No. 100492-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VILLA MARINA ASSOCIATION OF APARTMENT OWNERS,

Petitioner,

v.

JOHN E. COLLINS, Jr., a/k/a JAKE E. COLLINS, Jr.,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

The Association seeks review of Division I's reversal of the trial court's grant of summary judgment in an unpublished decision, alleging both conflict of law and the existence of a substantial public interest pursuant to RAP 13.4(b)(1) (2), and (4).

The Association virtually abandoned *Le Bire v. Dept. of Labor & Indus.*, 14 Wn.2d 407, 128 P.2d 308 (1942), as its sole authority submitted to Division I, after the Court of Appeals thoroughly analyzed the case and held that *Le Bire* is not analogous. In seeking review, the Association only alleged in general that Division I's ruling "ignores the power of a private settlement" and "permits a collateral attack on the finality of a valid judgment and discourages parties from similar settlements in the future, since it makes all such settlements unpredictable." Petition, p. 16.

There is no private settlement agreement. There is no final judgment amount agreed upon by the parties in this

case. Neither issue preclusion nor claim preclusion is implicated. The Association received a lump sum payment from John "Jake" E. Collins, to resolve a prior lawsuit and it alone determined how this payment would apply to his account going forward. Jake Collins is a consumer who had no say on when and how his condominium association would apply his payments; he had no way to verify the accuracy of his account as represented by the Association. The Association says he owes tens of thousands; Collins disputes that he owes anything if his payment were applied correctly. The divergence in the parties' summary judgment evidence is based on the accounting of debits and credits on an account ledger and nothing more This case presents neither a conflict of law nor a substantial public interest that warrants review by this Court.

II. THERE IS NO CONFLICT OF LAW WARRANTING REVIEW

The law requires exactness in the calculation of the debt being sued upon. *Conklin v. Buckley*, 19 Wash. 262, 265, 53

P.52 (1898) (as a predicate to a decree of foreclosure and sale, the court must enter an absolute money judgment, definite in amount and supported by proof of the exact debt); *Tesdahl v. Collins*, 2 Wn.2d 76, 81-82, 97 P.2d 649 (1939) ("To support a mortgage, there must be a debt capable of identification, and the amount thereof must be ascertainable."); *Koster v. Wingard*, 50 Wn.2d 855 (1957) ("A mortgage cannot exist without a debt, and that debt must be identified and the amount fixed with certainty."), citing to *Tesdahl*. Beyond Washington, the concept that the accuracy of an alleged outstanding debt determines whether the creditor should be entitled to summary judgment is rudimentary. *Rosen v. Verizon Pa., LLC*, 2014 U.S.Dist. LEXIS 40750 (E.D. Penn., Mar. 27, 2014) (court denied summary evidence upon examination of evidence including account statements, explanations from service provider as the charges, and the consumer's dispute of these charges, concluding: "The explanations may be clear to Verizon, but it is not clear to us, and we can see why it was not clear to Rosen."); *Powell v. J.J.*

Mac Intyre Co. 2003 U.S. Dist. LEXIS 24699 (D. Haw., Oct. 16, 2003) (court denied summary judgment because "[a]lthough Defendant presents the account summaries indicating that charges were accrued, it does not resolve the issue of whether those charges were accrued properly.").

In Washington, legislation has been enacted to ensure that a property owner/consumer is afforded certain protections before his homeowners' association can foreclose on his property, through the Washington Uniform Common Interest Ownership Act (WUCIOA), effective May 10, 2021. The new statute includes the requirement that "every aspect of a collection, foreclosure, sales, or other conveyance under the lien foreclosure provisions must be commercially reasonable . . ." Thus, reasonableness in the foreclosure initiated by a homeowners' association necessitates the starting point or starting balance for the calculation of the homeowner's account delinquency.

The Association operated from the mistaken belief that it does not have to provide an accurate accounting in the debt collection action and the foreclosure lawsuit because the super lien statute gives it unfettered power and discretion:

> "Defendant tries to create issues of fact by starting from the presumption that the validity of the debt stems from the Association's ledgers."
>
> While receipt of payments are [sic] tracked on [those] ledgers, the legal bases for the debt stem from the Association's budget and governing documents."
>
> "With just these uncontested authorities, this court can reconstruct in full the debits owed through the relevant period of time even if no ledger had ever been maintained."

(CP481-482).

Of course, there is no legal authority for the court to "reconstruct" an accounting for the benefit of the creditor in a debt collection case. By definition, math has to be exact, and accounting irregularity or irreconciliation, whether resulting in a plus, or minus balance on the ledger is still an evidentiary problem for the factfinder. The Association's mistaken belief that the math is unimportant is reflected throughout the

litigation where its lawyers did not provide testimony concerning the accounting and records of the Association or its management company but added the lawyers' own "additional summary ledgers "to help visualize what is at dispute." (CP 524).

Initially, at the summary judgment hearing, the trial court expressed much confusion over the Association's evidence, commenting that it could not determine the starting point of the calculation of delinquency based on the Association's accountings and denied summary judgment:

> . . . -problem here, of course, Ms. Burkemper, is that, unfortunately, *due to changes in management companies and whatnot there are a number of conflicting accountings as to how much-you know, where sort of the starting point, if you will, which was the conclusion of the previous litigation, whether that meant that-that both-that both sides were even*, whether there was some sort of a credit, what the size of that credit is . . . And I am having difficulty getting there given all the different numbers flying around and the different accountings and ledgers and so on.

(CP 536:1-8), emphasis added.

Thereafter, the Association "fixed" its evidentiary problem by removing interests charged and applying certain payments made by Collins. Its lawyers created and submitted even more ledgers in support of motion for reconsideration. This exercise proved that the Association deviated from its original amount due, not by a few hundred dollars, but by thousands of dollars. Based on Collins' contest and the trial court's denial of summary judgment, Rachel Burkemper, Esq., submitted nearly a dozen ledgers that she created which reflects a recalculation of the debt, purportedly to give Collins all the credits that he was due (CP 523-587). At the end of Burkemper's recalculation, the total amount sought by the Association on summary judgment changed from $49,425.79 (CP 584) to $44,092.27 (CP 587). Thus, where the trial court thought the Association's accounting may be "a few hundred one way or the other," (CP 542) the amount that the Association contended Collins must pay or lose his property to foreclosure was off by more than $5,000 (CP525).

The Association conceded that its accounting for purpose of summary judgment amount was faulty but nevertheless insisted that where the inexactness resulted in a "windfall" to Collins, the trial court should reconsider and grant summary judgment. Petition, p.6. Ironically, the discount in the amount of $5,333.52 that Burkemper detected as irregularity of the Association's accounting benefited neither Collins nor the Association; only her law firm. At summary judgment, the law firm's requested fees were $19,236.50 (CP 376-390). Upon reconsideration, Burkemper showed that $23,083.00 in attorney's fees had been incurred by Collins as the property owner (CP 716). Ultimately, more than 50% of the summary judgment amount granted by the trial court, $44,092.27, was for attorney's fees (CP 716-721). But that is not the end of Collins' pain; the trial court also granted a supplemental judgment in the amount of $11,415.35 in additional attorney's fees and costs to Burkemper's law firm (CP 788-789). All in all, Collins' effort to get to the bottom of the Association's accounting of the

alleged debt, at the trial court level, cost him and enriched the debt collection lawyers, by approximately $35,000.

On appeal, Division I likewise was struck by the Association's inability to calculate the summary judgment amount based on an ascertainable beginning balance, on a date certain, of Collins' account. First, the Association contends that the Stipulation to dismiss the 2016 lawsuit bars Collins from establishing the starting point for his account for purpose of the 2019 lawsuit. Yet, the Stipulation entered into by the parties on March 1, 2017, and approved by the court reads simply: "Defendant Collins' account has been settled." (CP 442-443). There are no other documents signed by the parties to explain what it means to have the account "settled." Similarly, there are no agreements between the parties as to a mutual release, and no mentioning of the status of the Collins account, as of the execution date of March 1, 2017. In other words, there was no "judgment amount" agreed upon by the parties in support of their Stipulation for the 2016 litigation to be dismissed. This is

unusual as lawyers routinely have their clients sign a settlement agreement prior to a stipulation of dismissal. Without such antecedent settlement agreement, what Collins had to pay in exchange for the dismissal with prejudice, how the Settlement Payment would apply, and what Collins' account would look like, after said Payment, was left open for another day. And Division I correctly ruled that "the amount, if any, of Collins' delinquency before the Association applied the Settlement Payment—was not a definite issue before the court when it dismissed the 2016 Lawsuit based on the stipulation of the parties." *Villa Marina v. Collins*, 2021 Wash. App. LEXIS 2256, *12.

In consideration of the Association's argument that the enforcement of the Stipulation operates as a bar to Collins' ability to establish the balance of his account after the application of the Settlement Payment, this Court would follow the summary judgment procedures whereupon the Association, as the movant, must prove that there is no genuine issue over

the existence and material terms of the Stipulation itself. If and only after the Association has satisfied its burden that Collins is obligated to produce evidence of a genuine issue of material fact. And in determining the meaning of the parties' submission, this Court must read the Document in the light most favorable to Collins to determine whether reasonable minds could reach only one conclusion. *Condon v. Condon*, 177 Wn.2d 150, 161-162, 298 P.3d 86 (2013). The subject submission is the Stipulation signed by the parties' counsel and approved by the trial court (CP 492-495). It does not mention any amount, and the record does not contain any other document, including an antecedent settlement agreement setting forth specific terms, including mutual releases, signed by the parties. The Association's reference to a payoff letter that Burkemper issued cannot be part of the Court's consideration because the document was not acknowledged or signed by the parties themselves (CP 341). Regardless, the Court cannot conclude that the Settlement Payment zeroed out Collins'

account as of March 1, 2017, because the Statement of Account directly contradicts it; it shows that the application of Settlement Payment resulted in a credit in the amount of $2,012.27 in late February, 2017 (CP 191-193).

The Association's insistence that the Stipulation bars Collins from demanding an accurate accounting of his account, including an ascertainable starting point or balance, has no support in the law. Washington follows the objective manifestation theory of contracts, whereupon the court determines the intent of the parties based on the objective manifestations of the agreement, rather than any unexpressed subjective intent of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 349, 147 P.2d 310 (1944) ("It is the duty of the court to declare the meaning of what is written, and not what was intended to be written."); *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 479, 149 P.3d 691 (2006) (holding that there was a

genuine issue of material fact over whether the parties agreed on all material terms); *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 190, 840 P.2d 851 (1992) (considering whether there was mutual mistake by the parties). If the Association subjectively believed or intended for the Stipulation to conclusively zero out Collins' account on March 1, 2017, such belief or intent is irrelevant to the Court's determination of the scope of the Stipulation. *Hearst Commc'ns, Inc. v. Seattle Times Co*., 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005); *Condon v. Condon*, 177 Wn.1d 150, 198 P.3d 86 (2013).

Taking the phrase "Defendant Collins' account has been settled" at its literal meaning, the reader would have to conclude that the balance right before the Settlement Payment is the same as the Settlement Payment, so that the application of the Settlement Payment would zero out the account, as of a certain date. According to the Association's agent, Laura Lotz, her company, NOVA, only began to manage the Association on October 1, 2018, and the record actually came from the

Copeland Group, the former company. Thereafter, NOVA "triaged" Copeland's record with its own accounting system "to continue levying assessments and crediting all payments received." Lotz was not able to attest to the balance right before the Settlement Payment was made by Collins; she could not attest that receipt of the Settlement Payment actually zeroed out Collins' account. To the contrary, Lotz pointed to the prior management company's Statement of Account, Exhibit B to her Declaration, which contains entries during the period between September 30, 2016 and October 15, 2018, as proof (CP 181-185). The Copeland's Statement of Account shows a balance of $9,994.59, just before the Settlement Payment was applied (CP 193-198). It shows that the Settlement Payment did not zero out the account but credited Collins with $2,012.27 (CP 193).

The Association's own evidence belies its contention that the Stipulation constituted a judgment on the merit; the Stipulation is nothing more than an agreement to dismiss the 2016 litigation for an unspecified amount. *State ex rel.*

Hamilton v. Cohn, 1 Wn.2d 54 (1939) ("A judgment is not conclusive, however, on any point or question which, from the nature of the cause, the form of the action, or the character of the pleadings, could not have been adjudicated in the action in which it was rendered, nor as to any matter which must necessarily have been excluded from consideration."); *Bellingham Cmty. Hotel v. Whatcom County,* 12 Wn.2d 237, 121 P.2d 335 (1942) (A judgment declaring the validity or invalidity of city's local improvement assessments is not *res judicata* upon a subsequent action pertaining to the reassessment of the same property). While it is true that courts look with favor on compromise, the compromise must be a result of a mutual agreement. *Kibler v. Frank L. Garrett & Sons, Inc*., 73 Wn.2d 523, 439 P.2d 416 (1968). In this case, there was no evidence that the parties mutually agreed upon the balance before, and after, the Settlement Payment. In addition to the Association's inability to conclusively establish the balance before and after Collins' Settlement Payment, Collins

submitted evidence that he did not owe anything, but had a substantial credit on his account after he made the Settlement Payment in February of 2017 (CP 405-471).

Where the Stipulation is silent on the meaning of the Collins account being "settled" and where the amount stipulated upon by the parties is not revealed by the record, the Court of Appeal correctly held that the Stipulation does not establish the amount that Collins owed just before he made the Settlement Payment in the amount of $12,006.86, and the applicable balance, as of the time the Settlement Payment was made, could not be read into the Stipulation as asserted by the Association. This is because "[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written.'" *U.S. Life Credit Life Ins. Co. v. Williams,* 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). When a court order incorporates a stipulation between parties, the meaning of the order is the same as the meaning objectively

manifested by the parties when they formed the agreement. *Martinez v. Kitsap Public Servs*., 94 Wn. App. 935, 942 (1999).

The Association's continuing effort to shore up the evidentiary problem proved unsuccessful even with additional submission of proof, including additional declarations and ledgers created by Rachel Burkember, Esq. (CP 219-391). As the lawyer for the Association, Burkemper attested that she is familiar with her own law firm's business records, not the Association's records, or NOVA's records, or the Copeland Group's records. Due to her obvious lack of the foundational records, Burkemper similarly could not pinpoint the effective date of the calculation of the account delinquency or the amount that the Association used to calculate what Collins owed for purpose of summary judgment. She opined, "*it appeared* that the managing agent had applied the payment found in Exhibit E in a manner that benefited Mr. Collins by hundreds of dollars" but could not say so as a matter of fact (CP 221). Burkemper stated that she "created a summary ledger beginning with the

last time Mr. Collins was current on his assessments according to the Association's record. That was August 17, 2018 . . . By way of demonstration, attached as Exhibit F is a summary ledger that tracks just the assessments and payments showing on the Association's accounting records." (CP 221-222).

Burkemper's summary ledger is referenced as "Demonstrative summary ledger showing assessments and payments from prior litigation to beginning date on Association's summary ledger used to calculate summary judgment amount." (CP 349-350). It starts with entries dated March 1, 2017, and therefore does not provide the balance just before the Association applied the Settlement Payment (CP 349-350). Significantly however, where the Statement of the Account issued by the Copeland Group, shows a *credit* balance of $200 on April 1, 2017 (CP 238), Burkemper's summary ledger shows a *debit* account balance in the amount of $1,046.66, for the same date of April 1, 2017 (CP349). This means the Association's evidence suffers from its own

inconsistencies, in addition to being contradicted by Collins' evidence. Given the quantity and the quality of the Association's proof, it cannot be said that the Association met its initial burden of showing the lack of a genuine issue of material fact.

In his opposition to the Association's motion for summary judgment, Collins' Declaration was supported by his own accounting and an analysis of the Associations' ledgers, Holly Hanson, a Certified Public Accountant, who discussed the Association's ledgers at length and pointing out numerous inconsistencies (CP 455-459). Collins detailed various payments that he made, provided canceled checks and correspondence to show that the Association and their lawyers engaged in a deliberate scheme to manipulate his payments in order to increase the interests and fees, including attorney's fees, on his account. Collins declared that he made a business decision to pay $12,006.86 to stop the clock on attorney's fees only (CP 405-411). Collins asserted that had all of his payments

been applied correctly, he would be due a credit of $11,310.00 after he had made this Settlement Payment (CP407).

Even though the Association argues that Collins should not be allowed to go beyond March 1, 2017, to establish the starting balance, the Association's Statement of Account contains entries as far back as September 30, 2016 – eighteen months prior to the Settlement Payment. The Association also addressed some of Collins' complaints, in particular, the application of two checks he made in 2016. Admitting to having to adjust the account to reflect these two checks, Burkemper nevertheless downplayed the accounting deficiency, stating, "it seems hard to maintain that those payments, even if received and deposited, would have had any effect on the merits of the defense other than a minor reduction in interest." (CP 483-484). Yet, in making the adjustments, the Association conceded that the starting point of the calculation of the delinquency amount for the lawsuit, is not limited to April 1, 2017, but much earlier. By making concession about the

misapplication of certain payments made by Collins in 2016, the Association materially contributed to the error and should not be allowed to complaint about it on appeal. *In re Dependency of A.L.K,* 196 Wn.2d 686, 694-695, 478 P.3d 63 (2020).

Division I struggled with the same problem that the trial court faced; the lack of a solid beginning balance for the calculation of the purported delinquency of Collins' account:

> The Association provided a declaration from Laura Lotz, its management company's community association manager, attaching and authenticating the Association's historical ledgers. But these ledgers date back to only September 2016, and they do not show an account balance of $12,006.86 as of the end of February 2017. In fact, one ledger shows a credit of $2,012.27 after receiving the Settlement Payment. Burkemper declared that her firm did not bill the Association for some of the fees included in the January 2017 payoff statement until March 2017. *But Burkemper's declaration is not sufficient to establish the accuracy of the Association's underlying accounting*.

Villa Marina Ass'n of Apt. Owners v. Collins, 2021 Wash.App. LEXIS 2356, n. 4, emphasis added.

As counsel for the Association, Burkemper did not have the requisite personal knowledge about any of the payments made by Collins and how they were applied; she was not an employee of the management company that kept the Association's books. Burkemper's declarations and statements are unsupported conclusory statements that and cannot be relied upon to prove the nonexistence of issues of fact. ER 901; *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014). Moreover, because Collins vigorously contested the amount demanded by the Association, the advocate-witness rule calls into doubt testimony provided by Burkemper about the ledgers she prepared, the accounting she rendered, and the substance and the weight of such evidence, which is the controversy between her client, the Association, and Collins. RPC 3.7(a); *State v. Lindsay*, 10 Wn.2d 423, 437, 326 P.3d 125 (2014) (quoting *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985)).

The manner in which the Association's lawyers reconstituted the evidence in the summary judgment proceeding and motion for reconsideration is astounding but the logic behind their conduct is even more bizarre. Never mind that the sausage making process of the evidence has done violence to the summary judgment process; Burkemper expressed that the new amount requested at reconsideration is the Association's "right to charge $5,333.52 less than what actually requested at summary judgment." She boldly asserted that where the trial court was concerned the issue being "a few hundred one way or the other" her summary ledgers "demonstrate exactly which way – that the Defendant received a windfall in excess of $5,000." Clearly, nothing is exact about a discrepancy of over $5,000 between the initial accounting, and the re-calculation, both of which Burkemper was involved in.

Burkemper opined that "[w]hat we have here is a defendant who is fighting to get past summary judgment to hopefully force a creditor into a settlement that involves

waiving even more amounts rightfully owed" and that the Association "should not be expected to incur further useless rounds of settlement discussion or a trial for two forensic accountants to produce the very same evidence set forth at summary judgment and as fleshed out in this brief." (CP 523-530). Nothing could be further from the truth; Jake Collins is certain that the delinquency was manufactured and he is willing to spend the resources to prove it at trial. It would make sense to have experts who do not have interest in the outcome of the case, like Burkemper and her law firm, provide testimony about the math.

Finally, there is no threat that Division I's unpublished opinion in this case "if left to stand, will allow a party to attack an agreed order of dismissal without prejudice years later under a different case" as urged by the Association. Petition, p. 8. Unpublished opinions of the courts of appeals have no precedential value and cannot be cited as authority under Washington law. *In re Marriage of Schweitzer,* 132 Wn.2d 318,

937 P.2d 1062 (1997); *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 229 P.3d 735 (2010). Therefore, the analysis and conclusions of Division I are applicable to this case and affect only the parties in this litigation.

III. THERE IS NO SUBSTANTIAL PUBLIC INTEREST IN THIS CASE WARRANTING REVIEW

This Court does not grant review absent a constitutional issue or a substantial public interest. *In re Pendency of P.H.V.S.*, 389 P.3d 460 (2015) ("To obtain this court's review, a parent must show that the Court of Appeals decision conflicts with a decision of this court or with another Court of Appeals decision, or that he or she is raising a significant constitutional question or an issue of substantial public interest [in the dependency proceeding]"); *In re Pers. Restraint of Williams,* 2021 Wash. LEXIS 159 (Feb. 3, 2021) (persons confined by DOC while COVID-19 ravages their facility claim such confinement violates the prohibition against cruel punishment under article I, section 14 of the Washington Constitution and

their petition implicates significant constitutional questions and an issue of substantial public interest worth of the Supreme Court review); *In re Adoption of T.A.W.*, 387 P.3d 636 (2016) (interpreting statute requiring application of the federal Indian Child Welfare Act and a parallel state statute that a party seeking to terminate parental rights to an Indian child must satisfy the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."); *State v. Douty,* 92 Wn.2d 930 (1979) (the scope of the applicability of a newly enacted statute addressing the large and growing problem of children out born out of wedlock is a significant public interest warranting discretionary review); *Dix v. ICT Group, Inc*., 160 Wn.2d 826 (2007) (a forum selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value, implicating the importance of the private right of action to enforce the Consumer Protection Act for the protection of all

the citizens of the state, is a substantial public interest warranting review).

The foregoing discussion should convince the Court to deny review as there is no worthy public interest being identified by the Association. This case is simply about how the Respondent is entitled to have an accurate mathematical calculation of the alleged delinquency of his account, which requires a starting point*, i.e.,* an account balance on a date certain, before his condominium Association could foreclose upon his real property.

IV. CONCLUSION

For the factual reasons and legal citations set forth in this Response, John "Jake" E. Collins, Jr., respectfully requests the Court to deny review.

Respectfully Submitted this 12th day of January, 2022.

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I certify that this memorandum contains 4,519 words, in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I, Christina L Henry, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served filed and served via the court's eportal upon the counsel of record.

Dated at Bothell, WA, this 13th day of January, 2022.

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