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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39070-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WESTAR FUNDING, INC. fka Westar Financial, Inc. and XIANJU XUI,

Respondents,

v.

RICHARD E. SORRELS

Appellant,

and

JOHN S. MILLS, in his capacity as Trustee,

Defendant.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. Summary of Proceedings Below	1
B. Standard of Review	1
1. The Standard of Review for a Summary Judgment is De Novo .	1
2. The Standard of Review for an Award of Attorney Fees Is Abuse of Discretion	2
II. RESPONSE TO ASSIGNMENT OF ERROR.....	2
A. Assignment of Error	2
B. Issue Pertaining to Assignment of Error.....	2
III. COUNTERSTATEMENT OF THE CASE	3
A. The Parties	3
B. 2002 Promissory Note and Deed of Trust	4
C. Loan Application and Representations Regarding Property	5
D. Default on 2002 Promissory Note and Foreclosure of Property	6
E. First Bankruptcy	7
F. Foreclosure Extension Agreement.....	8
G. 1992 Promissory Note and Deed of Trust	10
H. Warranty Deed in Lieu of Foreclosure	11
I. Foreclosure of the 1992 Deed of Trust.....	12
J. Foreclosure of the Westar Deed of Trust.....	13
K. Preliminary Injunction.....	14
L. The Summary Judgment.....	17
IV. ARGUMENT	17
A. The Claim of the Appellant Is Barred by the Statute of Limitations.....	17
1. Sorrels Cannot Foreclose His 1992 Deed of Trust Because the 1992 Promissory Note Became Due on August 3, 1994, and the Six-Year Statute of Limitations on Collection of the Note Has Long Since Expired.....	17
2. Sorrels Cannot Defeat RCW 7.28.300 by Arguing That the Statute of Limitations Is Not Available to Third Parties	21
3. The Bar of the Statute of Limitations Can Be Decided as a Matter of Law	22
B. The Claim of the Appellant Is Also Barred by the Statute of Frauds	23
1. The Alleged Oral Agreement to Assume the 1992 Promissory Note Violates the Statute of Frauds.....	23
C. The Claim of the Appellant Is Also Barred by Judicial Estoppel	26

1. Judicial Estoppel Precludes Sorrels from Pursuing This Claim,
Which Was Not Properly Disclosed and Scheduled as a Liability in
The R.E.S. Trust Bankruptcies26

D. The Claim of the Appellant Is Barred by His Own
Representations.....29

F. Respondents Are Entitled to an Award of Attorney Fees
and Costs on Appeal30

V. CONCLUSION.....31

TABLE OF AUTHORITIES

Cases

<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007)	27
<i>Bartley-Williams v. Kendall</i> , 134 Wn. App. 95, 138 P.3d 1103 (2006)....	27
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 65, 738 P.2d 665 (1987)....	2
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 (2008)	1
<i>City of Seattle v. McCready</i> , 131 Wn.2d 266, 931 P.2d 156 (1997)	30
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 108 P.3d 147 (2005)	27
<i>Hemenway v. Miller</i> , 116 Wn.2d 725, 807 P.2d 863 (1991)	30
<i>Johnson v. Si-Cor, Inc.</i> , 107 Wn. App. 902, 28 P.3d 832 (2001).....	27
<i>Kirkland v. Dressel</i> , 104 Wash. 668, 177 Pac. 643 (1919)	24
<i>Labriola v. Pollard Group</i> , 152 Wn.2d 828, 100 P.3d 791 (2004)	31
<i>Lloyd Co. v. Wyman</i> , 16 Wn. 2d 621, 134 P.2d 459 (1943)	24
<i>McLeod v. Northwest Alloys, Inc.</i> , 90 Wn. App. 30, 969 P.2d 1066 (1998).....	23
<i>Quality Food Centers v. Mary Jewell T, LLC</i> , 134 Wn. App. 814, 142 P.3d 206 (2006)	31
<i>Saluteen-Maschersky v. Countrywide Funding Corp.</i> , 105 Wn. App. 846, 22 P.3d 804 (2001)	23
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	27
<i>Walcker v. Benson and McLaughlin</i> , 79 Wn. App. 739, 904 P.2d 1176 (1995), <i>reconsideration denied</i> , 129 Wn.2d 1008, 917 P.2d 129 (1996)	18, 20
<i>Wingert v. Yellow Freight Sys., Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002)	2
<i>Zaleck v. Everett Clinic</i> , 60 Wn. App. 107, 802 P.2d 826 (1991).....	23

Statutes

RCW 4.16.040	24
RCW 4.84.330	34
RCW 7.28.300	17-22
RCW 19.36.010	26
Remington's Revised Statutes, § 785-1	20

Rules

RAP 18.1	31
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Regulations

WAC 458-61-330(2)(a)	25
WAC 458-61A-208(3)(a)	25

I. INTRODUCTION

A. Summary of Proceedings Below.

Respondents Westar and Xui filed this action in the Pierce County Superior Court on May 4, 2007, seeking to restrain a Trustee's foreclosure sale scheduled for Friday, May 18, 2007. On May 9, 2007, Judge Bryan Chushcoff entered an Order to Show Cause directing the defendants to appear a week later, on May 16, 2007, and show cause why the sale should not be restrained. On May 16, 2007, Judge Chushcoff restrained the sale. In January 2009, the respondents filed a Motion for Summary Judgment to quiet title to the subject real property and to remove an outlawed deed of trust from the title. On March 5, 2009, Judge Frederick W. Fleming granted the motion, quieted title in Mr. Xui, and awarded the respondents their reasonable attorney fees and costs. This appeal followed.

B. Standard of Review.

1. The Standard of Review for a Summary Judgment is De Novo.

The appellate courts review questions of law *de novo*. "In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court." *Champagne v. Thurston County*, 163 Wn.2d 69, 76, 178 P.3d 936 (2008), quoting *Wingert v.*

Yellow Freight Sys., Inc., 146 Wn.2d 841, 847, 50 P.3d 256 (2002)

2. The Standard of Review for an Award of Attorney Fees Is Abuse of Discretion.

The standard of review for attorney fee awards is abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Appellant did not assign error to the Trial Court's award of fees and costs.¹

II. RESPONSE TO ASSIGNMENT OF ERROR

A. Assignment of Error.

Appellant Sorrels assigns a single error: that the Trial Court erred in extinguishing his interest in the Gig Harbor real property and quieting title in respondent. Brief of Appellant at 2.

Respondents submit that RCW 7.28.300 not only permits such a result but in fact mandates that title to real property be quieted against any mortgage or deed of trust which is "outlawed," that is, barred by the statute of limitations.

B. Issue Pertaining to Assignment of Error.

Appellant argues that the result reached by the trial court, that is, the quieting of title in Respondent Xui, should not have been done on a summary judgment motion. Brief of Appellant at 2.

¹ The Trial Court awarded respondents their attorney fees and costs, but the amount of that award has not been decided.

Respondents submit that as a matter of law the 15 year old note and deed of trust upon which appellant sought to base his foreclosure were barred by the statute of limitations, and summary judgment was appropriate.

III. COUNTERSTATEMENT OF THE CASE

A. The Parties.

The following persons and entities are relevant to this appeal:

Richard E. Sorrels. Appellant Richard E. Sorrels (“Sorrels”) is a resident of Pierce County, Washington. Complaint, ¶ 2.3, CP 4; Answer, ¶ 1, CP 199.

The R.E.S. Trust. The R.E.S. Trust is Richard Sorrels’ living trust. The R.E.S. Trust was formed as a revocable living trust in 1992, and according to him it was converted to an irrevocable living trust in 1994. Complaint, ¶ 3.2, CP 4; Answer, ¶ 2, CP 199.

The Gig Harbor Property. The real property which is the subject of this action is located in Gig Harbor, Pierce County, and is legally described as follows:

Beginning 760 feet South and 482 feet East of the Northwest corner of Lot 4, Section 6, Township 21 North, Range 1 East of the W.M., in Pierce County, Washington, thence North 47 feet; thence East 280 feet, more or less, to meander line of Glencove; thence South 44°15’ East 65.61 feet along meander line; thence West 325.78 feet to the point of beginning.

Complaint, ¶ 3.3, CP 4; Answer, ¶ 3, CP 199.

David Brown. David Brown is a previous owner of the Gig Harbor Property. His whereabouts are presently unknown. Mr. Brown deeded the Gig Harbor property to The R.E.S. Trust in 1995. CP 39.

Westar Funding, Inc. Respondent Westar Funding, Inc., formerly known as Westar Financial, Inc. (“Westar”) is a commercial lender and a Washington corporation doing business in Pierce County, Washington, which loaned money to The R.E.S. Trust in 2002, and which foreclosed the Gig Harbor property when the loan was not repaid. Complaint, ¶¶ 2.2, 3.9, CP 2, 6; Answer, ¶¶ 1, 3, CP 199.

Xianju Xui. Respondent Xianju Xui (also known as Sam Chui) is a resident of King County. Mr. Xui purchased the Gig Harbor property at the foreclosure sale in April 2007. Complaint, ¶ 2.4, CP 4; Answer, ¶ 2.4, CP 199.

John S. Mills. Tacoma attorney John Mills previously represented Richard Sorrels in this case, but has withdrawn. Attorney Mills remained a defendant in his capacity as the Trustee appointed by Sorrels, but did not participate in the summary judgment proceedings below and has not participated in this appeal.

B. 2002 Promissory Note and Deed of Trust.

On June 19, 2002, Mr. Sorrels, acting as Trustee for his R.E.S.

Trust, borrowed the sum of \$61,500 from Westar. He executed a Promissory Note (“Westar Promissory Note”), a copy of which is authenticated by the Declaration of Jerome Froland as Ex. A. CP 126-127. Sorrels also executed a Deed of Trust (“Westar Deed of Trust”) in the Gig Harbor Property in favor of Westar to secure the \$61,500 loan. A copy of the Deed of Trust is authenticated by the Froland Dec. as Ex. B. CP 128-130. Westar recorded its Deed of Trust against the Gig Harbor Property under recording no. 200206210932. Froland Dec., ¶ 2. CP 121. This Deed of Trust recites that it is given for the purpose of securing performance of the \$61,500 Westar Promissory Note. CP 128.

C. Loan Application and Representations Regarding Property.

When Mr. Sorrels applied for the 2002 loan on behalf of The R.E.S. Trust, he completed and signed a Uniform Residential Loan Application. A copy of the loan application is authenticated by the Froland Dec. as Ex. C. CP 131-134. On page 3 of the loan application, Mr. Sorrels represented that the subject property, 9410 Glen Cove Road in Gig Harbor, was free and clear of encumbrances. CP 133. On the same page, he verified that the loan would be secured by “a first mortgage or deed of trust in the property.” *Id.*

Mr. Sorrels signed the loan application on page 3 and again on page 4. Above his signature on page 3 is this language: “*I/we certify that*

the information provided in this application is true and correct as of the date set forth opposite my/our signature. . . .” The date written opposite Mr. Sorrels’ signature is June 19, 2002. CP 133. Above both signatures is the precaution that any false statement could result in criminal prosecution and on page 3 is further warning above Sorrels’ signature: “. . . *any intentional or negligent misrepresentation(s) of the information contained in this application may result in civil liability and/or criminal penalties including monetary damages to the Lender, its agents, successors and assigns. . . .*” *Id.* In other words, at the time that Sorrels applied for the loan, he was given the opportunity to identify any senior encumbrances on the real property he was pledging to secure the loan, and he was warned of the importance of truthfulness. Nonetheless, Mr. Sorrels certified under penalty of criminal and civil liability that the real property was not encumbered.

D. Default on 2002 Promissory Note and Foreclosure of Property.

The R.E.S. Trust promptly defaulted on the Westar Promissory Note. Mr. Froland, the Trustee named in the Deed of Trust (CP 128) testified that foreclosure proceedings were first commenced in March 2003, nine months after the loan was made. Froland Dec., ¶ 4, CP 122. Defendant Sorrels admits this default. In his May 14, 2007 declaration, he stated “We all agree that subsequent to all these transactions, The R.E.S.

Trust borrowed money from Westar, secured by the property. We all agree that Westar has not been fully paid, and has foreclosed on its Deed of Trust.” Sorrels Dec., p. 2, ll. 4-6, CP 32. In all, Westar commenced four separate non-judicial foreclosures on the Gig Harbor Property to try to recover on the defaulted Westar Promissory Note. Froland Dec., ¶ 4, CP 122. The first three times, the defaults were cured at the eleventh hour or other agreement was reached.

Foreclosure No. 1: Cured on or about May 30, 2003;

Foreclosure No. 2: Cured on or about March 26, 2004;

Foreclosure No. 3: On or about November 30, 2005, Sorrels paid all the interest due through December 1, 2005, with the agreement that the note would be paid in full by balloon payment on or before January 31, 2006.

Foreclosure No. 4: The January 31, 2006, balloon payment was not made as promised and Westar commenced a fourth foreclosure. This foreclosure was postponed by agreement (discussed below) but eventually resulted in a foreclosure sale. Froland Dec., ¶ 4, CP 122.

E. First Bankruptcy.

In August 2005, during Foreclosure No. 3, Mr. Sorrels filed a petition for Chapter 13 bankruptcy for his R.E.S. Trust, in the U.S. Bankruptcy Court in Tacoma, cause No. 05-47562. Froland Dec., ¶ 6, CP

122. With the Chapter 13 petition, Sorrels filed a schedule of assets and liabilities in which he was required to accurately and truthfully list all of The R.E.S. Trust's existing assets and liabilities. Sorrels signed the schedules, stating "*I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 11 sheets, and that they are true and correct to the best of my knowledge, information and belief.*" Bianchi Dec., Ex. A, CP 104. Significantly, Mr. Sorrels, acting on behalf of The R.E.S. Trust, listed Westar as a secured creditor but did not list himself as a secured creditor of The R.E.S. Trust. This failure is highly probative and important.

The Chapter 13 Trustee ultimately moved to dismiss the bankruptcy because a trust cannot file a Chapter 13 bankruptcy. Froland Dec., ¶ 6. CP 122. Acting *pro se*, Mr. Sorrels moved to convert to a Chapter 11 bankruptcy. *Id.* At that point, the Pierce County Prosecutor's Office, which is a frequent litigant against Mr. Sorrels, moved to dismiss the Chapter 11 bankruptcy because The R.E.S. Trust was not represented by an attorney. *Id.* In response, Sorrels voluntarily dismissed his bankruptcy petition. *Id.*

F. Foreclosure Extension Agreement.

During Foreclosure No. 4, Mr. Sorrels filed two separate motions in Pierce County Superior Court to restrain the trustee sale. Both motions

were denied. Froland Dec., ¶ 7, CP 123.

After the two motions to restrain the trustee sale were denied, on or about October 5, 2006, the parties entered into a Foreclosure Extension Agreement. Froland Dec., ¶ 8 and Ex. D, CP 123, 135-138. By the terms of this agreement, Sorrels acknowledged the default under the note and acknowledged the amounts owed to Westar. CP 136. He also released, on behalf of the trust, any and all other claims against Westar, including “all rights, claims, demands, and damages of any kind, known and unknown, existing or arising in the future. . . .” CP 137. In exchange for Westar’s postponement of the foreclosure sale, Mr. Sorrels agreed to pay off the debt in full on or before February 2, 2007. *Id.*

It became apparent soon after he signed the Foreclosure Extension Agreement that Sorrels and The R.E.S. Trust did not intend to comply with its terms. The parties signed the Foreclosure Extension Agreement on October 5, 2006. Less than three weeks later, Trustee Jerome Froland received a letter dated October 26, 2006 from attorney John Mills representing Richard Sorrels and The R.E.S. Trust. Froland Dec., ¶ 9 and Ex. E, CP 123, 139-40. By this letter, Mr. Sorrels alleged for the first time that he, Sorrels, held a previously undisclosed Deed of Trust against the very same Gig Harbor property which was the subject of all four foreclosures by Westar. Attorney Mills stated, contrary to Sorrels’

representations in his loan application in 2002, that this previously undisclosed encumbrance on the Gig Harbor property was senior to the Deed of Trust granted to Westar in 2002. Mills stated that he had been engaged to foreclose the previously undisclosed Deed of Trust and suggested that Westar was going to have to pay a large sum of money to Sorrels personally to avoid losing its security interest:

Anyway, it seems to me (and I've talked to David Smith about this) that Westar is going to end up paying Rick Sorrels personally to avoid his foreclosure of the Brown Deed of Trust, and then Rick is going to turn around and loan enough money to the Trust so it can pay Westar the amount set out in the settlement agreement.

CP 140. In other words, attorney Mills was claiming that Sorrels and his trust could extract the money to repay the Westar loan (and a lot more) from Westar itself. Of course, this circuitous scheme had not been disclosed to Westar at the time it loaned \$61,500 to The R.E.S. Trust in 2002.

G. 1992 Promissory Note and Deed of Trust.

With his October 26, 2006 letter, attorney Mills furnished a copy of a Promissory Note and a Deed of Trust, both dating back to 1992. Froland Dec., ¶ 9 and Exs. F and G, CP 123, 141-143. In 1992, the Gig Harbor Property was apparently owned by one David Brown. On August 3 of that year, Brown executed a Promissory Note (hereinafter the "1992

Promissory Note”) in favor of Richard E. Sorrels. CP 141. *See Sorrels Declaration Opposing Injunction* (dated May 14, 2007), p. 1, l. 22, CP 31. The Promissory Note was a two-year note which contemplated a single repayment of all principal and interest in the amount of \$33,167.00 upon maturity on August 3, 1994. CP 141.

As security for the Promissory Note, David Brown executed a Deed of Trust (hereinafter the “1992 Deed of Trust”) against the Gig Harbor Property. The 1992 Deed of Trust was recorded under Pierce County Auditor’s number 9208040744. CP 142-143.

Appellant Sorrels claims that David Brown did not repay the 1992 Promissory Note when it matured on August 3, 1994. Sorrels Dec. dated May 14, 2007, p. 3, ll.1-5, CP 33. Despite this default on the 1992 Promissory Note, Sorrels admits taking no action against David Brown to collect the note or to foreclose the 1992 Deed of Trust for the next 13 years, until he faced the fourth foreclosure of the Westar obligation. *Id.* at p. 2, ll. 16-20, CP 32.

H. Warranty Deed in Lieu of Foreclosure.

On or about November 13, 1995, David Brown executed a Statutory Warranty Deed conveying the Gig Harbor Property to The R.E.S. Trust. The deed was recorded under Pierce County Recording No. 9511130390. CP 39. It conveyed the Gig Harbor property to Richard

Sorrels as Trustee for The R.E.S. Trust. Sorrels Dec., p. 2, ll. 3-4, footnote 2, and Ex. A (fourth page), CP 32, 39. According to the Real Estate Excise Tax Affidavit signed by Sorrels and David Brown at the time, the Statutory Warranty Deed was given to The R.E.S. Trust in lieu of foreclosure. CP 40. Once this conveyance occurred, David Brown had no further interest in the Gig Harbor property and The R.E.S. Trust was vested in title.

According to Sorrels, after receiving the Statutory Warranty Deed in lieu of foreclosure from David Brown, his R.E.S. Trust held title to the Gig Harbor property, but subject to his own 1992 Deed of Trust, which secured repayment of David Brown's 1992 Promissory Note. Sorrels Dec., p. 3, ll. 5-9, CP 33. This makes no sense. At the time of the deed in lieu of foreclosure in 1995, the 1992 Promissory Note secured by the 1992 Deed of Trust had already been in default for more than a year, having matured on August 3, 1994. Once Sorrels took the real estate in lieu of foreclosure, his note and deed of trust were extinguished by the doctrine of merger. Nonetheless, Sorrels claims that the 1992 Deed of Trust continues to encumber the real property to this day, despite the fact that 13 more years passed after the default in 1994 without incident and without any attempt to foreclose the 1992 Deed of Trust.

I. Foreclosure of the 1992 Deed of Trust.

Instead of paying off the obligation to Westar on February 2, 2007, as promised by the Foreclosure Extension Agreement, Sorrels filed another petition for bankruptcy protection, on February 1, 2007. Froland Dec., ¶ 11, CP 123-124. This bankruptcy lasted only 18 days, with Sorrels voluntarily dismissing the bankruptcy on February 20, 2007, even before filing a schedule of assets and liabilities. *Id.* Once the bankruptcy was dismissed, the foreclosure of the Westar Deed of Trust went forward. *Id.*

Meanwhile, however, attorney Mills, acting as Trustee for Richard Sorrels, recorded a Notice of Trustee's Sale under Pierce County recording No. 200702161008, purporting to schedule a Trustee Sale for the 1992 Deed of Trust, which was now 15 years old. Froland Dec., ¶ 10, Ex. I, CP 123, 146-149. Attorney Mills set the foreclosure sale for May 18, 2007, roughly one month after Westar's scheduled foreclosure sale of the property. The Notice by attorney Mills proposed to sell the Gig Harbor Property to recover principal, interest, late charges, fees and costs totaling \$225,532.00. CP 146.

J. Foreclosure of the Westar Deed of Trust.

On April 13, 2007, the Westar Deed of Trust was finally foreclosed by a nonjudicial trustee's sale. Froland Dec., ¶ 12, CP 124. No other bidders appeared for the sale and the Trustee issued a Trustee's Deed to plaintiff Xianju Xui. *Id.* The Trustee's Deed was recorded under

Pierce County Auditor's Recording No. 200704300862. CP 150-152.

The effect of the Trustee's Deed was to vest title in Mr. Xui and to divest The R.E.S. Trust from title.

K. Preliminary Injunction.

Despite the foreclosure of the Westar Deed of Trust, appellant Sorrels and his trustee, attorney Mills, attempted to go forward with their threatened foreclosure of the Gig Harbor property.

To prevent that, on May 4, 2007, Westar and Xui filed this pending lawsuit and moved for a preliminary injunction to restrain trustee Mills from selling the Gig Harbor Property at a foreclosure sale. The preliminary injunction was requested on the ground that enforcement of the 1992 Promissory Note was barred by the statute of limitations and consequently Sorrels no longer had the right to foreclose on the 15-year-old 1992 Deed of Trust. Sorrels opposed the motion, and provided a detailed declaration explaining exactly why he believed the 1992 Promissory Note was still operative:

First of all, as described on the face of the note, it matured August 23, 1994. However, the court can see that the principal effect of the passing of maturity was to increase the interest payable from 8½ % to 12%. Thus, after August 23, 1994, I held a note paying 12 % fully secured by waterfront property in Washington.

* * *

[I]n 1995, Mr. Brown transferred his title to the property to R.E.S. Trust because he was unable to pay a Note held by

the R.E.S. Trust. At that time, ***although nothing was reduced to writing, quite obviously R.E.S. Trust assumed the obligation to pay me*** [Sorrels]. I mean, Mr. Brown left town, and had turned over the property to the Trust, so he obviously wasn't going to pay me back. The trust acquired the title to the property, but again obviously it would have to pay on the note eventually, or I'd foreclose my [Sorrels] Deed of Trust and take the property away.

Still, I [Sorrels] did not ever need the cash, so on an ongoing basis, the due date was extended by agreement.

* * *

Throughout all this time, the R.E.S. Trust was waiving any statute of limitations on the note.

* * *

I mean, it should be pretty obvious that I [Sorrels] never intended to just waive my right to repayment of the note. So for years and years, what happened is that, by mutual agreement [between Sorrels and his Trust], the note's due date was extended, the Trust got property appreciation and I got 12% interest which was tax deferred because it simply accrued as a debt secured by the Deed of Trust.

Sorrels Dec. Opposing Injunction dated May 14, 2007, p. 3, ll. 3-21 (emphasis added), CP 33. Mr. Sorrels' declaration did not explain why he had previously represented to Westar that the Gig Harbor property was free and clear of liens and encumbrances.

The Preliminary Injunction was granted by Judge Bryan Chushcoff on May 16, 2007.

Sorrels' claim is that although nothing was ever reduced to writing, and in clear contravention of the Statute of Frauds, The R.E.S. Trust orally assumed David Brown's 1992 Promissory Note obligation to Sorrels.

Then, because Sorrels didn't need the money from his R.E.S. Trust, Sorrels agreed orally with himself on a regular basis to extend the due date of the 1992 Promissory Note. These oral extensions supposedly went on for at least 15 years while the \$28,000 Note accrued almost \$200,000 in interest. This arrangement was not disclosed to Westar in 2002 when it was asked to loan \$61,500 to The R.E.S. Trust and take the property as collateral. Then, conveniently, at the time when The R.E.S Trust was in default on the Westar loan, and the Westar Deed of Trust was being foreclosed, Sorrels finally called upon his R.E.S Trust (by inner monologue, of course) to repay the entire 1992 Promissory Note and accumulated interest. Curiously, the actual written Notice of Default was directed to David Brown and not The R.E.S. Trust. CP 144. When The R.E.S. Trust supposedly couldn't or wouldn't repay Sorrels, he initiated foreclosure of the 1992 Deed of Trust, with the purpose of foreclosing Westar or whoever purchased the property at Westar's sale. Sorrels explains:

I initiated a foreclosure of my Deed of Trust only after it became apparent R.E.S. Trust did not have the money to pay Westar and that Westar was going to foreclose on its Deed of Trust.

Sorrels Dec., p. 2, ll. 16-17, CP 32. It would seem that Mr. Sorrels knew all along that he had no intention of re-paying the money he borrowed from Westar in 2002, and was holding the undisclosed 1992 note and deed

of trust in reserve until he needed it to avoid paying his obligations.

L. The Summary Judgment.

On January 20, 2009, respondents Westar and Xui filed a Motion for Summary Judgment, seeking the quieting of title and attorney fees and costs. CP 153-174. The Motion was argued on March 6, 2009 before Judge Frederick W. Fleming. The Motion was granted and reasonable attorney fees and costs were awarded. CP 192-194. Appellant Sorrels timely filed his Notice of Appeal on March 25, 2009. CP 195-196.

IV. ARGUMENT

A. The Claim of the Appellant Is Barred by the Statute of Limitations.

1. Sorrels Cannot Foreclose His 1992 Deed of Trust Because the 1992 Promissory Note Became Due on August 3, 1994, and the Six-Year Statute of Limitations on Collection of the Note Has Long Since Expired.

The 1992 Promissory Note, which appellant Sorrels attempted to foreclose, became due on August 3, 1994, and the six-year statute of limitations for collection of that note has long since expired. The foreclosure is barred by RCW 7.28.300 which provides:

Quieting Title Against Outlawed Mortgage Or Deed of Trust

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to

satisfy the court, may have judgment quieting title against such a lien.

RCW 7.28.300.

The Washington Court of Appeals directly addressed the application of RCW 7.28.300 in the case of *Walcker v. Benson and McLaughlin*, 79 Wn. App. 739, 904 P.2d 1176 (1995), *reconsideration denied*, 129 Wn.2d 1008, 917 P.2d 129 (1996). In *Walcker*, the Walckers signed a promissory note in favor of Benson and McLaughlin, and also granted a Deed of Trust in real property to secure the note. 79 Wn. App. at 741. The Walckers did not pay the note, but Benson and McLaughlin never took any action to collect the obligation. *Id.* More than six years after execution of the note and deed of trust, Benson and McLaughlin commenced a nonjudicial foreclosure of the deed of trust. *Id.* The Walckers filed an action to quiet title and to restrain the trustee's sale, contending the foreclosure was barred by the prohibition contained in RCW 7.28.300. *Id.* The trial court concluded that the deed of trust survived, even after the six year statute of limitations expired to sue on the note, and ruled in favor of Benson and McLaughlin. The Walckers appealed, and the Court of Appeals reversed.

At the time that the *Walcker* case arrived at the Court of Appeals in 1994, the statute in question made no mention of deeds of trust. RCW

7.28.300 was first enacted by the Legislature in the Laws of 1937, c. 124 § 1, and codified at Remington's Revised Statutes, § 785-1. The statute on its face spoke only of mortgages, for the obvious reason that deeds of trust did not exist in Washington law in 1937, and the statute had never been amended.

The decision of the Court of Appeals focused directly on the issue presented by Mr. Sorrels' actions:

The sole issue in this appeal is whether the right of nonjudicial foreclosure of a deed of trust extends beyond the limitation period for enforcement of the underlying debt.

79 Wn. App. at 741. The Court of Appeals found the deed of trust foreclosure by Benson and McLaughlin was barred, by the following reasoning:

[T]he goal of statutes of limitations is to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969); *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d at 714, 709 P.2d 793 (1985).

These goals are generally applicable in foreclosure proceedings, whether based on mortgages or deeds of trust. Nor is it clear that an unlimited foreclosure period would conserve judicial resources. Indeed, the owner of record facing nonjudicial foreclosure of a deed of trust may ask a

court to restrain the sale by “contest[ing] the alleged default on any proper ground.” RCW 61.24.030(6)(j); *see* RCW 61.24.130. Any such action certainly would expend judicial resources, as this case has demonstrated.

The plain language of RCW 61.24.020 states that, “[e]xcept as provided” in the deed of trust act, mortgage law applies to foreclosure of deeds of trust. The act does not address the applicability of statutes of limitations. Therefore, RCW 7.28.300, which expressly makes the statute of limitations a defense in mortgage foreclosure proceedings, applies to foreclosure of trust deeds as well. ***Because Benson and McLaughlin failed to initiate its foreclosure within the applicable six-year limitation period, the foreclosure should be barred.***

Walcker, 79 Wn. App. at 745-746 (emphasis added.)

Three years later, the Legislature amended RCW 7.28.300. The words “or deed of trust” were inserted after the word “mortgage,” thus legislatively adopting the Court of Appeals’ interpretation in the *Walcker* case. At this point the issue became closed. It would now take an action of the Legislature to reverse the effect of the *Walcker* decision and allow foreclosure of a deed of trust which secures an obligation barred by the statute of limitations.

The facts of this case are identical to the facts in *Walcker*. In 1992, David Brown executed a \$28,000 Promissory Note in favor of Richard E. Sorrels and the 1992 Deed of Trust was recorded against the Gig Harbor property to secure the note. Repayment of the Note was due by its terms on August 3, 1994, and David Brown never paid the Promissory Note.

Sorrels took no action to obtain a judgment or collect on the 1992 Promissory Note. Rather, he waited more than 12 years after default on the note and then for the first time attempted to initiate a non-judicial foreclosure. Because Sorrels failed to initiate his foreclosure within the applicable six-year limitation period, the *Walcker* case and RCW 7.28.300 mandate that the foreclosure is now barred. *Walcker*, 79 Wn. App. at 746.

2. Sorrels Cannot Defeat RCW 7.28.300 by Arguing That the Statute of Limitations Is Not Available to Third Parties.

Sorrels seems to argue that the statute of limitations is an affirmative defense which is personal to a debtor and cannot be asserted by a third party such as Westar or Xui. Such an argument is incorrect.

The statute states in relevant part:

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations...

RCW 7.28.300 (emphasis added). The plain language of the statute makes clear that quieting title is available to any *record owner of real estate* who holds property which is subject to a deed of trust which *would be* barred by the statute of limitations. Plaintiff Xui is the record owner by virtue of the recorded Trustee's Deed. The beneficiary of an outlawed deed of trust, such as Mr. Sorrels claims to be, cannot defeat the plain purpose and

language of RCW 7.28.300 simply by arguing that the owner of the property does not have standing to assert the statute of limitations defense, when the statute explicitly provides the defense to any record owner.

3. The Bar of the Statute of Limitations Can Be Decided as a Matter of Law.

The material facts in this case are undisputed, and since the Legislature spoke in 1998, the applicable law is now beyond question. Therefore, summary judgment is unavoidable.

Appellant Sorrels claims that he still holds a promissory note dated August 3, 1992. CP 141. The Note on its face was due August 3, 1994. The statute of limitations for the enforcement of a written obligation is six years. RCW 4.16.040. The statute of limitations to collect the Note in question thus expired on August 3, 2000. Appellant Sorrels took no action to collect the Note or foreclose the Deed of Trust which secured it until October 26, 2006, when his attorney wrote a threatening letter. CP 139-140.

The vague assertions by Mr. Sorrels that he reached oral agreements with himself to waive the statute of limitations are of no effect. Bare assertions of oral agreements which would contradict written agreements are not sufficient to raise a material dispute of fact and do not avoid summary judgment. *Saluteen-Maschersky v. Countrywide Funding*

Corp., 105 Wn. App. 846, 854, 22 P.3d 804 (2001). Statutes of limitation are routinely enforced as a matter of law. *McLeod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 969 P.2d 1066 (1998) (Summary judgment dismissing trade secret claim raised after statute of limitations expired; affirmed on appeal); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 802 P.2d 826 (1991) (Medical malpractice claim dismissed on summary judgment on statute of limitations grounds; affirmed on appeal.).

B. The Claim of the Appellant Is Also Barred by the Statute of Frauds.

1. The Alleged Oral Agreement to Assume the 1992 Promissory Note Violates the Statute of Frauds.

Appellant Sorrels attempts to circumvent his Statute of Limitations problem by asserting that he repeatedly granted extensions of the due date for the repayment of the 1992 Promissory Note, by oral agreements that he reached with his R.E.S. Trust. However, it must be remembered that The R.E.S. Trust was not the maker of the 1992 Promissory Note. The debt is a 1992 debt owed by one David Brown. According to Sorrels, it is clear, although nothing is in writing, that The R.E.S. Trust “obviously” assumed Mr. Brown’s obligation to repay the 1992 Promissory Note. Sorrels Dec., p. 2, ll. 5-9, 16-18, CP 33. In other words, when The R.E.S. Trust became the owner of the Gig Harbor Property in 1995, the Trust supposedly became obligated to repay the debt owed by Mr. Brown to Richard

Sorrels. Mr. Sorrels claims that from 1995 on, he as a creditor was repeatedly agreeing with himself as the Trustee for The R.E.S. Trust to waive the statute of limitations on the debt. According to Sorrels, “for years and years, what happened is that, by mutual agreement [between Sorrels and his Trust], the note’s due date was extended.” CP 33.

The Statute of Frauds prohibits Sorrels from manufacturing this charade. Under the Statute of Frauds an oral contract assuming and agreeing to pay the debt of another is unenforceable. RCW 19.36.010; *Kirkland v. Dressel*, 104 Wash. 668, 177 Pac. 643 (1919) (oral assurances to parents that they would be paid on debts owed by their son were insufficient to support attempt to collect debts from third party); *Lloyd Co. v. Wyman*, 16 Wn. 2d 621, 134 P.2d 459 (1943) (evidence established that defendants’ oral promise to pay for or become responsible for purchases of materials by copartners from plaintiff was a collateral “promise to answer for debts or default of another” and was not an “original undertaking” and was void as offending the Statute of Frauds).

In the instant matter, Sorrels argues that The R.E.S. Trust somehow implicitly assumed the 1992 Promissory Note obligation owed by David Brown. But any such assumption is barred by the Statute of Frauds unless it is in writing. Sorrels’ own declaration is dispositive and confirms that the alleged assumption is not in writing:

However, in 1995, Mr. Brown transferred his title to the property to R.E.S. Trust because he was unable to pay a Note held by the R.E.S. Trust. At that time, although nothing was reduced to writing, quite obviously R.E.S. Trust assumed the obligation to pay me [Sorrels].

Sorrels Dec., p. 3, ll. 5-7, CP 33 (emphasis added). Leaving aside any question of self-dealing or self-serving recollection, Sorrels' declaration confirms that any assumption of the 1992 Promissory Note was implicit and oral because "nothing was reduced to writing." Mr. Sorrels cannot manipulate the facts of this case to avoid the applicability of the Statute of Frauds.

Furthermore, the documentary evidence offered by Mr. Sorrels also defeats his claim. One of the documents attached to his declaration is an excise tax affidavit he signed in 1995, when David Brown conveyed the Gig Harbor property to The R.E.S. Trust in lieu of foreclosure. Sorrels Dec., Ex. A (fifth page). CP 40. That excise tax affidavit attests (under penalty of perjury and a Class C felony) that no excise tax was owed when Brown conveyed the Gig Harbor property to The R.E.S. Trust. However, if the Trust had assumed Mr. Brown's debt to Richard Sorrels, there should have been excise tax paid because assumption of an underlying debt is taxable consideration. The excise tax affidavit even cites the regulation (WAC 458-61-330(2)(a), now WAC 458-61A-208(3)(a)) which provides that a deed in lieu of foreclosure is only non-taxable if there is no

other consideration. Thus, the contemporaneous written evidence signed by Richard Sorrels himself under penalty of perjury establishes that the Brown debt was not assumed when the property was conveyed to The R.E.S. Trust.

There are simply no issues of material fact, and the testimony of Sorrels himself supported the dismissal of his claim. The statute of limitations expired, and Mr. Sorrels' efforts to revive the claim by The R.E.S. Trust's oral assumption of David Brown's 1992 Promissory Note clearly violate the Statute of Frauds.

C. The Claim of the Appellant Is Also Barred by Judicial Estoppel.

1. Judicial Estoppel Precludes Sorrels from Pursuing This Claim, Which Was Not Properly Disclosed and Scheduled as a Liability in The R.E.S. Trust Bankruptcies.

There exists an entirely separate and independent basis for preventing Sorrels from foreclosing the 1992 Deed of Trust. Even if The R.E.S. Trust had properly assumed the 1992 Promissory Note, Sorrels failed to list it as an obligation in The R.E.S. Trust's bankruptcy schedules. Sorrels attested under penalty of perjury that those bankruptcy schedules were truthful and accurate, CP 104, yet those schedules made no mention of any such obligation. CP 97. However, when it suited his purposes, Sorrels declared under penalty of perjury that he was in fact a secured creditor of The R.E.S. Trust by virtue of The R.E.S. Trust's

assumption of the 1992 Promissory Note. CP 33. The doctrine of judicial estoppel requires that Sorrels cannot have it both ways.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (citing *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006); *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007)). The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005), quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). Intent to mislead is not an element of judicial estoppel, and it does not matter whether someone ever intended to deceive the Court. *Cunningham*, 126 Wn. App. at 233.

In 2005, Richard E. Sorrels, on behalf of The R.E.S. Trust, initiated and filed a Chapter 13 Bankruptcy petition. Froland Dec. ¶ 6, CP 122. The Voluntary Petition signed by Mr. Sorrels shows that the bankruptcy was filed on August 19, 2005. CP 89-90. When the schedules

of assets and liabilities were filed in the bankruptcy court, Mr. Sorrels certified under penalty of perjury that the schedules are “true and correct to the best of my knowledge, information, and belief.” CP 104. Yet when Schedule D of the Chapter 13 schedule is examined, it shows that Sorrels correctly identified Westar as a secured creditor against the Gig Harbor property, but he did not identify himself as a secured creditor. CP 97. If the 1992 debt owed by David Brown to Mr. Sorrels had been assumed by The R.E.S. Trust, that obligation should have been listed in its schedule of liabilities when The R.E.S. Trust filed bankruptcy, and it was not. Rhetorically speaking, how could Sorrels possibly prepare The R.E.S. Trust’s bankruptcy schedules and forget to list a \$220,000.00 secured debt owed to him personally? The obvious conclusion is that he did not forget; rather, back in 2005 Sorrels had yet to invent his story about The R.E.S. Trust’s implied oral assumption of the 1992 Promissory Note and his alleged oral agreements with himself extending the due date for the Note. This story was newly created by Sorrels in 2007 from whole cloth, to try to undo the foreclosure of the Westar Deed of Trust and to defeat this quiet title action. Unfortunately for Mr. Sorrels, judicial estoppel absolutely binds him to the truths he told the Bankruptcy Court in 2005, and estops him from now claiming to be a secured creditor of The R.E.S. Trust, with the right to foreclose the 1992 Deed of Trust.

D. The Claim of the Appellant Is Barred by His Own Representations.

The underlying truth of this matter is that appellant Sorrels is trying to avoid repaying a loan. When he applied for the loan in 2002, he represented to Westar that The R.E.S. Trust owned the Gig Harbor property free and clear of all encumbrances. He also promised that Westar's loan would be secured by "a first mortgage or deed of trust." These assurances were made in a written loan application signed under penalty of perjury. CP 131-134. When the loan closed, Mr. Sorrels signed a Promissory Note promising that The R.E.S. Trust would repay the loan, CP 126-127, and a Deed of Trust pledging the Gig Harbor Property to secure the loan. CP 128-130.

Furthermore, on October 5, 2006, while faced with imminent foreclosure, Mr. Sorrels signed a Foreclosure Extension Agreement to stave off a pending foreclosure sale. CP 135-138. In that document, he promised the loan would be repaid and he released any and all claims against Westar, including known and unknown claims. CP 137. This release would certainly apply to his subsequent claim to hold a note and deed of trust which are superior to Westar's note and deed of trust.

All these assurances and representations by Mr. Sorrels, whether he made them for himself or for his Trust, are inconsistent with and contradictory to the aggressive attack Sorrels launched on October 26,

2006. At that time, he unexpectedly asserted that he personally held the first position deed of trust, which he threatened to use to foreclose the property and wipe out the security interest of Westar or the ownership interest of whoever was the successful bidder at Westar's foreclosure sale. This shameless behavior is opportunistic at best and fraudulent at worst. It is no wonder the trial judge said:

I'm not buying it. I think this looks to me like – an appellate court can tell me I'm wrong, but it looks to me like this is an abuse of the justice system. And I'm not going to be part of it. So I'm going to grant the motion for summary judgment and quiet title in Mr. Xui.

RP 5:23-6:13.

F. Respondents Are Entitled to an Award of Attorney Fees and Costs on Appeal.

The American Rule states that attorney fees may be awarded if authorized by contract, statute, or a recognized ground in equity. *City of Seattle v. McCready*, 131 Wn.2d 266, 931 P.2d 156 (1997). Attorney fees are properly awarded on a contract when the contract containing the attorney fee provision is central to the controversy. *Hemenway v. Miller*, 116 Wn.2d 725, 742, 807 P.2d 863 (1991).

In this case the center of controversy is whether Richard E. Sorrels can foreclose a 1992 Deed of Trust. That Deed of Trust contains the following attorney fee provision:

Grantor covenants and agrees: . . .

To pay all costs, fees and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney's fees actually incurred, as provided by statute.

CP 142, ¶ 5. Mr. Sorrels attempted to foreclose this Deed of Trust and to use the attorney fee provision it contained to obtain attorney fees from Westar. (See Notice of Trustee's Sale at CP 146 asking for attorney fees.) Since the attorney fee provision in the Deed of Trust must be read as bilateral, RCW 4.84.330, Westar is properly entitled to attorney fees and costs incurred in defeating the enforceability of the 1992 Deed of Trust. *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006). An award of fees and costs is proper even if the written agreement is ultimately invalidated by the Court. *Labriola v. Pollard Group*, 152 Wn.2d 828, 100 P.3d 791 (2004). The trial court properly awarded Westar its reasonable fees and costs, and appellant did not appeal that portion of the decision.

Pursuant to RAP 18.1, respondents Westar and Xui jointly request a further award of their attorney fees and costs on appeal.

V. CONCLUSION

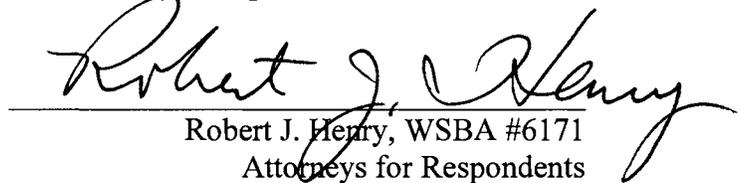
The R.E.S. Trust borrowed money from Westar in 2002 and never paid it back. As a result, the Gig Harbor Property was foreclosed and sold

to Mr. Xui at a Trustee's Sale in April 2007, after four separate foreclosures, two forbearance agreements, two failed protective bankruptcies and two failed motions to restrain the sale. Nonetheless, appellant Sorrels claims that he holds a note and deed of trust signed in 1992 which give him a security interest in the Gig Harbor property which is senior to that of Westar or Mr. Xui.

This specious assertion must fail for three reasons. First, the 1992 note and deed of trust are time barred, and therefore under RCW 7.28.300, title must be quieted in Mr. Xui. Second, the claim that The R.E.S. Trust orally or implicitly assumed the 1992 debt violates the Statute of Frauds. Third, Mr. Sorrels is judicially estopped by his sworn statements when he put The R.E.S. Trust into bankruptcy in August 2005, representing that Westar was the senior secured creditor.

Therefore, the grant of summary judgment quieting title in Mr. Xui should be affirmed.

Respectfully submitted this 8th day of September, 2009.



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CERTIFICATE OF SERVICE

I certify that on September 8, 2009, I caused a copy of the foregoing document to be served via first class U.S. mail, postage prepaid, to the following counsel of record:

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Lee Brewer

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