

No. 72053-8-I

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DBM CONSULTING ENGINEERS, INC., a Washington corporation,

Respondent,

vs.

JOSEPH D. SANDERS, and the marital community composed of Joseph
D. Sanders and "Jane Doe" Sanders; SOOS CREEK VISTA, INC., a
Washington corporation,

Appellants.

BRIEF OF APPELLANTS SANDERS AND
SOOS CREEK VISTA, INC.

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A. INTRODUCTION

For the third time, this Court must examine the legal sufficiency of attempts by DBM Consulting Engineers, Inc. (“DBM”) to remedy its failure to foreclose on a lien bond that it had available to satisfy a judgment it obtained in 2005.

DBM had a billing dispute with Soos Creek Vista, Inc. (“Soos Creek”) over engineering consulting services DBM provided. Although Soos Creek disputed the billing claim, it met its obligation to DBM by recording a bond in lieu of claim in an amount far in excess of DBM’s mechanic’s lien demand. DBM obtained a judgment against Soos Creek in 2005. However, DBM failed to properly execute on the lien bond, and its claim to the proceeds of the bond was denied by this Court. *DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 41, 170 P.3d 592, 595 (2007) (“*DBM I*”).

Having squandered its own ability to satisfy its judgment with the lien bond, DBM pursued another avenue – supplemental proceedings against Soos Creek. Soos Creek was insolvent. DBM obtained an order against Soos Creek’s principal, Joseph Sanders, claiming Soos Creek had fraudulently transferred promissory notes to Sanders. However, DBM failed to make Sanders a party to the supplemental proceedings.

Once again, this Court voided the order DBM had obtained, holding that DBM had violated due process and statutory provisions by failing to make Sanders a party. *DBM Consulting Engineers, Inc. v. Sanders*, 157 Wn. App. 1051 (2010) (unpublished) (“*DBM IF*”).

After remand, DBM again failed take the necessary steps to make Sanders a party for almost three years, despite knowing that a one-year statute of limitations applied. After DBM finally made Sanders a party, it obtained a summary judgment order that Soos Creek had fraudulently transferred the promissory notes to Sanders, even though the notes were the subject of a valid security interest dating back to 1997, long before Soos Creek and DBM ever did business.

The trial court erroneously applied the Uniform Fraudulent Transfer Act, RCW ch. 19.40 (“UFTA”) to this case, both in terms of what constitutes an asset and what defenses are available. The trial court also ignored the statute of limitations set forth in the UFTA. This Court should reverse the trial court’s order and either dismiss the UFTA action or remand for trial to resolve disputed issues of material fact.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred by entering summary judgment in favor of DBM in its order dated June 2, 2014.

2. The trial court erred by denying summary judgment in favor of Soos Creek in its order dated June 2, 2014.
3. In the alternative, the trial court erred by entering summary judgment in favor of DBM in its order dated June 2, 2014, when there were disputed issues of material fact that should have been resolved by a jury.

(2) Issues Relating to Assignments of Error

1. Are promissory notes and their proceeds that are subject to a valid security interest “assets” under the UFTA? (Assignments of Error 1-3)
2. Does the UFTA provide a complete defense to a claim of fraudulent transfer if the assets in question were subject to a valid, preexisting security interest? (Assignments of Error 1-3)
3. Does the question of whether there is a preexisting security interest, and whether a UFTA defendant acted in the normal course of business rather than with fraudulent intent a fact question for a jury?
4. When this Court rules that a claim is subject to a one-year statute of limitations, and voids an order because a necessary defendant was not served, and then upon remand the plaintiff fails to serve the defendant for three more years, has the statute of limitations recommenced and run as to that defendant?

C. STATEMENT OF THE CASE

On April 24, 1997, Soos Creek Vistas, Inc. (“Soos Creek”), for valid consideration, made, executed and delivered to Joseph D. Sanders a Promissory Note for \$1,400,000.00. CP 292-94. To secure repayment of

the Promissory Note, Soos Creek duly executed as Grantor a Deed of Trust (“Deed of Trust”), dated April 24, 1997, in favor of Sanders as security on the Property. The Deed of Trust was recorded on April 24, 1997, under Auditor’s File No. 9704240657, King County, Washington. CP 300-18. Sanders was the owner and holder of said Promissory Note and Deed of Trust.

The Note and Deed of Trust arose out of Sanders’ initial investment in Soos Creek and its predecessor corporation, B&M Investments, to develop property adjacent to the old Seattle International Raceway in Kent, Washington. CP 392. The Promissory Note provides in relevant part:

1.01 Payment of Principal and Interest. Principal and interest shall be paid as follows:

(c) Borrower shall pay Lender one hundred percent (100%) of the net proceeds from the sale of the Property, or any portion or subdivision thereof, until the aggregate outstanding balance due under this Note, including accrued interest, is paid in full.

CP 292. The Deed of Trust provides in relevant part:

12. BORROWER AND LIEN NOT RELEASED. From time to time, Lender may ... , reconvey any part of the Property Any actions taken by Lender pursuant to the terms of this paragraph 12 shall not affect the obligations of Borrower ... to pay the sums secured by this instrument, ... and shall not affect the lien or priority of lien hereof on the Property.

15. UNIFORM COMMERCIAL CODE SECURITY AGREEMENT. This Instrument is intended to be a security agreement pursuant to the Uniform Commercial Code for any of the items specified above as part of the Property which, under applicable law, may be subject to a security interest pursuant to the Uniform Commercial Code, and Borrower hereby grants Lender a security interest in said items

CP 304.

From 1999 through 2002, respondent DBM worked with Sanders to finalize the Soos Creek plat and receive building permits from the King County Building Department. Beginning in 1999, a number of the Soos Creek properties were sold under sales contracts against which Sanders held a valid lien under the deed of trust. CP 392.

DBM billed Soos Creek over \$450,000.00. Soos Creek paid over \$400,000.00 to DBM for this work. CP 530. Despite DBM's continual reassurance of completion and imminent final plat approval, the work always seemed to drag on and cost more. *Id.* Finally, in 2002 the delays and cost were unbearable and Sanders refused to pay for any additional work until the plat was completed. Sanders and DBM reached a settlement whereby DBM promised to get the plat completed in exchange for payment of its outstanding billings plus some minor additional work. *Id.*

Sanders paid and DBM again failed to deliver. CP 531. The work dragged on and DBM billed Sanders over \$60,000.00, which he did not agree to. *Id.* DBM withdrew from the project in December 2002 without completing the short plats. DBM refused to release its work product to the succeeding engineering firm, claiming a copyright, and threatened legal action. CP 531. DBM was “well aware” that Sanders had unpaid liens and deeds of trust securing his interest in all of Soos Creek’s property. *Id.*

DBM claimed that it was owed money under its contract and filed a mechanic’s lien for \$62,836.89 against the Soos Creek property. *DBM I*, 142 Wn. App. at 37. Soos Creek disputed the validity of the lien. A few weeks later, DBM filed its complaint against Soos Creek for breach of contract, unjust enrichment, and foreclosure of the mechanic’s lien. *Id.* Shortly thereafter, Soos Creek purchased and recorded a bond in lieu of claim in the amount of \$94,255. *Id.* In 2004, while the dispute was ongoing, Sanders had an opportunity to sell three of the lots. CP 393. Sanders released his beneficial interest in the 1997 Deed of Trust through partial reconveyances as an inducement to the three lot sales. The partial reconveyances released the seller-financed lots for sale. However, the notes and proceeds of the sales continued to be secured under the Uniform Commercial Code (“UCC”). CP 292-95, 393-95, 409. The purchasers, in turn, executed new, separate deeds of trust to Soos Creek to secure the

three promissory notes. *Id.*

These promissory notes were sales contracts for lots against which Sanders held and holds a valid lien under the 1997 deed of trust. As properties were sold by Soos Creek, Sanders released his deed of trust against individual lots and the sale proceeds were deposited in Soos Creek's accounts as loans to Soos Creek to pay ongoing bills, subject to the terms of Sanders' promissory note and deed of trust. CP 297-98. Periodically, withdrawals were credited towards the loan balance owing to Sanders. *Id.* This is the way it was done repeatedly as Sanders and Soos Creek sold lots both before and after DBM's lawsuit and judgment. CP 400-500. At no time did Soos Creek "own" the promissory notes from the buyers, or the proceeds from those notes. CP 397. The promissory notes from the purchasers were always held in escrow. *Id.* Sanders retained a security interest in the "proceeds" of the sale as provided in paragraph 1.01(c) of the Promissory Note.

On April 26, 2005, DBM obtained an amended judgment against Soos Creek, in the amount of \$139,502.72. *DBM I*, 142 Wn. App. at 38. The judgment was not against Sanders; he was not a party. *Id.* DBM attempted to recover on the lien release bond executed by Soos Creek. However, DBM failed to foreclose on the lien bond. *Id.* at 42. On appeal, this Court determined that because DBM had failed to properly name the

bonding company or foreclose on the lien bond, its claims against the lien bond were dismissed. *Id.*

Having sabotaged its own ability to execute on the bond that would have made it whole, DBM then attempted to execute on the promissory notes that Sanders possessed, and in which he held a security interest. *DBM II* at *1.¹ The trial court ordered execution on these notes under RCW 19.40.051(b) even though Sanders was not a judgment debtor and had not been served with legal process. *Id.*

In a second appeal, Sanders and Soos Creek challenged the trial court's order raising statute of limitations and due process claims. *DBM II* at *2-3. This Court held that the applicable statute of limitations under the UFTA was one year, and that DBM had properly brought its UFTA action against Soos Creek by filing the supplemental proceeding within one year. *Id.* at 2. However, this Court also found that Sanders was a necessary party, and that DBM's failure to obtain an order to show cause making him a party was a due process violation and rendered the trial court's order void. *Id.* On September 7, 2010, this Court remanded for further proceedings consistent with RCW 6.32.270. *Id.* On March 4, 2011, this Court issued its mandate. CP 1-2.

¹ Sanders is aware of the rule prohibiting citation to unpublished authority, and cites to *DBM II* only to simplify references to factual and procedural history. Sanders does not rely on *DBM II* for any legal authority, except insofar as the decision represents the law of the case.

Almost three years later on February 28, 2014, DBM obtained an order to show cause making Sanders a party. CP 164-66.² Sanders defended the motion on procedural and substantive grounds. CP 142-48. After the order to show cause was granted, Sanders moved for summary judgment, arguing that DBM's UFTA claim against Sanders was untimely, and that the transfer of the promissory notes did not constitute a fraudulent transfer under the UFTA because he had a preexisting security interest in them. CP 338-53. The trial court rendered summary judgment in DBM's favor, and ordered Sanders to return the promissory notes and cash proceeds from those notes to Soos Creek. CP 905-08. This timely appeal followed.

D. SUMMARY OF ARGUMENT

Property subject to a UCC Article 9 security interest, such as the promissory notes at issue here, are not "assets" of the debtor and cannot be the subject of a UFTA claim. If the debtor did not own the property because it is secured debt owing to another creditor, it would not be available to pay subsequent debt even in the absence of the transfer.

² DBM attempted to obtain show cause orders earlier, but its attempts were procedurally defective, as it admitted. CP 152. It then failed to act for almost two years, citing counsel's busy schedule and the fact that DBM's principal passed away. *Id.* Also, even DBM's earliest failed attempt at show cause order was not within the UFTA one-year statute of limitations. CP 69.

The UFTA also provides a complete defense to a claim of fraudulent transfer if the property in question was subjected to a UCC Article 9 security interest. The trial court erred in entering summary judgment in favor of DBM, and in declining to enter summary judgment in favor of Soos Creek and Sanders.

Even if this Court believes that the question of Sanders security interest is disputed on this record, the issue should be remanded for trial.

UFTA actions against insiders are subject to a one-year statute of limitations. Even assuming that the statute tolled from 2005-2010 while DBM was moving against Soos Creek, after this Court's 2010 ruling the statute recommenced, and DBM was obligated to make Sanders a party within one year. DBM failed to make Sanders a party for almost three years after this Court's remand. Its UFTA action against Sanders is time-barred.

E. ARGUMENT

(1) Standard of Review

This Court reviews a summary judgment order by undertaking the same inquiry as the trial court. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). This Court reviews questions of law de novo. *Id.* at 341. It considers all facts and reasonable inferences from facts in the light most favorable to the nonmoving party.

Id. If this Court determines that there is a dispute as to any material fact, then summary judgment is improper. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). But if reasonable minds could reach only one conclusion from the admissible facts in evidence, summary judgment is proper. *Id.*

(2) The UFTA Only Prohibits Transfers of “Assets” That Are “Owned” by the Debtor; If an Asset Is Encumbered by a Valid Preexisting Security Interest It Is Not the Proper Subject of a UFTA Action

The purpose of statutes against fraudulent conveyances, which have generally been upheld as valid, is to prevent debtors from placing beyond the reach of creditors property which legitimately should be available for the satisfaction of the creditors’ demands. 37 C.J.S. Fraudulent Conveyances § 3. “Broadly speaking, the purpose of such statutes is to prevent debtors from placing beyond the reach of creditors property which legitimately should be available for the satisfaction of the creditors’ demands. *Id.*

In 1987, the Legislature enacted the UFTA to replace the Uniform Fraudulent Conveyance Act (UFCA). Laws of 1987, ch. 444, § 10. The former UFCA had been, in general, a declaration of the common law. *Osawa v. Onishi*, 33 Wn.2d 546, 554, 206 P.2d 498 (1949). Under the UFTA, a fraudulent conveyance or transfer is defined as a transaction in

which “*the owner of property* has sought to place the property beyond the reach of his or her creditors....” *Freitag v. McGhie*, 133 Wn.2d 816, 822, 947 P.2d 1186 (1997), *as amended* (Dec. 18, 1997) (emphasis added); *Rainier Nat’l Bank v. McCracken*, 26 Wn. App. 498, 506, 615 P.2d 469 (1980); 37 Am.Jur.2d *Fraudulent Conveyances* § 1 (1968).

However, the UFTA specifically defines what constitutes an “asset” that is owned by a debtor, and it does not include property that is fully encumbered. RCWA 19.40.011(2). This is because a creditor is not injured unless a transfer puts beyond reach property that would otherwise have been subject to the payment of debt. *Mehrtash v. Mehrtash*, 93 Cal.App.4th 75, 80, 112 Cal.Rptr.2d 802 (2001).³ Encumbered property is not property that can be used to pay a subsequent debt.

(a) An “Asset” Is Property that the Debtor Owns that Is Not Encumbered By Preexisting Liens

In order for a fraudulent transfer to occur, there must be a *transfer* of an *asset* as defined in the UFTA. RCW 19.40.061. An “asset” under the UFTA means “property of a debtor,” but does not include “property to the extent it is encumbered by a valid lien.” RCW 19.40.011(2)(a). “Property” means anything that may be the subject of ownership. RCW

³ Because RCW 19.40.903 provides that the UFTA should be construed in a uniform manner throughout the states, case law from other jurisdictions can provide guidance in interpreting the UFTA. *Thompson v. Hanson*, 168 Wn.2d 738, 744, 239 P.3d 537, 539 (2009); *Sedwick v. Gwinn*, 73 Wn. App. 879, 890, 873 P.2d 528, 534 (1994).

19.40.011(10). “Lien” means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien. RCW 19.40.011(8).

Fully encumbered property is not an asset of the debtor, and its transfer to another “is not a ‘transfer’ at all within the meaning of the UFTA.” *Jecker v. Hidden Valley, Inc.*, 422 N.J. Super. 155, 166, 27 A.3d 964, 971 (App. Div. 2011). “[S]tate courts have consistently held that a transfer of fully encumbered property may not be set aside under the UFTA.” *Id.* (citing David B. Young, *Preferences and Fraudulent Transfers*, in *Understanding the Basics of Bankruptcy & Reorganization 2007* at 713, 733–34 (PLI Commercial Law and Practice Course Handbook Series No. 11219, 2007)).

Jecker holds that property subject to a valid, preexisting security interest – even if that interest is held by an insider – is not an asset under the UFTA. *Id.* In *Jecker*, the 80% majority shareholder of a business that owned real property held a preexisting security interest in that real property. *Id.* at 158. Two employees seeking unpaid commissions and defaulted loans sued the business, but not the insider personally. The insider, after a \$148,000 verdict had been rendered in the employees'

favor, foreclosed on the mortgages he owned against the real properties and obtained a judgment in his own favor for more than \$6,000,000. *Id.* at 159-60. Then, in a complicated transaction, he transferred the properties to a third party, who paid him \$2,300,000. *Id.*

Despite the fact that the insider's actions in selling the real property rendered the business insolvent, the appellate court affirmed dismissal of the employees' UFTA complaint. *Id.* at 158. Rejecting the employees' claim that the insider could not foreclose on his mortgages without violating the UFTA, the court stated that "The mortgages preexisted plaintiffs' lawsuit...and remained secured debt as part of Hidden Valley's reorganization plan." *Id.* at 166. The court stated that because the insider's mortgages constituted legitimate, preexisting secured debt, the insider's foreclosure action "cannot be a fraudulent transfer under the express terms of the UFTA." *Id.* The court explained that because the insider's legitimate, secured interest in the properties exceeded their value, they were not "assets" as defined in the UFTA. *Id.*

The source of the trial court's error here may have been the result of believing that because Soos Creek possessed the promissory notes, those notes were "assets" Soos Creek owned under the UFTA. Instruments such as promissory notes can change possession without changing ownership. *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484,

493, 326 P.3d 768 (2014). As such, “there has been considerable confusion in both judicial decisions and statutes” between the concepts of an “owner” of a promissory note and its “holder.” *Id.* at 495.

The “holder” with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;...

RCW 62A.1–201(21). The term “owner” with respect to negotiable instruments is not explicitly defined in the UCC. *Trujillo*, 181 Wn. App. at 498.

However, this Court has recently clarified that the terms “holder” and the “owner” in this context are not synonymous. *Trujillo*, 181 Wn. App. at 497. Thus, one may possess a promissory note and be the beneficiary entitled to payment under that note, without being the owner of the note. *Id.*, citing RCW 62A.3–203. “Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. *The right to enforce an instrument and ownership of the instrument are two different concepts.*” *Id.* (emphasis in original).

Again, in order for the UFTA to apply to the promissory notes in question, those notes must be “assets” that are “owned” by Soos Creek. If they were encumbered by a valid lien, even if that lien is held by an

insider, they cannot be the subject of a fraudulent transfer action. *Jecker*, 422 N.J. Super. at 166.

Under the 1997 deed of trust and promissory note, Sanders had a preexisting security interest in the subsequent notes and all of their proceeds. CP 292-94; 300-18. Soos Creek was the holder of the promissory notes at issue, but Sanders had a security interest in them. *Id.* They were not “assets” of Soos Creek, and their transfer to Sanders was not properly the subject of UFTA action by the terms of that statute.

(b) The Promissory Notes Were Subject to a Preexisting Article 9 UCC Security Interest; Their Transfer to Sanders Was Not Voidable Under RCW 19.40.081

A secured creditor is “protected by a pledge, mortgage, or other encumbrance of property that helps ensure financial soundness and confidence.” *Cashmere Valley Bank v. State, Dep’t of Revenue*, __ Wn.2d ___, 334 P.3d 1100, 1106 (September 25, 2014). Under the UCC, a secured creditor has “the right, on the debtor’s default, to proceed against collateral and apply it to the payment of the debt.” *Id.* (citing UCC § 9–102–(a)(72)). Thus, a secured party obtains two related benefits: leverage for payment or performance of the obligation and the ability to proceed against specific property if the debtor defaults. *Id.*, citing Russell A. Hakes, *The ABCs of the UCC: Article 9: Secured Transactions* 2 (3d ed.

2013); *see also*, *Cashmere Valley Bank v. State, Dep't of Revenue*, 175 Wn. App. 403, 417, 305 P.3d 1123 (2013) (a “secured” party necessarily has some recourse to collateral securing its investment).

A promissory note that is secured by a deed of trust is properly the subject of a UCC secured transaction. *Trujillo*, 181 Wn. App. at 493; *In re Staff Mortgage & Investment Corporation*, 625 F.2d 281 (9th Cir. 1980). It is “a separate obligation than the deed of trust or mortgage that secures that note.” *Boeing Employees' Credit Union v. Burns*, 167 Wn. App. 265, 272, 272 P.3d 908, 912, *review denied sub nom.*, *In re Burns*, 175 Wn.2d 1008 (2012). Thus, entry of judgment on a note does not necessarily affect the rights or remedies provided for a deed of trust or mortgage securing that note. *Id.*

A transfer that is subject to a valid UCC Article 9 security interest is not voidable under the UFTA:

A transfer is not voidable under RCW 19.40.041(a)(2) or 19.40.051 if the transfer results from:

...

Enforcement of a security interest in compliance with Article 9A of Title 62A RCW.

RCW 19.40.081(e)(2). This defense reinforces and strengthens the UFTA rule that an “asset” does not include encumbered property. If particular property would not have been available to a creditor in the absence of a

transfer because of a preexisting senior security interest, then the transfer does not harm junior lienholders. In other words, transfer of encumbered property does not “render” a debtor insolvent, the debtor was already insolvent before the transfer because it did not actually own the property in question.

This complete defense to a UFTA action, available to a transferee, is sensible in the context of secured transactions law, because a debtor is not prohibited from preferring one secured creditor among many. *Manello v. Bornstine*, 44 Wn.2d 769, 774-75, 270 P.2d 1059 (1954). The New Jersey Supreme Court summarized the rule as follows:

We start with the proposition that a preference as such is not a fraudulent conveyance. True, a creditor who collects from an insolvent debtor fares better than other claimants. Yet if the transfer were set aside in favor of another creditor, there would be but a substitution of one preference for another. For that reason a preference cannot be undone by a competing creditor whether the preference was obtained through judicial process or by a transfer from the debtor, and the Uniform Fraudulent Conveyance Act did not alter that proposition.

Smith v. Whitman, 39 N.J. 397, 189 A.2d 15 (1963); *see also*, *Marroquin v. Barrial*, 174 Cal.App.2d 540, 543, 345 P.2d 30 (1959); *In re Olson*, 45 B.R. 501, 505 (D., Minn. 1984); *Peoples-Pittsburgh T. Co. v. Holy Family P. Nat. C. Ch.*, 341 Pa. 390, 19 A.2d 360 (1941); *American Cas. Co. of Reading Pa. v. Line Materials Indus.*, 332 F.2d 393, 396 (10th Cir. 1964);

Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987) (hypothetical debtor who owes \$10,000 to A and \$20,000 to B, but has only \$8,000, which he uses to satisfy his debt to A, does not make “fraudulent conveyance” under the Uniform Act because payment satisfies a debt owed to legitimate creditor; “B must find a remedy in bankruptcy, or in some other, law”).

A perfected Article 9 security interest is effective against subsequent judicial lien holders. RCW 62A.9-301; *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 703-04, 934 P.2d 715, 719 (1997), *aff’d and remanded*, 135 Wn.2d 894, 959 P.2d 1052 (1998). In *Eagle Pacific*, this Court concluded that even cash could be subject to a perfected security interest and therefore exempt from the UFTA:

The funds transferred to CGI were “cash proceeds” of CMYC’s accounts. RCW 62A.9-306(1). As cash proceeds, the funds remained subject to the underlying security interests. RCW 62A.9-203(3). Further, because the security interests in CMYC’s accounts were perfected by filed financing statements, the security interests in the funds remained perfected. RCW 62A.9-306(3). Consequently, the UFTA does not apply to any transaction between CMYC and CGI involving funds from an account encumbered by prior, perfected security interests.

Eagle Pacific, 85 Wn. App. at 704.

Sanders recorded his deed of trust in 1997, which secured his interest in the subsequent promissory notes and notified potential future

creditors of Soos Creek of his secured claim. CP 300-18. Even if Sanders had not taken possession of the notes, he would still have been a priority secured UCC Article 9A creditor and would have been entitled to take possession of the notes in Soos Creek's bankruptcy proceeding. His repossession is not voidable under RCW 19.40.081(e)(2). The trial court should have entered summary judgment in Sanders and Soos Creek's favor regarding DBM's UFTA claims.

(3) In the Alternative, the Question of Whether Sanders Had a Valid Security Interest and Whether Soos Creek Acted Properly In Light of that Interest Is a Question of Fact for the Jury

Sanders presented substantial evidence that he had a valid security interest in the promissory notes, and that their transfer to him was not a UFTA violation. Although Sanders believes the facts establishing his security interest are undisputed and support summary judgment in his favor, at the least this Court should reverse and remand for a trial.

In *Eagle Pacific*, a yacht building company owed outstanding premiums to its insurer. *Eagle Pacific*, 85 Wn. App. at 698. Through the actions of its principal, the company made several asset transfers between it and other corporations established to hold off creditors and allay fears of unsatisfied customers. *Id.* at 700. The principal advanced the company almost a million dollars, secured under the UCC. The insurer later

obtained a judgment for the unpaid premiums, and then sued the company and its principal, claiming that transfers of assets to a new corporation controlled by the principal violated the UFTA. *Id.* The trial court entered summary judgment in favor of the insurer/creditor.

Division II of this Court reversed the trial court's summary judgment order in favor of the insurer/creditor, holding that there were material fact issues regarding whether the principal had properly established a valid security interest in the company's assets. *Id.* at 704. The Court concluded:

Demonstrating that the disputed transactions were subject to the UFTA is an element of Eagle Pacific's claim. By producing the security agreements, Christensen created an issue for trial as to whether any of the disputed transactions involved "assets" subject to the UFTA.

Id. at 719.

Sanders presented substantial evidence that the promissory notes at issue were subject to a UCC Article 9 security interest. Even if this Court thinks that summary judgment cannot be rendered in Sanders and Soos Creek's favor, this case must be remanded for trial on this issue.

- (4) DBM Failed to Make Sanders a Party to Its UFTA Action Within a Year of This Court's Remand to the Trial Court, the Action to Implead Sanders Is Barred by the Statute of Limitations

This Court in September 2010 voided an order in DBM's favor on its UFTA claim, holding that DBM was required to make Sanders a party in order to take the promissory notes from him. *DBM II* at *3. This Court also concluded that the UFTA's extinguishment provision, which requires that an action alleging a transfer to an insider be brought within a year, applied. *Id.* at *2. This Court stated that because DBM brought its action against Soos Creek within one year, its claim as to Soos Creek was not extinguished. *Id.* However, this Court also noted that failure to make Sanders a party to the action deprived the trial court of authority and rendered its order void. *Id.* at 3. This Court also noted that failure to implead a necessary party to a supplemental proceeding was a jurisdictional issue. *Id.* at *3 n.14.

However, after remand, DBM did not obtain an order to show cause against Sanders until February 28, 2014, nearly three years after this Court's mandate issued and this case was remanded to the trial court. CP 1-2, 164-66.

The UFTA requires a party claiming fraudulent transfer to an insider to be brought within one year of the transfer:

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought: ... (c) Under RCW 19.40.051(b), within one year after the transfer was made or the obligation was incurred.

RCW 19.40.091. Although this provision is called an “extinguishment provision” in the UFTA, our Supreme Court has clarified that it is a statute of limitations. *Freitag*, 133 Wn.2d at 820.

In order to comply with a statute of limitations, the plaintiff must not only file a claim, but timely serve the defendant. RCW 4.16.170. Failure to serve the defendant renders the action not commenced for statute of limitations purposes. *Id.*

This Court has already established that a UFTA claim may be brought in the context of a supplemental proceeding, and the statute of limitations still applies in that context. *DBM II* at *2. However, in the context of a supplemental proceeding, there is no “complaint” to be served on the defendant. “Service” is the service of an order to show cause delivered to the person:

An injunction order or an order requiring a person to attend and be examined made as prescribed in this chapter must be served by delivering to the person to be served a certified copy of the original order and a copy of the affidavit on which it was made.

RCW 6.32.130.

Thus, in order to comply with the UFTA one-year statute of limitations and this Court’s 2010 ruling, DBM was required to serve Sanders with an order to show cause *at the latest* within one year of remand of this case to the trial court. Its failure to do so bars its UFTA

claim against Sanders.

There is no contradiction between the proposition that a party can have an enforceable judgment, or even an existing claim, but through failure to act lose the right to a particular means to enforce that judgment. This Court has explained what happens when a claim exists, but the plaintiff's failure to take action for reasons within that plaintiff's control causes the statute of limitations to expire:

The events underlying these claims were wholly within Taggart's control. The statute of limitations claim is grounded in Taggart's failure to reduce its claim to judgment and then execute on it. If the statute of limitations has expired, the debt is not extinguished; Taggart is simply left with no remedy to collect on the obligation.

CHD, Inc. v. Taggart, 153 Wn. App. 94, 106, 220 P.3d 229, 235 (2009); citing *Jordan v. Bergsma*, 63 Wn. App. 825, 827–28, 822 P.2d 319 (1992).

DBM's UFTA claim is barred as against Sanders. Its action should have been dismissed by the trial court.

(5) Attorney Fees

RAP 18.1 provides that a prevailing party on appeal may recover attorney fees if applicable law grants them that right.

This Court has already stated that Soos Creek has a right to an award of attorney fees under the contract it had with DBM. *DBM II* at *3. The trial court awarded DBM fees on this basis. CP 995.

Should Soos Creek prevail on appeal, it is entitled to an award of attorney fees incurred in the supplemental proceedings and on appeal.

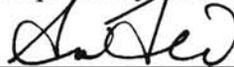
F. CONCLUSION

DBM has, time and again, failed in its efforts to devise a proper legal remedy for its own original sin in failing to properly execute on the lien bond Soos Creek provided. It has attempted to use supplemental proceedings and the UFTA to make up for that failure, but it has failed to follow the statutes – either procedurally or substantively. Its claims against Sanders and Soos Creek to a right in the promissory notes and their proceeds are without merit.

DBM's current effort is as deficient as its previous endeavors, and the trial court should have rejected it. This Court should instruct the trial court to enter summary judgment in favor of Soos Creek and Sanders, and finally put this 13-year litigation to rest. It should also award attorney fees to Soos Creek incurred in the supplemental proceedings and on appeal.

DATED this 21st day of November, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 72053-8-I to the following parties:

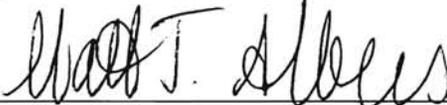
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November ^{24th} 21, 2014 at Seattle, Washington.



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