separation agreement, divorce decree or other**
4 **order of a court of record, or a determination made in accordance with State or**
5 **territorial law by a governmental unit.**

6 *Id.* [Emphasis added] This differs from 11 U.S.C. §523(a)(5), which requires a determination of
7 whether the debt at issue constitutes a domestic support obligation, because section 523(a)(15) is
8 satisfied if a debt is “ (1) owed to or recoverable by “a spouse, former spouse, or child of the debtor”
9 and (2) “is incurred by the debtor in the course of a divorce or separation or in connection with a
10 separation agreement, divorce decree or other order of a court of record”. *Id.*

11 Attorney’s fees

12 It is a “well-established principle of bankruptcy law that dischargeability must be determined
13 by the substance of the liability rather than its form.” *Pauley v. Spong (In re Spong)*, 661 F.2d 6, 9 (2d
14 Cir.1981). The case at hand is apposite to *In re Ginxle*, 430 B.R. 702 (2010). In that case, a
15 property settlement agreement imposed various obligations on a former spouse, including the debt of
16 a mortgage note. *In re Ginzi*, 430 BR 702 (2010). The obligated spouse failed to fulfill his various
17 obligations and filed bankruptcy. *Id.* The creditor spouse filed an adversary suit against the debtor
18 spouse, requesting attorney fees in connection with the breach of the marriage settlement agreement,
19 which had an attorney’s fees provision. *Id.* The court held the creditor spouse’s claim for attorney’s
20 fees was non dischargeable pursuant to 523(a)(15). *Id.*

21 Clearly, the damages and attorney’s fees awarded by the state court are non-dischargeable
22 under 11 U.S.C. 523(a)(15). The Superior Court awarded damages to Dahlgren and found he was the
23 prevailing party and entitled to recovery of attorney’s fees and costs. No dispute exists that
24 Dahlgren’s damages and attorney’s fees arose from Paulite’s breach of the Decree and Property
25 Settlement by failing to deal with Dahlgren’s personal liability for the Chase debt and Paulite’s

1 egregious conduct that followed. If Paulite had complied with her obligations, Dahlgren's credit
2 would not have been damaged, he would not have been forced to deal with Chase's foreclosure and
3 adverse credit reporting. He also would not have had to undergo the exhausting proceedings to
4 remove Paulite and her relatives from the Subject Property so it could be sold. All of these damages,
5 costs and fees flow from Paulite's breach.

6 Moreover, in light of Debtor's willful failure to follow Court orders and the PSA, to hold
7 otherwise would reward her for her outright disregard for Court and contractual obligations.

8
9 **B. THE DAMAGES AND ATTORNEY'S FEES INCURRED BY CREDITOR
10 DAHLGREN WERE THE RESULT OF DEBTOR'S WILLFUL INTENT TO
11 INJUR HIM.**

12 Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor may not
13 discharge a debt "for willful *and* malicious injury by the debtor to another entity or to the property of
14 another entity." (emphasis added). *In re Su* established that the malicious injury requirement of §
15 523(a)(6) must be determined separately from the willful injury requirement. *In re Su*, 290 F.3d 1140,
16 1146-47 (2002). Here, Debtor's actions were both willful and malicious.

17 As used in that section, the word "willful" indicates "a deliberate or intentional *injury*, not
18 merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61,
19 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). The injury caused by the debtor must also be malicious,
20 meaning "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or
21 ill-will." *In re Stelluti*, 94 F.3d 84, 87 (2d Cir.1996). Malice may be implied "by the acts and conduct
22 of the debtor in the context of [the] surrounding circumstances." *Id.* at 88 (alteration in original,
23 internal quotation marks omitted).

24 In the breach of contract setting, exception from discharge under 523(a)(6) applies, when it is
25 accompanied by malicious and willful *tortious conduct*." *In re Jercich*, 238 F.3d 1202, 1205 (2001).

1 *Jercich* held that liability for a breach of contract need not be wholly independent from liability for
2 the tort in order for the tortious conduct to give rise to nondischargeability under § 523(a)(6). *Id.* at
3 1206.

4 In the case at hand, Debtor's conduct is clearly willful. She was clearly aware that Dahlgren's
5 name was attached to the note and she had the obligation to get Dahlgren released or otherwise
6 protect him from the debt. There is no evidence that she ever made any attempt to apply for the loan
7 to be transferred. Dahlgren and Chase both attempted to have Debtor remove Dahlgren from the
8 Note. Paulite did not do so and even directed Chase to send information Creditor Dahlgren at her
9 address. Debtor's actions are also malicious because there is no just excuse for Paulite's actions.

10 Paulite has argued that she was unable to pay the mortgage. This is no excuse. She failed to
11 pay what was required for months before Chase began foreclosure. She had opportunity to sell the
12 residence or take other action to obtain Dahlgren's release. She had ample equity in the house and
13 could have sold it and paid off Chase with significant money to spare. Even in the Receiver's sale,
14 considering the lower price the Receiver could command and the costs the Receiver charged, there
15 were net proceeds of almost \$90,000. Unfortunately, because Paulite obstructed the sale process for
16 months and and with so much unnecessary litigation, Dahlgren incurred almost twice that amount in
17 attorney's fees and costs. Paulite's serial bankruptcy filing, the need for multiple eviction actions to
18 get her and her relatives out of the house, and the extended proceedings all derived from Paulite's bad
19 faith and malice toward Dahlgren. Paulite's actions were nothing short of willful. Additionally,
20 Debtor flagrant disregarded Court Orders multiple times, which is necessarily willful and without
21 justification. Therefore Creditor Dahlgren's claim is clearly nondischargeable.

22 IV. CONCLUSION

23 For the forgoing reasons, Dahlgren's claim again Paulite should be deemed dischargeable.

24 DATED this August 15, 2013

25
**CREDITOR DAHLGREN'S MOTION FOR SUMMARY
JUDGMENT REGARDING NONDISCHARGEABILITY OF
CLAIM- 10**

CLAUSEN LAW FIRM PLLC
MARK A. CLAUSEN WSBA 15695
701 FIFTH AVENUE • SUITE 7230
SEATTLE, WASHINGTON 98104
(208) 223-0335 • FAX (208) 223-0337
E-Mail: mclausen@clausenlawfirm.com

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CLAUSEN LAW FIRM PLLC



Mark A. Clausen, WSBA #15693

Morgan R. Blackbourn, WSBA # 42179

Attorneys for Plaintiff, Robert Dahlgren

**CREDITOR DAHLGREN'S MOTION FOR SUMMARY
JUDGMENT REGARDING NONDISCHARGEABILITY OF
CLAIM- 11**

CLAUSEN LAW FIRM PLLC
MARK A. CLAUSEN WSBA 15693
701 FIFTH AVENUE • SUITE 7230
SEATTLE, WASHINGTON 98104
(206) 223-0335 • FAX (206) 223-0337
E-Mail: mclausen@clausenlawfirm.com

1 Sten E. Sorby
2 Law Office of Sten E. Sorby
3 4011 Wallingford Ave. N., Suite B
4 Seattle, WA 98103
5 206-547-1003

Judge: Timothy W. Dore
Chapter: 7
Location: U.S. Courthouse
700 Stewart Street
Seattle, WA 98101-1271
Room 8106
Date: **October 25, 2013**
Time: 9:30 a.m.
Response date: **October 18, 2013**

6
7 UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

8 In re:) Chapter 7
9 Omega P. Paulite,)
Debtor,) Case No.: 12-14935
10)
11) NOTICE AND MOTION TO RE-CONVERT
12) FROM CHAPTER 7 TO CHAPTER 13

11 TO: THE CLERK OF THE COURT; and
12 TO: DEBTOR, CH. 13 TRUSTEE, UST, ALL CREDITORS ENTITLED TO NOTICE, & OTHER
13 PARTIES IN INTEREST

13 **NOTICE**

14 The hearing on the Motion to Re-Convert to Chapter 13 is SET FOR HEARING, as follows:

15 **Judge: Timothy W. Dore** **Date: October 25, 2013**

16 **Location: U.S. Courthouse – Room 8106** **Time: 9:30 a.m.**
17 700 Stewart Street
18 Seattle, WA 98101-1271

19 IF YOU OPPOSE the Motion, you must file your written response with the Court Clerk, serve two
20 copies on the Judge's chambers and deliver copies on the undersigned NOT LATER THAN the
21 RESPONSE DATE, which is **October 18, 2013**.

22 IF NO RESPONSE IS TIMELY FILED AND SERVED, the Court may, in its discretion, GRANT
23 THE MOTION, ENTER AN ORDER IN THE FORM ATTACHED HERETO, PRIOR TO THE
24 HEARING, WITHOUT FURTHER NOTICE and strike the hearing.

25 DATED October 2, 2013.

26 Moving Party,

27 LAW OFFICE OF STEN E. SORBY

28 By: /s/ Sten E. Sorby
Sten E. Sorby, WSBA# 27020, Attorney for Debtor

APPENDIX B

Motion to Re-Convert to Chapter 13 - 1

Law Office of Sten E. Sorby
4011 Wallingford Ave. N., Suite B
Seattle, WA 98103
206-547-1003
fax-206-547-0390

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MOTION

COMES NOW the debtor, Omega Paulite, by and through her attorney, Sten E. Sorby, and moves this court for an order converting the above captioned Chapter 7 case to Chapter 13, pursuant to 11 U.S.C. §706(b), based on the following:

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on May 9, 2012. Debtor's case was converted to a case under Chapter 7 on October 18, 2012. Debtor's case was converted to Chapter 7 after a failed attempt to retain a residence that was central to an ongoing dispute with debtor's former spouse. The residence has now been sold and will not be an impediment to the debtor proposing and confirming a simple best efforts plan.

WHEREFORE, debtor requests the court enter an order, in the form of the proposed order attached as Exhibit "A", converting the above captioned case back to chapter 13.

Dated this 30th Day of September, 2013

/s/ Sten E. Sorby #27020
Sten E. Sorby, Attorney for Debtor

DECLARATION

I the debtor, Omega Paulite, declare under penalty of perjury that I have read the motion filed herewith and believe the contents to be true and correct.

SWORN TO this 30th day of September, 2013

/s/ Omega Paulite
Omega Paulite, Debtor

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON

3 In re:) Case No. 12-14935
4 OMEGA P. PAULITE,) *Proposed*
5 Debtor.) ORDER ON MOTION TO RE-CONVERT TO
6) CHAPTER 13
7)

8 THIS MATTER having come on the debtor's Motion to Re-Convert from Chapter 7 to
9 Chapter 13, notice having been given, no responses having been filed, no parties having
10 appeared at the time and place set for hearing, and the Court having reviewed the files and
11 record herein, IT IS HEREBY

12 ORDERED that the above captioned case is hereby converted back to Chapter 13.

13 END OF ORDER

14 Presented by:

15 /s/ Sten E. Sorby
16 Sten E. Sorby, wsba#27020
17 Attorney for Debtor

18 Order on Motion to Re-Convert to Chapter 13- 1

19 Law Office of Sten E. Sorby
4011 Wallingford Ave. N, Suite B
Seattle, WA 98103
206-547-1003



Timothy W. Dore
U.S. Bankruptcy Court
(Dated as of Entered on Docket date above)

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TIMOTHY W. DORE
United States Bankruptcy Judge
700 Stewart Street, Room 8106
Seattle, WA 98101
(206) 370-5300

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

In re:

OMEGA P. PAULITE,

Debtor.

Bankruptcy No. 12-14935-TWD

ROBERT W. DAHLGREN,

Plaintiff,

Adversary No. 12-01772-TWD

v.

OMEGA P. PAULITE,

Defendant.

**ORDER REGARDING MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court on the summary judgment motion filed by Robert Dahlgren ("Dahlgren"). The Court has reviewed and considered the summary judgment motion, all

APPENDIX C

1 evidence submitted in support of and in opposition to the summary judgment motion, the records and
2 files in this adversary proceeding and the oral argument held on October 4, 2013. Specifically, the
3 Court considered the pleadings and evidence appearing at Docket Nos. 1, 5, 10, 14, 17, 18, 26, 28-34
4 and 36. The Court stated its reasons for partially granting and partially denying the summary judgment
5 motion on the record at the conclusion of the hearing on the summary judgment motion on October 4,
6 2013 as contemplated by Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil
7 Procedure 56(a). The Court concluded that there is no just reason for delay and that entry of final
8 judgment in favor of Dahlgren on the 11 U.S.C. § 523(a)(15) cause of action is appropriate under
9 Federal Rule of Bankruptcy Procedure 7054 and Federal Rule of Civil Procedure 54(b). Now,
therefore, it is hereby ORDERED that:

10 1. Dahlgren's request for summary judgment on the 11 U.S.C. § 523(a)(6) cause of action
11 is denied.

12 2. Dahlgren's request for summary judgment on the 11 U.S.C. § 523(a)(15) cause of
13 action is granted.

14 3. The entire amount of the debt owed by Omega Paulite to Dahlgren set forth in the Order
15 Granting Dahlgren's Motion and Notice for Presentation of Judgment dated August 8, 2013 in
16 Dahlgren v. Northwest Trustee Services, Inc. et al., King County, Washington Superior Court Case
17 No. 10-2-40312-4SEA is excepted from discharge under 11 U.S.C. § 523(a)(15).

18 4. This is a final order. All further activity in this adversary proceeding is stayed absent
19 further order of this Court until such time as any appeal of this Order is complete. If there is no appeal
20 of this Order, the Clerk's office shall close this adversary proceeding.

21 /// End of Order ///

Below is the Order of the Court.



Timothy W. Dore

Timothy W. Dore
U.S. Bankruptcy Court
(Dated as of Entered on Docket date above)

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Morgan R. Blackburn
Clausen Law Firm, PLLC
701 Fifth Avenue, Suite 7230
Seattle, WA 98104
206.223.0335

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re:
Omega Paulite,

Debtor(s).

No. 12-14935-TWD

ORDER DENYING MOTION TO RE-
CONVERT FROM CHAPTER 7 TO
CHAPTER 13

~~THIS MATTER~~ came before the court on ~~the motion of~~ Debtor Omega Paulite's Motion to Re-convert from Chapter 7 to Chapter 13 (Docket No. 88). This Court has reviewed and considered the ~~summary judgment~~ motion, all evidence submitted in support of and in opposition to the summary judgment motion, ~~the records and files in this adversary proceedings and that~~ made oral findings and oral argument held on November 8, 2013. The Court ~~stated its reasons for denying the motion to~~ conclusions ~~re-convert~~ on the record at the conclusion of the hearing on the Motion to reconvert from

**ORDER DENYING DEBTOR PAULITE'S MOTION TO RE-
CONVERT FROM CHAPTER 7 TO CHAPTER 13- 1**

APPENDIX D
CLAUSEN I
MARK A. CLAUSEN
701 FIFTH AVENUE - SUITE 7230
SEATTLE, WASHINGTON 98104
(206) 223-0336 • FAX (206) 223-0337
E-MAIL: mark@clausenlaw.com

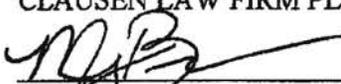
1 Chapter 7 to Chapter 13 on November 8, 2013 as contemplated by Federal Rule of Bankruptcy
2 7052 and Federal Rule of Civil Procedure 52(a)
3 Procedure 7056. **NOW, THEREFORE, IT IS HEREBY ORDERED** that Debtor Paulite's

4 Motion is **DENIED**.

5 */// End of Order ///*

6 Presented by:

7 CLAUSEN LAW FIRM PLLC

8 
Mark A. Clausen, WSBA #15693

9 Morgan R. Blackburn, WSBA #42179

10 Attorneys for Plaintiff
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**ORDER DENYING DEBTOR PAULITE'S MOTION TO RE-
CONVERT FROM CHAPTER 7 TO CHAPTER 13- 2**

CLAUSEN LAW FIRM PLLC
MARK A. CLAUSEN WSBA 15693
701 FIFTH AVENUE - SUITE 7230
SEATTLE, WASHINGTON 98104
(208) 223-0335 • FAX (208) 223-0337
E-Mail: mclausen@clausenlawfirm.com

UNITED STATES BANKRUPTCY COURT
Western District of Washington
700 Stewart St, Room 6301
Seattle, WA 98101

DEC 17 2013
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In Re:

Omega P Paulite

Debtor(s).

Case Number: 12-14935-TWD

Chapter: 7

CASE CLOSED WITHOUT DISCHARGE

All creditors and parties in interest are notified that the above-captioned case has been closed without entry of discharge for Omega P Paulite, for the reason(s) indicated below:

- The Debtor(s) did not file a Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management.
- Debtor(s) has not certified that all domestic support obligations due have been paid.
- Debtor(s) is ineligible for a discharge.

If the debtor files a Motion to Reopen the Case to file the missing certificate(s), a reopening fee is due.

Dated: November 25, 2013

Mark L. Hatcher
Clerk of the Bankruptcy Court

EXHIBIT E

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of: Clausen Law Firm PLLC.

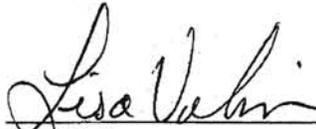
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the Respondent's Brief and Appendix on the following person(s):

Omega Paulite
PO Box 7265
Bellevue, WA 98008
megpaulite@hotmail.com
 Via Electronic Mail
 US Postal Service

Ann T. Marshall, Esq.
Bishop White Marshall & Weibel PS
720 Olive Way Ste 1201
Seattle, WA 98101-1878
amarshall@bwmlegal.com
 Electronic Mail

SIGNED in Seattle, Washington this April 14, 2014.



Lisa Vulin