

73915-8

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Court of Appeals  
Division I  
State of Washington

73915-8

NO. 73915-8-I

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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COLUMBIA STATE BANK,

Respondent

v.

MARK JORDAN,

Appellant,

and

INVICTA LAW GROUP, PLLC,

Defendant.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

Appellant Mark Jordan (“Jordan”) filed for bankruptcy on September 30, 2013. He closed his law firm, Invicta Law Group, PLLC (“Invicta”), the same day, and began to practice law as an individual.

A big reason for Jordan’s bankruptcy was his personal guaranty of a \$165,000 loan from Respondent Columbia State Bank (“CSB”) to Invicta. The note also was secured by a perfected security interest in all of Invicta’s assets. The guaranty was discharged in the bankruptcy, leaving CSB with only the collateral.

Shortly after Jordan’s filing, Invicta contacted CSB to coordinate turning over its assets under the security agreement. However, CSB took no action to obtain the collateral. While he waited for CSB to take possession of the collateral, Jordan used Invicta’s office for his practice. When a month passed, Invicta followed up, offering to purchase the collateral or turn it over to CSB. Again, CSB said and did nothing.

Even after this action was filed, Invicta continued to make the collateral available to CSB. In fact, Invicta finally put the collateral in storage and sent CSB the keys. However, CSB promptly rejected the tender and sent the keys back with a letter stating “the estimated cost of disposition exceeds the value of the Collateral.”

Three months later, CSB filed this action, alleging that Invicta had transferred all of its assets for inadequate consideration. That allegation was made on information and belief, and it was supported by no more than the fact that Jordan was using Invicta’s office. CSB claimed that Jordan was personally liable for Invicta’s loan under the “mere continuation” theory of successor liability.

The mere continuation rule applies when a debtor transfers its assets to a successor for less than adequate consideration and places them beyond the reach of creditors. The creditors are injured when they are left with the inadequate proceeds from the transaction and have no recourse to the assets. At that point, equity will step in and hold the successor liable for the debt.

No reported decision in the United States has ever imposed successor liability in favor of a secured creditor. The transfer of property subject to a security interest does not place it beyond the reach of the creditor. The security interest remains attached to the property and to the proceeds of the sale. For that reason, the creditor has an adequate legal remedy, and equitable relief is not available

At trial, much about this case became clear. CSB claimed that Invicta transferred its assets to Jordan, but presented no evidence of any actual transfers. Jordan used the property because he was waiting for CSB to collect the collateral, but CSB never took any action. Why CSB failed to foreclose on the collateral remained a mystery until CS Vice President Alana Rouff testified at trial that: “The bank made a decision not to pursue that remedy.” That decision was part of plan to fabricate a claim for successor liability and hold Jordan liable for the very debt that was discharged in his bankruptcy.

CSB’s plan worked in the trial court. King County Superior Court Judge Sean O’Donnell found for CSB and awarded it \$151,360.40 under the note plus \$258,045.78 of contractual attorney fees. He found that the loss of Jordan’s personal guaranty to bankruptcy itself justified awarding CSB equitable relief, and he found that Invicta transferred to Jordan everything that would be needed to start a law practice.

Judge O'Donnell erred in three principal ways. First, he granted equitable relief in a circumstance where the plaintiff had a complete legal remedy but independently chose to disregard it. Whether equitable relief was appropriate is a question of law that this Court reviews *de novo*. Second, he made conclusory findings that Invicta transferred its assets to Jordan when the record contained no evidence at all of a single transfer. His findings are defective on their face and not supported by substantial evidence. Third, he overruled a hearsay objection to oral testimony of the loan balance based on refreshed recollection about the contents of a computer report. That oral testimony was the only evidence of the loan balance.

Perhaps the most astonishing thing about this case is that CSB sought, and Judge O'Donnell awarded, contradictory relief. CSB asserted a claim for successor liability because its legal remedy of foreclosure was inadequate, but it also asserted a claim for a judgment of foreclosure. Judge O'Donnell imposed successor liability because foreclosure would not provide a remedy, but then also granted the judgment to foreclose on the collateral. He awarded successor liability because Jordan has used of the assets to run his practice and repay the loan, but then took those assets from Jordan, leaving him with all of Invicta's debt and no means to repay it.

This Court should reverse the trial court's decision, award Jordan attorney fees, and remand for entry of judgment for Jordan.

## **II. ASSIGNMENTS OF ERROR**

### ***General Errors***

1. The trial court erred when it concluded that "The Sole Proprietorship is liable for the obligation owed by the PLLC to Columbia

Bank as the PLLC's successor because the Sole Proprietorship is a mere continuation of the PLLC."

2. The trial court erred when it concluded that "The PLLC and the Sole Proprietorship are obligated to pay Columbia Bank \$151,360.40, plus additional interest at the rate of 10.50 percent per annum, plus Columbia Bank's attorneys' fees and costs" and when it granted judgment against Jordan. (Conclusion of Law 4)

3. The trial court erred when it granted CSB both a judgment for successor liability and a judgment to foreclose on its security interest.

***Errors Regarding Equitable Remedies***

4. The trial court erred in exercising its equitable jurisdiction in this case and in determining that equitable relief was appropriate.

5. The trial court erred when it determined that CSB's legal remedies were inadequate.

6. The trial court erred when it determined that CSB lost its ability to secure satisfaction of the Note with Invicta's assets. (Conclusion of Law 3(d).)

***Errors Regarding Asset Transfers by Invicta***

7. The trial court erred in making findings of fact that lack any specificity and do not explain the basis of the trial court's decisions.

8. The trial court erred in making findings of fact that were not supported by substantial evidence. (Findings of Fact 23-34, 36-38 and Conclusions of Law 3(b) and 3(d) (to the extent they are findings of fact)).

***Errors Regarding Rouff Testimony***

9. The trial court erred when it admitted Rouff's testimony about the loan amount at trial as hearsay.

10. The trial court erred when it ruled that Rouff's recollection of the contents of a computer report was properly refreshed.

***Errors Regarding Award of Attorney Fees***

11. The trial court erred in awarding attorney fees against Jordan when the action was not brought to enforce the terms of the Note.

12. The trial court erred in awarding attorney fees against Jordan because he did not sign the Note.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether plaintiff proved its claim for "mere continuation" successor liability? (Assignments of Error 1-3).

2. Whether the trial court should have heard CSB's equitable claim for successor liability or granted equitable relief when CSB had a perfected first position security interest in all of the PLLC's assets? (Assignments of Error 1-6)

3. Whether the trial court's findings of fact meet the requirement of CR 52 and case law? (Assignment of Error 7)

4. Whether the trial court's findings of fact are supported by substantial evidence? (Assignment of Error 8)

5. Whether Alana Rouff's testimony regarding the loan balance was hearsay? (Assignment of Error 9)

6. Whether this action was brought to enforce the terms of the Note? (Assignment of Error 10)

7. Whether Jordan is liable for contractual attorney fees when he did not sign the Note? (Assignment of Error 11)

8. Whether Jordan is entitled to an award of attorney fees under the doctrine of mutuality of remedy (No Assignment of Error)

#### **IV. STATEMENT OF THE CASE**

The facts and procedural history of this case overlap and cannot easily be separated. For that reason, they are presented together.

Mark Jordan formed Invicta Law Group PLLC in 1999. Exhibit 10. Jordan was the sole member of Invicta. CP 147 at ¶ 3. In 2012, Invicta executed a Promissory Note for \$165,000 (Exhibit 7), Security Agreement (Exhibit 8) and Loan Agreement (Exhibit 9) with Columbia State Bank. Jordan also signed a personal guaranty of the obligation. Exhibit 81.

The security agreement encumbered a long list of categories of property that together covered all of Invicta's tangible and intangible assets. Exhibit 8. Rouff testified that "the bank had a security interest in everything that Invicta owned." RP 422.

In 2013, Invicta experienced financial problems, ultimately causing Jordan to file a personal Chapter 7 petition on September 30, 2013. CP 148 at ¶ 9. When Jordan filed his petition, Invicta ceased operating as a law firm, but it did not file for bankruptcy. CP 148 at ¶ 14. It still had to wind up its affairs and go through dissolution.

Ceasing Invicta's operations as a law firm was a matter of necessity, not choice. Once Invicta defaulted on its loan, CSB "had the right to take or repossess everything that Invicta owned." RP 422; Exhibit 8 at Remedies paragraph. It would have been unethical as well as impractical for Invicta to remain in business as a law firm knowing that at any moment, CSB might appear and seize all of its property. Keeping Invicta in business simply was not an option.

Jordan stopped practicing law under Invicta and began to practice as an individual, which the trial court called "the Sole Proprietorship." CP 148-49 at ¶ 15. Judge O'Donnell consistently treated "the Sole Proprietorship"

as an entity separate from Jordan. For example, Judge O'Donnell found that "Mark Jordan owned, operated, and controlled the Sole Proprietorship." CP 149 at ¶ 17. The "Sole Proprietorship" and Jordan were the same legal person, and any distinction between the two is erroneous. *Bankston v. Pierce County.*, 174 Wn.App. 932, 938, 301 P.3d 495, 498 (2013). ("There is no such thing as an ownership interest in a sole proprietorship.").

On the other hand, Judge O'Donnell also often failed to distinguish between Jordan and Invicta. A limited liability company and its members are different legal persons. *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 539, 256 P.3d 1251, 1254 (2011) ("Unlike a sole proprietorship, a sole member limited liability company is a distinct legal entity that is separate from its owner.") (citation omitted); *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 747, 153 P.3d 186, 191 (2007).

Jordan's bankruptcy filing itself was a default on the Note. Exhibit 7 at Default paragraph. Invicta acknowledged the default and contacted CSB about turning over the collateral. On October 24, 2013, CSB attorney Farron Curry sent Invicta attorney Nate Riordan an email confirming this effort.

You indicated that Invicta would like to work with CSB to turn over its equipment, inventory, accounts, general intangibles, etc. and said that you or Mr. Jordan would provide detailed financial and A/R documentation before the end of this week. I have not yet received this information, nor have I received Mr. Jordan's bankruptcy schedules or seen that they have been filed.

Exhibit 82. However, the record contains no evidence that CSB made any effort to obtain the collateral.

When CSB's inaction continued for three weeks, Riordan followed up with an email inquiring if the bank would sell the collateral to Jordan and stating that if CSB was not interested in selling the collateral, "my client

is ready and willing to arrange a time for the bank to come and pick up the equipment.” Exhibit 83.

In the meantime, Jordan was proceeding with his transition to a private practice. Fortuitously, or so it seemed at the time, CSB did not appear anxious to obtain the collateral, and since Invicta had no use for it at the time, Jordan used Invicta’s property when he started his solo practice.

What Jordan did not know at the time was that CSB’s failure to collect the collateral was not the result of oversight or neglect. CSB had a plan, and part of that plan was a conscious decision not to pursue the collateral. Vice president Alana Rouff testified for CSB at trial, and she was unequivocal on this point.

- Q. You understood that the bank had the right to take or repossess everything that Invicta owned?
- A. Correct.
- Q. But you chose not to do that, didn't you?
- A. The bank made a decision not to pursue that remedy, yes.

RP 422-23.

CSB’s plan became apparent on February 6, 2014 when it filed this action. When it decided not to pursue the remedy of the collateral, it also decided that it would pursue the remedy of successor liability. Although Invicta offered to turn over the collateral, and although CSB made its own decision not to pursue the collateral, CSB based this lawsuit on its allegation that Invicta transferred the collateral to Jordan, and it alleged that these transfers caused Invicta to become insolvent and impaired its ability to obtain payment on the loan. CP 6-7.

In their Answer, Invicta and Jordan admitted that Invicta was in default and that CSB had the right to foreclose. CP 27-31. CSB could have

obtained the collateral with a simple motion for judgment on the pleadings, but it instead did nothing.

CSB brought a motion for partial summary judgment, which included the successor liability and foreclosure claims. CP 35-51. Judge Timothy Bradshaw denied summary judgment on the successor liability claims, but granted summary judgment against Invicta. CP 78-80. Armed with this order, CSB could have proceeded to collect the collateral, but again did nothing.

Invicta finally became so frustrated with CSB's unwillingness to act that it placed the collateral in storage and sent CSB the keys. CSB responded by sending the keys back with a letter from its attorney stating:

Columbia State Bank's agent inspected the Collateral. Columbia State Bank does not accept the Collateral as full or partial satisfaction of the obligation it secures. Columbia State Bank does not wish to take possession of the Collateral or dispose of the Collateral, as **the estimated cost of disposition exceeds the value of the Collateral**. Enclosed please find the keys to the units in which the Collateral is being held.

Exhibit 80 (emphasis added). Although CSB rejected the collateral, it still maintained its claim for an order of foreclosure.

The case proceeded to a bench trial before Judge O'Donnell. The trial lasted two days with closing argument the following morning. CSB called a total of three witnesses and presented fifty exhibits. *See general Report of Proceedings*; CP 125-30.

CSB's witnesses were Jordan, Rouff, and Invicta's landlord Kris Hart by deposition. None of that testimony identified any transfers from Invicta to Jordan. Variants of the word "transfer" appear only three times in the testimony, and none of those concern transfers from Invicta to Jordan. RP 118, 377.

The exhibits presented by CSB did not identify, document, or relate to any transfers from Invicta to Jordan. Instead, CSB offered documents such as Jordan's malpractice insurance application and related correspondence, correspondence between Invicta and its landlord, and letters that Jordan sent out with Invicta's letterhead after September 30, 2013.

CSB also presented an extensive assortment of financial documents from both Invicta and Jordan. These included Accounts receivable reports, general ledgers, balance sheets, profit and loss statements, quarterly tax returns, check registers and statements, and budgets. CP 125-30. None of those documents identified or discussed a transfer from Invicta to Jordan. The evidence did show that Jordan used Invicta's office and equipment, and it showed that he took his own clients with him to his private practice. RP 104-05. It also showed that he paid Invicta's rent for the office and other expenses, and that he handled administrative matters for Invicta. Exhibit 76 at SH\_000277-278.

A great deal of the trial was spent on subjects that have no bearing on successor liability. For example, when Jordan obtained malpractice insurance, he used the same broker that Invicta did, and he made sure that he obtained coverage for his time with Invicta. Exhibits 1-6. Invicta had subtenants, and Jordan collected the subtenant rent and then paid the balance of the master rent himself. Exhibits 31-38.

CSB was particularly concerned that Jordan "held himself out" as Invicta. They pointed out that he did not send out any announcements to his clients that he was no longer practicing under the limited liability company, and that he sent out letters on Invicta Law Group PLLC letterhead after September 30, 2013. RP 33, 60. No authority was offered that Jordan was

required to tell his clients that he had moved his practice to a sole proprietorship, or that a few letters with an outdated letterhead are relevant to successor liability. Successor liability focuses on transfers of assets, not how the debtor “held itself out.”

CSB also argued that Invicta transferred to Jordan certain things that do not exist or that cannot be transferred. For example, CSB argued that Invicta transferred its clients to Jordan. RP 55. However, clients of a law firm are not assets and cannot be transferred. *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn.App. 912, 924, 262 P.3d 108, 115 (2011). It claimed that Invicta transferred Jordan’s own client list to him. RP 55. No evidence was ever presented that Invicta even had a client list.

CSB argued that Invicta transferred to Jordan its “insurance contract rights” and the tenant improvements in the office. RP 448-49. It is not at all clear what CSB means by this. No evidence was ever presented that Invicta had any transferable insurance benefits, or that it had any interest in the tenant improvements.

Lastly, CSB argued that Invicta transferred client payments to Jordan. CSB showed that some of the retainer letters with the old letterhead refer to payment of retainers. RP 173-85. However, those letters were dated after September 30, 2013, and it is undisputed that Invicta ceased operating as a law firm on September 30. CP 148 at ¶ 14. It is not possible that the letterhead on those letters was anything other than a mistake.

CSB also argued that Jordan’s receipt of payments during the first ninety days of his private practice created an “incredibly strong inference here that Jordan sole proprietorship was taking the -- taking money that was paid by PLLC clients for work that was done before September 30, 2013.” RP 458. CSB’s position was that Jordan could not have brought in the

amount that he did when he started his private practice. RP 230-236. However, Jordan explained every specific example that was identified by CSB at trial as a flat fee paid in advance. RP 179-180, 184-85, 248-49. Aside from its assertion that Jordan brought in too much money, CSB never presented any evidence to support its “inference.”

Judge O’Donnell found in favor of CSB. He accepted all of CSB’s arguments, and made twelve separate findings of transfers from Invicta to Jordan.

24. The PLLC transferred the right to use the PLLC’s space to the Sole Proprietorship.
25. The PLLC transferred its rights in its existing subleases, including the subtenant rents owed and paid to the PLLC, to the Sole Proprietorship.
26. The PLLC transferred its rights in existing client contracts to the Sole Proprietorship.
27. The PLLC transferred client fees paid for work done by the PLLC to the Sole Proprietorship.
28. The PLLC transferred the PLLC's client list to the Sole Proprietorship.
29. The PLLC transferred the PLLC's existing client relationships and any goodwill generated therefrom to the Sole Proprietorship.
30. The PLLC transferred the PLLC’s trade name to the Sole Proprietorship.
31. The PLLC transferred security deposit funds owned by PLLC to the Sole Proprietorship.
32. The PLLC transferred all benefits associated with the PLLC’s insurance contracts to the Sole Proprietorship.
33. The PLLC transferred the value and benefits of all tenant improvements paid for by the PLLC and used by Sole Proprietorship in the office space at 2775 Harbor Avenue, Seattle, Washington to the Sole Proprietorship.
34. The PLLC transferred every aspect of the PLLC which would be needed to start a law practice to the Sole Proprietorship.

CP 149-50. Notably, all of these findings are devoid of any detail or explanation.

For example, Judge O'Donnell found that Invicta assigned its interest in the lease and subleases to Jordan, but lease assignments are subject to the statute of frauds and require a written agreement unless excused by part performance. *Losh Family, LLC v. Kertsman*, 155 Wn.App. 458, 467, 228 P.3d 793, 798 (2010). No finding of a written agreement or part performance was made.

Judge O'Donnell found that Invicta transferred its existing client contracts, relationships and goodwill to Jordan. A law firm's clients are not property or a commodity that can be transferred. *Dixon*, 163 Wn.App. at 924. An attorney's goodwill is personal, and cannot be transferred to him. *In re Marriage of Lukens*, 16 Wn.App. 481, 484, 558 P.2d 279, 281 (1976).

Judge O'Donnell found that Invicta transferred its client list and trade name to Jordan. No evidence was admitted that Invicta had a client list or that Jordan needed a list of his own clients. Nor was any evidence of an agreement to transfer the trade name and trademark admitted.

Judge O'Donnell found that Invicta transferred its lease deposit and the tenant improvements to Jordan. The lease deposit was held by the landlord, and Invicta could not possibly transfer it. The tenant improvements belonged to the landlord and were part of the building. Invicta had no interest in them to transfer.

Judge O'Donnell found that Invicta transferred its insurance benefits to Jordan. No evidence of any kind was introduced about assignable insurance benefits that Invicta had, or about its insurance benefits at all for that matter.

Judge O'Donnell found that Invicta "transferred client fees paid for work done by the PLLC to the Sole Proprietorship." 150 at ¶ 27. Not a

single witness testified to such an occurrence, and CSB never identified a single transfer from Invicta to Jordan.

Judge O'Donnell also found that Invicta "secretly transferred accounts received (AR) to the Sole Proprietorship." CP 150 at ¶ 36. Judge O'Donnell did explain this finding, but his explanation does not support his finding. He found:

The value of the accounts receivable was significant — according to the PLLC's journal ledger for May 31, 2013 through September 30, 2013. The firm brought in \$396,462.06 (Exhibits 76). Notably, the Sole Proprietorship generated \$557,202.00 from these same clients from January — November 2014 (Exhibit 76).

CP 150 at ¶ 36. The citations to the trial exhibits in Finding 36 are incorrect. The \$396,462.06 figure is found in Invicta's general ledger, or Exhibit 74 (not Exhibit 76) at page SH\_000037. Sixteen lines from the bottom is the September 27, 2013 entry and the corresponding entry for income, which is \$394,706.33. The trial court used the number above, which is not the last entry for September. The \$557,202.00 number for Jordan is from Exhibit 77 (not Exhibit 76), although it is actually \$557,202.31.

Judge O'Donnell appears to have understood that the PLLC brought in \$396,462.06 in 2013, which increased to \$557,202 in 2014. An increase like that might suggest that Jordan was receiving payments intended for Invicta.

However, that is not what the evidence says. Invicta brought in \$396,462.06 over four months (June through September) in 2013, or \$99,46.06 per month. CP 150 at ¶ 36. Jordan brought in \$557,202 over 11 months in 2014, or \$50,654.73 per month in 2014. When the numbers are converted to monthly income, they demonstrate that Jordan brought in half as much with his individual practice as he did under Invicta. That

relationship does not support an inference of transfers from Invicta to Jordan at all.

Judge O'Donnell also adopted CSB's argument that factors other than the transfer of assets was relevant. He found that Jordan held himself out as Invicta to the landlord, to subtenants, and to his insurance company. No admitted evidence remotely supports those findings. Moreover, CSB never presented any authority that those facts, even if true, were relevant to the successor liability question.

The final piece of the puzzle is CSB's claim to foreclose on the collateral. The successor liability claim was predicated on CSB's assertion that Invicta had transferred the collateral out of its reach. Judge O'Donnell actually found that "Because the PLLC secretly transferred those assets to the Sole Proprietorship, plaintiff's ability to secure satisfaction of its debt [via] those assets was lost." CP 152 at ¶ 3(d). But CSB's right to secure payment with those assets apparently was not really lost, because Judge O'Donnell also ruled in his Judgment that CSB "is entitled to the immediate possession of the Collateral and has the right to take immediate possession of the Collateral." CP 339 at ¶ 2.

This determination not only contradicted his finding that CSB's access to the collateral was "lost," but also awarded CSB both successor liability and foreclosure on the collateral. Successor liability is awarded against a party that has possession of the debtor's assets because it can use those assets to generate income and pay the debt. Judge O'Donnell left Jordan with all of Invicta's debt, but without its assets to operate the business and generate income.

After motions for reconsideration were denied, Jordan filed this appeal.

## **V. ARGUMENT**

### **A Standard of Review.**

In an appeal from a bench trial, the court's role is "limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 222, 797 P.2d 477 (1990).

### **B. CSB's Equitable Claim for Successor Liability Is Precluded by its Security Interest.**

Successor liability is an equitable claim and is subject to the requirements for exercising equitable jurisdiction. *Gall Landau Young Const. Co., Inc. v. Hedreen*, 63 Wn.App. 91, 99, 816 P.2d 762, 767 (1991); *Uni-Com Nw., Ltd. v. Argus Pub. Co.*, 47 Wn.App. 787, 805, 737 P.2d 304, 314 (1987). Although many aspects of equity are left to the discretion of the trial court, "the question of whether equitable relief is appropriate is a question of law." *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463, 467 (2005); *see also Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605, 609 (1994). As a result, courts "review the decision of whether to grant equitable relief de novo." *Trotzer v. Vig*, 149 Wn.App. 594, 607, 203 P.3d 1056, 1062 (2009).

One of the most basic maxims of equity states that "A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172, 1176 (2006). A party with an adequate legal remedy may not simply choose to assert an equitable claim with the hope of a greater recovery.

The right to foreclose is a legal remedy. *Seattle Mortgage Co., Inc. v. Unknown Heirs of Gray*, 133 Wn.App. 479, 497, 136 P.3d 776, 786

(2006). In *Seattle Mortgage*, the court ruled that the claim of a creditor with a junior lien for an equitable lien was precluded because it could have foreclosed. *Id.* at 497.

In this case, CSB's right to foreclose is an absolute verity because Judge O'Donnell entered judgment enforcing that right. CP 339-40. CSB has never really even responded to this argument except to suggest that foreclosure is not an adequate remedy because it would not result in full payment on the Note. Judge O'Donnell appears to have agreed. He concluded:

The legal remedies that may be available to Plaintiff do not provide a guarantee that they would provide complete, or any, relief.

CP 152 at ¶ 2.

The question is not whether the plaintiff would recover all of its damages through its legal remedy, but instead whether that remedy is inherently flawed. In *City of Kirkland v. Ellis*, 82 Wn.App. 819, 827, 920 P.2d 206, 211 (1996), the court pointed out that

A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.

CSB had the same rights as any other secured creditor, and they cannot be called flawed.

In *Landry v. Luscher*, 95 Wn.App. 779, 785, 976 P.2d 1274, 1279 (1999), for example, the court held that a couple's second lawsuit was barred as claim splitting, and that their equitable arguments were barred because they had an adequate legal remedy if they had pled the claims together in the first action. In *Stafne v. Snohomish County*, 174 Wn.2d 24, 39, 271 P.3d 868, 876 (2012), the court found an equitable claim was barred

because the plaintiff could have filed a LUPA appeal. Most notably, in *Seattle Mortgage*, 133 Wn.App. at 497, the court held that a junior lender's equitable claim was barred because it could have foreclosed.

All of these cases share two important characteristics. First, the adequate legal remedy was an opportunity that was not pursued and had passed. It was not available to the plaintiffs when the cases were decided. Second, the adequate legal remedies were uncertain but adequate. In *Landry*, what, if anything the plaintiff would have recovered in a joint action is unknowable. In *Stafne*, the right to appeal likewise does not guarantee any result. And the right to foreclose in *Seattle Mortgage* is exactly the same right that CSB had here.

Any suggestion that a remedy must deliver full compensation to be adequate or complete was squarely laid to rest by the Supreme Court in *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006). In *Sorenson*, Barbara Pyeatt obtained a number of fraudulent loans by forging quit claim deeds from the owner, Carole Sorenson, to herself and encumbering property that she did not own. *Id.* at 528-29. Sorenson then brought a quiet title action and prevailed against Pyeatt and her lenders. *Id.* at 529-30. The court also awarded the lenders a judgment against Pyeatt in the amount of \$868,000. However, the trial court also granted the lenders a \$532,000 equitable lien against the property.

The Supreme Court reversed the equitable lien. On appeal, the lenders attempted to assert equitable claims for comparative innocence and fraudulent conveyance. The Supreme Court rejected those arguments in part because the lenders had an adequate remedy in their judgment against Pyeatt.

Second, it is a fundamental maxim that equity will not intervene where there is an adequate remedy at law. *Accord*

*Orwick*, 103 Wash.2d 249, 692 P.2d 793; *McClintock*, *supra*, § 22, at 48; 30A C.J.S. *Equity* § 25 (1992). In determining whether to exercise equitable powers, Washington courts follow the general rule that equitable relief will not be accorded when there is a clear, adequate, complete remedy at law. *City of Lakewood v. Pierce County*, 144 Wash.2d 118, 126, 30 P.3d 446 (2001). Furthermore, we think it a good equity policy that the person against whom the legal remedy is sought and authorized should be the same person against whom the equitable remedy is sought. *Accord McClintock*, *supra*, § 23; 30A C.J.S., *supra*, § 94.

In this case, the Lenders, as Barbara Pyeatt's creditors, brought suit on promissory notes executed by Barbara Pyeatt in favor of the Lenders. The Lenders recovered judgment against the Pyeatts and their marital community in the amount of \$868,000, together with interest from the date the judgment was entered. The trial court also determined that the Lenders are "entitled to recover their attorneys' fees" against the Pyeatts and their marital community. The trial court's entry of judgment in favor of the Lender claimants on the money owed to them by Barbara Pyeatt is sufficient evidence that a remedy at law exists, that the Lenders in this case have availed themselves of this relief, and that equity does not call for our granting them the additional and extraordinary relief they seek.

In raising these additional grounds for relief, the Lenders again assert that due to the Pyeatts lack of funds and property to satisfy this judgment, they will likely never be accorded full relief for their losses. Even so, the remedy at law accorded to the Lenders in this case is valid, although the likelihood of full payment is small. We conclude that the Lenders have failed to show how the equities would be served by requiring, in essence, Sorenson to bear the burden of satisfying the Lenders' judgment against the Pyeatts.

*Id.* at 543-44.

CSB's right to foreclose on the collateral gave it everything to which it even arguably was entitled under its agreement with Invicta. The reason that it was unlikely to recover the fully amount owing was Jordan's bankruptcy petition, but a bankruptcy is not grounds to award equitable relief that restores the very debt discharged in the bankruptcy. Awarding such relief would be contrary to the fundamental purpose and meaning of bankruptcy law.

That appears, however, to be exactly what Judge O’Donnell intended. He inserted a paragraph into the proposed order stating in part that “The legal remedies that may be available to Plaintiff do not provide a guarantee that they would provide complete, or any, relief.” CP 152 at ¶ 3. He also inserted a footnote at the end of that sentence. It reads:

This includes enforcing Mr. Jordon's Personal Guarantee which was discharged in bankruptcy.

CP 152 at n. 2. In other words, Judge O’Donnell expressly determined that the discharge of Jordan’s personal guaranty in his bankruptcy justified holding him liable for the same debt in equity. If that argument were accepted, it would make a bankruptcy discharge an illusory remedy for countless people. No court has ever accepted that argument, and this court should not be the first.

These principles largely explain why successor liability claims are available only to unsecured creditors. A secured creditor can never satisfy the fundamental requirement of a successor liability claim that the debtor transferred its assets beyond the creditor’s reach.

The successor liability doctrine exists for a very specific purpose. This Court identified that purpose in *Gall Landau Young Const. Co., Inc. v. Hedreen*, 63 Wn.App. 91, 98, 816 P.2d 762, 766 (1991):

The purpose of the mere continuation theory is to render ineffective a transfer of the debtor corporation's assets when those assets could have been used to satisfy the corporation's debts.

That goes hand in hand with what the Supreme Court said in *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 135 Wn.2d 894, 910, 959 P.2d 1052, 1060 (1998):

In the course of conducting business and building yachts, CMYC incurred debts which Christensen sought to avoid by transferring the business to CSL. Because the assets were transferred to CSL to avoid the reach of the creditors, the

transaction is fraudulent and successor liability attaches to CSL.

Successor liability exists to give creditors recourse in a debtor's assets that have been transferred to avoid payment.

A secured creditor does not need successor liability to be protected from a debtor's transfer of the collateral. A perfected first position security interest follows the property and retains its priority through any transfer. RCW 62A.9A.315(1) provides that a security interest "continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest." RCW 62A.9A.315(2) augments that protection by providing that "A security interest attaches to any identifiable proceeds of collateral."

Even if some circumstance might cause "delay, expense, annoyance, or even some hardship," that does not make the remedy any less an adequate. *Landry*, 95 Wn.App. at 785. CSB's remedy is not theoretical or speculative; it is a concrete reality in the form of a valid existing judgment of foreclosure. And the adequate legal remedy was awarded by the same judge at the same time as the judgment for successor liability.

A clearer case to dismiss an equitable claim because of an adequate legal remedy could not possibly exist. More to the point, equitable relief is awarded to an appropriate plaintiff instead of the legal remedy, not in addition to it. Here, Judge O'Donnell awarded CSB both its legal remedy and the equitable remedy even though they are mutually antagonistic. Jordan cannot pay the debt as the continuation of Invicta after CSB takes all of its assets.

Although it was in the related area of successor liability for product liability, the Supreme Court's explanation of the limitation on successor

liability in *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 267, 692 P.2d 787, 792 (1984) is apt here.

The requirement of a transfer of the substantial assets of the predecessor together with its goodwill is founded on the policy that the successor has benefited from the predecessor's goodwill and has acquired the resources to compensate the victims of the predecessor's manufacturing defects. The destruction of the predecessor by acquisition and the benefits derived by the successor from the predecessor's product line preserves a sense of balance in the rule of successor liability, making it more than an unbalanced assertion of social policy.

This Court cited *Hall* with approval in the mere continuation context in *Gall Landau*, 63 Wn.App. at 96. In this context, imposing successor liability while at the same time depriving the successor of the ability to compensate the plaintiff would be a harsh and inequitable result.

This Court should hold that CSB's successor liability claim is barred by its perfected security interest in all of Invicta's assets. No transfer could place Invicta's assets beyond CSB's reach, and the security interest is a complete legal remedy. The Court should reverse and remand with instructions to enter judgment for Jordan.

**C. Invicta Did Not Transfer Any Assets to Jordan.**

Successor liability cannot exist without a transfer of assets. *Bert Kutu Revocable Living Trust ex rel. Nakano v. Mullen*, 175 Wn.App. 292, 314, 306 P.3d 994, 1005 (2013) ("Without a transfer of assets, Columbia River Properties is not a successor company of D.C. Inc."). Judge O'Donnell made thirteen separate findings that Invicta transferred everything from the right to use the PLLC's space and the value and benefits of all tenant improvements, to its clients, to benefits associated with its insurance contracts, to payments for work performed by Invicta. Not a hint of evidence supports any of them.

Judge O'Donnell's findings do not even pretend to identify, discuss, or weigh any evidence. Instead, they consist of conclusory statements such as "The PLLC transferred the PLLC's existing client relationships and any goodwill generated therefrom to the Sole Proprietorship." CP 150 at ¶ 29. How, when, or where that transfer took place is anyone's guess.

The transfer findings have two problems. First, the findings on their face do not meet the requirements of CR 52.

Meaningful appellate review is available because the trial court makes detailed findings of fact to support its decisions. The court rules also require the trial court to specify the factual basis for its decisions. CR 52(a)(1). "[W]here findings are required, they must be sufficiently specific to permit meaningful review." *In re LaBelle*, 107 Wash.2d 196, 218, 728 P.2d 138 (1986). When the findings are not "sufficiently specific," appellate courts will remand to the trial court. *State v. Barber*, 118 Wash.2d 335, 345, 823 P.2d 1068 (1992).

*In re Dependency of A.D.*, 73055-0-I, 2016 WL 1562252, at \*8 (Wash. Ct. App. Apr. 18, 2016). Judge "O'Donnell's findings lack any specificity. Second, the general statements in the findings are not supported by substantial evidence.

### **1. Judge O'Donnell's Findings Do Not Satisfy CR 52.**

"The purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made." *In re LaBelle*, 107 Wn.2d 196, 218-19, 728 P.2d 138, 152 (1986) (citations and quotes omitted). Conclusory findings without a discussion of the evidence do not meet that standard.

Findings must be made on matters "which establish the existence or nonexistence of determinative factual matters ...". *In re LaBelle*, at 219, 728 P.2d 138. The process used by the decisionmaker should be revealed by findings of fact and conclusions of law. *Hayden v. Port Townsend*, 28

Wash.App. 192, 622 P.2d 1291 (1981). Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an “indefinite, uncertain, undeterminative narration of general conditions and events”, are not adequate. *State ex rel. Bohon*, 6 Wash.2d at 695, 108 P.2d 663.

*Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35-36, 873 P.2d 498, 503 (1994); *Lawrence v. Lawrence*, 105 Wn.App. 683, 686, 20 P.3d 972, 974 (2001).

When the trial court’s findings are defective but supported by substantial evidence, an appellate court normally will remand to the trial court for further findings. *E.g.*, *Little v. King*, 160 Wn.2d 696, 699, 161 P.3d 345, 347 (2007) (“When the findings and conclusions are missing or are defective, the proper remedy is remand for entry of adequate ones unless the appellate court is persuaded that sufficient basis for review is present in the record.”). When a case is remanded for additional findings, they should be made on the existing record. *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 352 n. 6, 254 P.3d 797, 802 (2011) (“Our resolution does not allow the trial court to make after-the-fact findings supporting its August 14 and October 15 orders, as this would be inappropriate.”). Even if this Court affirms in all other respects, it should remand for entry of appropriate findings on the existing record.

## **2. The Findings Are Not Supported by Substantial Evidence.**

Remand is not necessary here because this Court has the record and can determine for itself whether substantial evidence supports even the conclusory statements of the trial court. When the record contains no evidence to support a finding, it must be reversed.

There was no evidence in this case that corporate records or formalities were not kept, nor does the record indicate an overt intention by Bergstrom to disregard the corporate entity. The trial court’s finding that Nordic operated as

Bergstrom's alter ego was not supported by substantial evidence and was correctly reversed by the Court of Appeals.

*Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 553, 599 P.2d 1271, 1274 (1979); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345, 858 P.2d 1054, 1079 (1993); *State v. Burkins*, 94 Wn.App. 677, 700, 973 P.2d 15, 29 (1999).

Judge O'Donnell made thirteen separate findings about transfers from Invicta to Jordan, but he discussed the supporting evidence in only one of them. The following findings lack any evidence in the record.

**24. The PLLC transferred the right to use the PLLC's space to the Sole Proprietorship.**

**25. The PLLC transferred its rights in its existing subleases, including the subtenant rents owed and paid to the PLLC, to the Sole Proprietorship.**

Invicta's right to use its office space was in the form of a written five-year lease, and subleases were in writing as well. Exhibits 32 and 33. A lease for more than a year is subject to the statute of frauds. *Losh Family, LLC v. Kertsman*, 155 Wn.App. 458, 467, 228 P.3d 793, 798 (2010). A transfer of Invicta's right to use its space or its subleases required a written agreement. No written assignment of either was offered as an exhibit because they were never assigned. Instead, Invicta continued to act as the tenant. For example, it entered into the sublease referenced in paragraph 38 of the findings in its own name. CP 151 at ¶ 38. It did not inform the landlord that it had transferred the lease to Jordan because it didn't. See CP 149 at ¶ 19; CP 151 at ¶ 38. No evidence supports these findings.

**26. The PLLC transferred its rights in existing client contracts to the Sole Proprietorship.**

**28. The PLLC transferred the PLLC's client list to the Sole Proprietorship.**

**29. The PLLC transferred the PLLC's existing client relationships and any goodwill generated therefrom to the Sole Proprietorship.**

These findings likewise fail to “specify the factual basis” for the finding. *Dependency of A.D.*, 2016 WL 1562252, at \*8. They give no clue about how and when these transfers occurred. No evidence was even offered that Invicta had a client list other than Jordan’s personal client list.

The findings do not state the factual basis because there was no evidence from which to derive them. Invicta’s client agreement was not made an exhibit, and its terms are unknown. CSB argued that Jordan called the client list “one of the most valuable assets of his -- of his law firm” (RP 450), but Jordan did not call it the “law firm’s” client list at all.

Also, my client list is a source of my income. I also think that there would be some ethical obligation to keep that information confidential. And from a trade secret standpoint, that would be considered a valuable asset of my law practice.

RP 90 (Jordan). *Dixon*, 163 Wn.App. at 924 (“Neither Dixon nor Crawford has a proprietary interest in the clients.”); *Koehler v. Wales*, 16 Wn.App. 304, 311, 556 P.2d 233, 238 (1976) (“A lawyer has no proprietary interest in former clients.”). RPC 1.17, Comment 1 (A law firm’s clients are not commodities that can be sold.).

**30. The PLLC transferred the PLLC’s trade name to the Sole Proprietorship.**

No evidence was admitted at trial about the form and nature of Invicta’s interest in its name. No authorities were offered about use or transfer of the agreement. This finding is pure speculation.

**31. The PLLC transferred security deposit funds owned by PLLC to the Sole Proprietorship.**

**32. The PLLC transferred all benefits associated with the PLLC’s insurance contracts to the Sole Proprietorship.**

**33. The PLLC transferred the value and benefits of all tenant improvements paid for by the PLLC and used by Sole Proprietorship in the office space at 2775 Harbor Avenue, Seattle, Washington to the Sole Proprietorship.**

These findings make no sense because they do not refer to property interests, let alone assets at all. No evidence was presented that Invicta had any control over its security deposit, that business insurance contracts have transferable benefits, or that a tenant has any interest of any kind in tenant improvements. These are findings about things that do not exist.

- 23. The PLLC transferred all of its physical assets to the Sole Proprietorship.**
- 34. The PLLC transferred every aspect of the PLLC which would be needed to start a law practice to the Sole Proprietorship.**

Findings 23 and 34 are perhaps the most conclusory findings of all.

They do not mean anything.

- 27. The PLLC transferred client fees paid for work done by the PLLC to the Sole Proprietorship.**
- 36. The PLLC secretly transferred accounts received (AR) to the Sole Proprietorship.' The value of the accounts receivable was significant — according to the PLLC's journal ledger for May 31, 2013 through September 30, 2013. The firm brought in \$396,462.06 (Exhibits 76). Notably, the Sole Proprietorship generated \$557,202.00 from these same clients from January — November 2014 (Exhibit 76).**

For these findings, at least, Judge O'Donnell did provide some explanation, but his explanation is wrong. As explained above, those numbers do not mean what Judge O'Donnell apparently thought they did. They show that Invicta brought in \$88,100.52 per month in 2013, while Jordan brought in \$50,674.76 per month in 2014. Earning half as much as he did before is not proof of transfers from Invicta by any stretch of the imagination.

A valid finding that Invicta transferred money to Jordan would include details like dates, amounts, and the Invicta matter for which the payment was made. Judge O'Donnell could not make those findings because that evidence did not exist.

The Court should reverse these findings for lack of any evidence at all. Because there is no evidence whatsoever of a transfer from Invicta to Jordan, let alone a transfer of substantially all of its assets as required by *Gall Landau*, 63 Wn.App. at 97 (“a transfer of all or substantially all of the predecessor corporation's assets is an implied element of the mere continuation theory”), the Court should reverse the trial court’s decision.

**D. No Admissible Evidence Supported the Damage Award.**

Judge O’Donnell entered a judgment in the amount of \$151,360.40 plus attorney fees. CP 335. The basis of that liability was the amount that Invicta owed on the loan. In other words, although the loan balance is the measure of the award, this is not the typical case where the lender is seeking a recovery from the borrower. It is a claim against another party for the amount owed by another party.

If Judge O’Donnell did have equitable jurisdiction, he could award damages as the remedy. *Brazil v. City of Auburn*, 93 Wn.2d 484, 496, 610 P.2d 909, 915 (1980). However, before damages can be awarded, the plaintiff must make an adequate showing.

It is well established that “damages must be proved with reasonable certainty.” *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wash.2d 712, 717, 845 P.2d 987 (1993). But “ ‘the doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage.’ ” *Lewis River Golf*, 120 Wash.2d at 717, 845 P.2d 987 (emphasis omitted) (quoting *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wash.2d 705, 712, 257 P.2d 784 (1953)). In *Lewis River Golf*, our Supreme Court explained:

“[O]nce the [plaintiff] establishes the fact of loss with certainty (by a preponderance of the evidence), uncertainty regarding the amount of loss will not prevent recovery. Thus, a [plaintiff] will not be required to prove an exact amount of damages, and recovery will not be denied because damages are difficult to ascertain.... Generally, whether the

[plaintiff] has proved his loss with sufficient certainty is a question of fact.”

120 Wash.2d at 717–18, 845 P.2d 987 (fourth alteration in original) (emphasis omitted) (quoting Roy Anderson, *Incidental and Consequential Damages*, 7 J.L. & Com. 327, 395–96 (1987)).

*Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 715-16, 315 P.3d 1143, 1150 (2013).

At trial, it became apparent that CSB had failed to identify an exhibit to prove the loan balance. Instead, CSB called CSB Vice President Alana Rouff and asked her the loan balance, which drew an objection.

Q. And how much is currently owed to Columbia Bank on that note?

A. I don't --

MR. DAVIS: Objection.

THE WITNESS: -- know that off the top of my head.

RP 317. Counsel for CSB then offered to refresh Rouff’s recollection with a payoff statement.

Q. (By Ms. Curry) Okay. Would it refresh your recollection to look at a payoff statement?

A. Yes.

RP 317. That drew objections on the grounds that the statement had never been produced or identified and hearsay. RP 318-21.

Judge O’Donnell refused to admit the exhibit at that point, but said that “If her memory is refreshed as to the amount that's currently owed, presuming you lay the foundation for that, she can testify to that.” RP 323. CSB then proceeded to attempt to lay a foundation, but Jordan continued to object on hearsay and foundation grounds. When the trial court asked for the basis of the objections, counsel responded:

The hearsay, Your Honor, is that her refreshed recollection itself is inadmissible hearsay because her recollection is that she saw computer data stating what the balance was and that computer data that she saw it is now trying to repeat -- she's trying to repeat the out-of-court statement of the computer data, and that's inadmissible hearsay.

RP 324-25. The trial court then called a recess so that counsel could decide how to proceed. RP 325.

After the recess, counsel handed Rouff the statement and asked if it refreshed her recollection of the loan balance, to which Rouff testified that it did. RP 326-27. Counsel then asked Rouff what the loan balance was, drawing another hearsay objection. RP 327.

Judge O'Donnell then again asked for an explanation of the hearsay objection.

THE COURT: You're saying that even at some point in her job, if she looked at a computer printout in terms of the amount of the note and the payoff amount, that that is hearsay?

MR. DAVIS: I am saying, Your Honor, that if what she's saying -- yes, that's exactly what I'm saying.

THE COURT: Okay.

MR. DAVIS: Not just me, but the Courts about a dozen times in Washington it said that computer-generated information is hearsay.

Now, you can get the exhibit in through the business records exception, but you can't get testimony about a nonexhibit in under the business records exception.

THE COURT: Okay. Well, I'm going to overrule your objection, and the reason I'm overruling the objection is because she's testified with respect to her position at the bank, her familiarity with the records associated with the note, Exhibit 7, and that she would have knowledge of this in the normal course of her profession.

I'm also satisfied that the document that's been shown to her, Exhibit 85, has independently refreshed her memory. And what she's testifying to is not simply from the document, but from her memory now that it has been refreshed. So the objection is overruled.

RP 327-28.

The court then permitted counsel to voir dire Rouff on the question of her refreshed recollection. Counsel began by asking Rouff if her refreshed recollection permitted her to again testify to the loan balance

without looking at the document. RP 329. Rouff responded: “I could give you an approximate balance of the loan today, yes -- as of yesterday, yes.”

Judge O’Donnell again overruled the objection. RP 332. Counsel then inquired if the court was admitting the statement. *Id.* The trial court replied, “I am not admitting the exhibit.” *Id.*

Three days later, Jordan filed a Motion for Reconsideration of Judge O’Donnell’s decision overruling the objection. CP 136-44. The motion renewed the foundation argument that Rouff’s recollection was not properly refreshed and the hearsay objection. *Id.*

### **1. Rouff’s Recollection Was Not Refreshed.**

The recollection part of the motion cited *State v. McCreven*, 170 Wn.App. 444, 475, 284 P.3d 793, 808-09 (2012) for the proposition that recollection of a witness’ memory requires that “the trial court is satisfied that the witness is not being coached,” and that “witness is not “coached” if “the witness is using the notes to aid, and not to supplant, his own memory.”

Stated another way: A contemporaneous memorandum made by a witness may be used to refresh his memory; that is, a witness may be allowed to refresh his memory by looking at a printed or written paper or memorandum and, if he thereby recollects a fact or circumstance, he may testify to it. It is not the memorandum which is evidence but the recollection.

*State v. Coffey*, 8 Wn.2d 504, 508, 112 P.2d 989 (1941).

As the motion pointed out, Rouff did not use the statement to refresh her recollection of the loan balance. She used it to determine the loan balance. On page 327 of the transcript, Rouff testified that she had looked at the statement, and it that it refreshed her recollection of the loan amount. RP 326-27. On page 329, Rouff was asked “Can you without looking at that document state what the balance of the loan is today?” Her response was “I

could give you an approximate balance of the loan today, yes -- as of yesterday, yes.” RP 329.

A mere two pages of transcript and 426 spoken words after testifying that her recollection of the loan amount was refreshed by the statement, Rouff could not state it without looking again. Her recollection of the loan amount was not refreshed by the statement. She never had a recollection to refresh. She obtained the information from the statement and simply read it on the stand.

A trial court’s decision “allowing the use of notes to refresh the memory of a witness lies within the discretion of the trial court.” *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258, 1259 (1979).

A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.

*State v. Hampton*, 184 Wn.2d 656, 670-71, 361 P.3d 734, 740-41 (2015) (citations omitted).

Judge O’Donnell abused his discretion in finding that Rouff was testifying from her memory and not from the document. Rouff testified that she obtained the statement by printing it on her work computer.

Q. Did you prepare this exhibit?

A. Did I prepare it?

Q. Yes.

A. I personally did not prepare it. I retrieved it off of our computer records at my office.

RP 329. What she “knew” was what the computer said. Then she used what the computer said to refresh her recollection of what the computer said, which was something that she never knew except from reading what the

computer said in the first place. If this worked to refresh Rouff's recollection, then it would work with any witness to admit the contents of any document. The Court should reverse Judge O'Donnell's ruling that Rouff's recollection was properly refreshed.

## **2. Rouff's Testimony Was Hearsay.**

CSB has an even bigger hearsay problem. The standard of review for hearsay objections was very recently summarized in *State v. Gonzalez-Gonzalez*, 33027-3-III, 2016 WL 1755818, at \*2-3 (Wash. Ct. App. May 3, 2016):

We take this opportunity to clarify the proper standard of review of trial court hearsay rulings. This court reviews whether a statement was hearsay de novo. *State v. Hudlow*, 182 Wash.App. 266, 281, 331 P.3d 90 (2014) (citing *State v. Neal*, 144 Wash.2d 600, 607, 30 P.3d 1255 (2001)); *State v. Edwards*, 131 Wash.App. 611, 614, 128 P.3d 631 (2006); *but see State v. Woods*, 143 Wash.2d 561, 595, 23 P.3d 1046 (2001) (applying an abuse of discretion standard of review to the excited utterance hearsay exception, which requires application of evidentiary factors by the trial court). The reason we do not review for an abuse of discretion is because ER 802 explicitly states that hearsay evidence is *not* admissible except as provided by the hearsay exception rules. The rules do not give trial courts discretion to admit inadmissible evidence. The more deferential abuse of discretion standard generally applies to our review of those trial court rulings where trial courts must use their discretion when weighing various factors.

As with either standard of review, an erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced. *State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004). For evidentiary errors not implicating a constitutional mandate, we reverse only if, “ ‘within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ “ *Id.* (quoting *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981)). “ ‘The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.’ “ *Id.* (quoting *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997)),

Rouff's testimony about the loan balance was hearsay and was prejudicial because it was the only evidence supporting the judgment amount.

By happenstance, the hearsay issue presented here was decided by this Court just six months ago. In *Podbielancik v. LPP Mortgage Ltd.*, 191 Wn.App. 662, 362 P.3d 1287, 1290 (2015), a borrower whose home was foreclosed brought an action for violation of the Deed of Trust Act. *Id.* at 665-66. The defendants brought a motion for summary judgment that was supported in part by a declaration of Northwest Trustee Services vice president Jeff Stenman. *Id.* at 666. The trial court granted summary judgment, and the plaintiff appealed.

The situation was exactly the same as the one presented here. Just as Rouff testified to the contents of a loan statement that was not admitted as an exhibit, Stenman testified in his declaration to the contents of documents that were not attached to his declaration. *Id.* at 667. The parties to the appeal appear to have agreed that the documents would have qualified under the business records exception to the hearsay rule. *Id.*

This Court held that even if the documents were business records, Stenman's testimony was inadmissible because the documents were not in the record.

Business records are an exception to the hearsay rule and are admissible as evidence. *See*. RCW 5.45.020. A custodian or other qualified witness may testify as to the contents and admissibility of a business record that is offered into evidence. *Id.* The business records exception does not permit affidavits testifying to the contents of documents that are not in the record. *Melville v. State*, 115 Wash.2d 34, 36, 793 P.2d 952 (1990) (disallowing affidavit asserting facts learned from documents outside of the record). Testimony concerning the content of documents not in the record may be admissible under another hearsay exception or if it is not offered for its truth. *Domingo v. Boeing Employees' Credit Union*, 124 Wash.App. 71, 79–80, 98 P.3d 1222 (2004).

In this case, Stenman's declaration testifies to the contents of several business records. Most, but not all, of those records were submitted as exhibits. Podbielancik objects to four paragraphs of the Stenman declaration. Two of these, paragraphs 17 and 19, are relevant to Podbielancik's argument on appeal. In paragraph 17, Stenman states that

NWTS received a step-bid from LPP and testifies to the contents of that bid. The step-bid is not in the record. In paragraph 19, Stenman states that NWTS's business records contain a sworn declaration from Vincent Wheaton, the NWTS agent who conducted the sale. Stenman declares that, according to Wheaton's statement, the "Rules of Auction" were properly read prior to the sale, the opening bid was announced, there were no third-party bids, and the property was sold to LPP at 2:02 p.m. for \$280,000. CP at 287. The Wheaton statement is not in the record.

Because these statements testify to the contents of documents not in the record, they are not within the business record exception. The respondents provide no alternate grounds of admissibility. We accordingly hold that the trial court erred in considering the challenged portions of the Stenman declaration. We review the summary judgment dismissal of Podbielancik's claims without reference to the inadmissible evidence.

*Id.* at 667 (footnotes omitted).

*Podbielancik* leaves no room for CSB to deny that Rouff's testimony was inadmissible hearsay. *Podbielancik* refers to "documents that are not in the record," and CSB may attempt to argue the statement is "in the record" because it was identified at trial. However, that argument is foreclosed by a number of cases. *State v. Fuentes*, 183 Wn.2d 149, 155, 352 P.3d 152, 154 (2015) ("The State claims that the officer's incident report, which the trial court did not admit into evidence, reveals different statements. Because the incident report was marked but not admitted into evidence, we do not consider it,").

The Court should strike Rouff's testimony about the loan balance. Because that leaves CSB with no evidence at all that a debt even exists, the court should reverse the decision in favor of CSB. The law in this respect was summarized in *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 715-16, 315 P.3d 1143, 1150 (2013).

**However, the fact that the amount of damages need not be proved with precision does not allow a claimant to present no evidence regarding the amount.** See *Bunch v. King County Dep't of Youth Servs.*, 155 Wash.2d 165, 180, 116 P.3d 381 (2005) ("there must be evidence upon which

the award [of damages] is based”). Although the precise amount of damages need not be shown with mathematical certainty, “competent evidence in the record” must support the claimed damages. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wash.2d 413, 443, 886 P.2d 172 (1994) (quoting *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash.App. 502, 510, 728 P.2d 597 (1986)). A claimant has the burden of proof on the amount of damages, and must come forward with sufficient evidence to support a damages award. *O'Brien v. Larson*, 11 Wash.App. 52, 54, 521 P.2d 228 (1974). “ ‘Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.’ ” *Clayton v. Wilson*, 168 Wash.2d 57, 72, 227 P.3d 278 (2010) (quoting *State v. Mark*, 36 Wash.App. 428, 434, 675 P.2d 1250 (1984)).

(emphasis added). Aside from Rouff’s inadmissible statements, the record contains no evidence of any kind that Invicta owes CSB anything. The error in admitting Rouff’s testimony was anything but harmless. This Court should reverse the trial court and remand with instructions to dismiss CSB claims against Jordan.

**E. The Trial Court Erroneously Awarded Attorney Fees.**

Judge O’Donnell treated CSB’s entitlement to attorney fees as a given. In Conclusion of Law 4, he states that CSB is entitled to an award of attorney fees even though that issue had never been briefed, argued or even discussed. CP 153.

After the Findings and Conclusions were filed, CSB brought a Motion for Entry of Final Judgment Including Fees. CP 162.68. The only explanation for the request for fees from Jordan was in a footnote stating

Defendant Mark Jordan is the successor to Invicta Law Group, PLLC. Washington law is clear that when there is an attorney fee provision in a contract, a "court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.App. 229, 278-279 (2009).

CP 164 at n. 4.

The Note contains a unilateral attorney provision that is limited in scope:

ATTORNEYS' FEES AND OTHER COSTS. If legal proceedings are instituted to enforce the terms of this Agreement, Borrower agrees to pay all costs of the Lender In connection therewith, including reasonable attorneys' fees, to the extent permitted by law.

Exhibit 7. CSB cites *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.App. 229, 278-279, 215 P.3d 990 (2009). (2009) in its footnote as authority for the court to award fees for “claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements.” CP 164 at n. 4.

**1. This Is Not an Action to Enforce the Note.**

CSB is playing fast and loose with the facts and the law. It has to know that its argument is entirely false. The fee agreement in *Deep Water Brewing* provided:

In the event of any controversy, claim, or dispute relating to this Agreement or the prior Agreement, or their breach, the prevailing party shall be entitled to recover reasonable expenses, costs, and attorneys fees.

*Deep Water Brewing*, 152 Wn.App. at 277. That is an entirely different kind of fee provision than one that provides for fees in any action “instituted to enforce the terms of this Agreement.”

That difference was not lost on the *Deep Water Brewing* court either. Its actual decision on fees was:

We conclude, then, **based on the fee provisions set out in the agreements** that the court properly awarded fees jointly and severally against Key Development (for breach) and Jack Johnson and Key Bay Homeowners Association (for tortious conduct arising from the agreements).

*Id.* at 279 (emphasis added). *Deep Water Brewing* has no bearing on this case because the decision applied to the fee provision in the contract at issue in the case.

CSB would have had to look far for cases discussing the language of the fee provision here.

Also at issue is whether one of Boguch's realtors is entitled to an award of attorney fees under her contract with Boguch. A provision in the contract provides for an award of attorney fees to the prevailing party in an action brought to enforce the terms of the agreement. However, a party may recover attorney fees under a contractual provision such as the one at issue herein only where the underlying action is brought on the contract and the contract is central to the dispute. Where a party alleges a breach of a duty imposed by a source other than the contract, the action is not on the contract, even if the duty would not exist in the absence of a contractual relationship. Although Boguch claimed a breach of contract, the litigation herein concerned Boguch's claims that the realtors breached the common law and statutory duties they owed to Boguch in representing his interests. Therefore, pursuant to the contract's fee-shifting provision, Boguch's realtor may not recover fees incurred for time spent defending against Boguch's tort claims. **Because the realtor's contractual fee-recovery right is limited to fees incurred in defense of an action brought on the contract, the realtor must segregate the time her lawyers spent defending against Boguch's tort claims from the time they spent defending against his breach of contract claim** in order to prove her entitlement to a fee award.

*Boguch v. Landover Corp.*, 153 Wn.App. 595, 600, 224 P.3d 795, 798 (2009) (emphasis added).

Generally attorney fees are not recoverable by the prevailing party as costs of litigation unless the fees are permitted by contract, statute or recognized ground in equity. *Hudson v. Condon*, 101 Wash.App. 866, 877, 6 P.3d 615 (2000). The court allowed attorney fees in *Hudson* under a broad provision of a partnership agreement creating an entitlement to prevailing party attorney fees in any litigation "related to" the partnership. The provision in the D & D Properties agreement, however, is narrower. Attorney fees are not available except in an action enforcing the agreement.

The D & D-related claims by Burns and McClinton against each other alleged breach of fiduciary duties arising as a matter of law. Burns has not identified any specific clause or provision of the partnership agreement that either party attempted to enforce.

*Burns v. McClinton*, 135 Wn.App. 285, 309, 143 P.3d 630, 641 (2006).

As a contractual basis for a fee award against the other members, Humphrey refers to the fee-shifting provision in Clay Street's LLC agreement. The agreement states, "In the

event a lawsuit is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover his attorney's fees and costs.” CP at 1662. But this appeal does not concern enforcement of the LLC agreement.

*Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn.2d 662, 676, 295 P.3d 231, 238 (2013)

Shurgard claims that its lease entitles it to costs and reasonable attorney fees. The lease provides:

Tenant agrees to pay all costs and expenses, including attorneys fees and reasonable service fees, of Landlord in enforcing the terms of this lease.

This language might entitle Shurgard to costs and reasonable attorney fees if it were suing Eifler to enforce the lease. However, it does not entitle Shurgard to costs and attorney fees where Eifler is suing Shurgard to enforce his rights under the common law and the CPA. In such a suit, the “landlord” is not incurring costs or expenses “in enforcing the terms of the lease,” and the quoted language does not apply.

*Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn.App. 684, 698, 861 P.2d 1071, 1080 (1993) (footnote omitted). This is not some obscure rule, but a basic rule that contracts mean what they say.

An action to “enforce the terms of this agreement” is necessarily a claim for breach of contract. The court made that very clear in *Boguch*.

A provision in the contract provides for an award of attorney fees to the prevailing party in an action brought to enforce the terms of the agreement. However, a party may recover attorney fees under a contractual provision such as the one at issue herein only where the underlying action is brought on the contract and the contract is central to the dispute. Where a party alleges a breach of a duty imposed by a source other than the contract, the action is not on the contract, even if the duty would not exist in the absence of a contractual relationship. Although Boguch claimed a breach of contract, the litigation herein concerned Boguch's claims that the realtors breached the common law and statutory duties they owed to Boguch in representing his interests. Therefore, pursuant to the contract's fee-shifting provision, Boguch's realtor may not recover fees incurred for time spent defending against Boguch's tort claims.

*Boguch*, 153 Wn.App.at 600. This was not a claim to enforce the Note, but a claim to make a third party liable for the note under equitable principles.

## **2. Jordan Is Not a Party to the Note.**

It is equally axiomatic that a person who is not a party to a contract cannot be held liable for contractual attorney fees.

Sixty-01 argues that it is entitled to attorney fees under RCW 64.34.364(14) and the recorded declaration of condominium, which provides for recovery of attorney fees in foreclosure actions. However, both of those apply to the condominium owners not a third party investor. \*235 Pashniak is not a party to that contract and thus Sixty-01 is not entitled to attorney fees.

*Sixty-01 Ass'n of Apartment Owners v. Parsons*, 178 Wn.App. 228, 234-35, 314 P.3d 1121, 1125 (2013).

Counsel for Jordan has searched the country for a case upholding an award of contractual attorney fees against a party liable under the successor liability rule and came up empty. It appears that once again, CSB is seeking a remedy that no court has ever adopted.

### **F. The Court Should Award Jordan Attorney Fees.**

CSB moved for and was awarded attorney fees. Under the doctrine of mutuality of remedy, Jordan is entitled to an award of attorney fees if he prevails in this appeal because CSB alleged a claim for contractual attorney fees. *Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 787, 197 P.3d 710, 713 (2008). Under this Court's decision in *Fairway Estates Association of Apartment Owners v. Unknown Heirs, Devisees of Young*, 172 Wn.App. 168, 182, 289 P.3d 675, 683 (2012), the doctrine of mutuality of remedies compels an award of fees to Jordan.

## **VI. CONCLUSION**

It is hard to imagine a claim more contrary to equity or a more inequitable decision than are presented by this case. Jordan obtained a discharge of a debt in bankruptcy, and CSB's express intention was to find a way to reinstate that obligation. Instead of honoring the bankruptcy

process, Judge O'Donnell found Jordan's discharge itself justified CSB's request.

CSB claimed that it lost its foreclosure remedy when Invicta transferred its assets to Jordan, but the truth was that CSB made its own independent decision not pursue foreclosure. Even if a transfer occurred, it would have had no effect on CSB because CSB was never going to foreclose on the collateral anyway.

The claim was contrived from the beginning, and it forced CSB into the hypocritical position of arguing that it was being deprived of valuable collateral in this lawsuit while it rejected the collateral as worthless in the real world. CSB had to maintain those contradictory positions through trial to preserve its claim, but in the end that resulted in a paradoxical judgment that declared the collateral "lost" to CSB at the same time that it awarded the collateral to CSB.

Everything about this case is antithetical to equity. Equity does not exist to provide an end run around bankruptcy or to confer a windfall on banks. It does not reward plaintiffs who elect not to pursue a remedy and then demand compensation for losing it. It does not provide a means to convert worthless collateral into a \$150,000 judgment.

Cases like this are the reason why this Court stands as a gatekeeper to equity and reviews *de novo* whether equitable relief was appropriate at all.

It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the court.

*J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 71-73, 113 P.2d 845, 857-58 (1941) (citation and quotation marks omitted).

This Court should hold that equitable relief was inappropriate in this case. It should further hold that a secured creditor cannot assert a claim for successor liability over a transfer of assets subject to the security agreement. It should reverse the decision in this case and award Jordan his attorney fees under the mutuality of remedies doctrine. This case should be remanded for an award of attorney fees and entry of judgment in favor of Jordan.

DATED this 20<sup>th</sup> day of May, 2016.

**DAVIS LEARY LLC**

By   
Matthew F. Davis, WSBA No. 20939  
Attorneys for Appellants

**DECLARATION OF SERVICE**

I, Matthew Davis, hereby declare as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On May 20, 2016, I served the foregoing document on the parties identified in paragraph 3.
3. The documents identified in paragraph 2 were served on the following persons at the email addresses stated pursuant to agreement of counsel.

**Columbia State Bank**

**Deborah Crabbe     [deborah.crabbe@foster.com](mailto:deborah.crabbe@foster.com)**

DATED this 20<sup>th</sup> day of May, 2016 at Seattle, Washington.

  
\_\_\_\_\_  
Matthew F. Davis