Appeal No. 2015 AP 001586

State of Wisconsin

In Supreme Court

Nationstar Mortgage LLC n/k/a Bank of America, NA, as successor by Merger to BAC Home Loans,
Plaintiff-Appellant-Cross-Respondent,

vs.

Robert R. Stafsholt,
Defendant-Respondent-Cross-Appellant-Petitioner,

Colleen Stafsholt f/k/a Coleen McNamara, unknown spouse of Robert R. Stafsholt, unknown spouse of Colleen Stafsholt, f/k/a Colleen McNamara, Richmond Prairie Condominiums Phase I, Association and The First Bank of Baldwin,
Defendants.

On Appeal from the Circuit Court for St. Croix County
Circuit Court Case No. 2011 CV 224
The Honorable Scott R. Needham, Presiding

BRIEF OF DEFENDANT-RESPONDENT-CROSS-APPELLANT – PETITIONER ROBERT R. STAFSHOLT

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1. Defendant-Respondent-Cross-Appellant-Petitioner Robert R. Stafsholt is a homeowner and mortgagor that has always paid for his own homeowners' insurance and provided proof of a conforming policy to his mortgagee,[1] and has always had the financial ability to make his mortgage payments.[2] But in 2011, mortgagee Bank of America ("BOA") commenced a mortgage foreclosure action against Stafsholt based on a charge for lender-placed homeowners' insurance ("LPI") that BOA unnecessarily purchased and charged Stafsholt for in 2010 (BOA had also unnecessarily purchased and charged Stafsholt for LPI in 2008 and 2009).

After a three day court trial in this mortgage foreclosure action in 2014, in his April 7, 2015, Order, Trial Court Judge Scott Needham found that:

a. In September, 2010, BOA "improperly charged the Stafsholts for the [LPI]" (BOA was most likely continuously purchasing unnecessary LPI for Stafsholt from 2008-2010 through Balboa Insurance Company because BOA was improperly receiving kick-back commissions from Balboa for those purchases);[3]

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[1] Petitioner's Appendix ("PA") 42, ¶1.

[2] PA 41, ¶44. For example, Stafsholt made two significant payments on his mortgage after the trial in this matter. He paid via cashier's check $90,000 on April 17, 2015, and $57,601.28 on July 28, 2015. The mortgagee returned the $57,601.28 payment to Stafsholt, but kept the $90,000 cashier's check.

[3] *See* footnotes 11 and 12, p. 10, *infra.*

b. "BOA caused the Stafsholts to default on the Mortgage and Note" (BOA was most likely deliberately attempting to place Stafsholts' account into foreclosure);[4]

c. BOA improperly declared the Loan in default[;]"

d. "BOA and its successors, including OCWEN, improperly maintained this foreclosure proceeding from February 2011 to present[;]" and

e. "This entire dispute was caused by BOA's poor record-keeping and business practices."[5] (for example, BOA continuously charged Stafsholt for the unnecessary LPI from 9/8/10 to 7/30/12, even though it represented in writing to both Stafsholt and the Wisconsin Commissioner of Insurance on 4/24/11 that the LPI would be cancelled "with no charge" to Stafsholt;[6] and after 4/24/11 BOA rejected Stafsholt's offers to reinstate the loan by paying the outstanding principal and interest amounts then due when BOA continually demanded for another 15 months that Stafsholt also still pay for the LPI and through trial that Stafsholt pay for other improper charges).[7]

Judge Needham ruled in his June 16, 2015, Order that Nationstar's predecessors' conduct in "handling this particular mortgage and subsequent foreclosure action" was "egregious" and that "the [legal and equitable] relief here should serve to make [Stafsholt] whole."[8] Judge Needham estopped Plaintiff from collecting from Stafsholt a portion of the principal amount of the underlying Mortgage Loan, which amount was calculated by deducting from the $172,108.17

[4] *See* Exs. 78, 114, and footnote 13, pp. 10-11, *infra.*
[5] PA 42-43, ¶¶ 1-4.
[6] PA 42, ¶ 52; Exs. 68-69, 72-73; Ex.111, BOA 241; T1. 240-241; Ex. 6, Plaintiff 36; T1. 237:1-238:9.
[7] PA 42, ¶¶52-53. *See also* Brief of Respondent, pp. 20-21.
[8] PA 46.

principal amount 90% of the estimated attorney's fees and costs that Stafsholt had incurred as of that point in the litigation.

Nationstar appealed what it contended was an award to Stafsholt of his attorney's fees, and on appeal Stafsholt argued that the Trial Court should be affirmed on its deduction of, or offset to, the principal amount that Stafsholt owed that was based on the amount of Stafsholt's attorney's fees. The Court of Appeals reversed the Trial Court, finding that Stafsholt was awarded his attorney's fees without a valid basis for doing so.

Issue: Did the Court of Appeals commit error when it reversed the Trial Court's exercise of discretion in a mortgage foreclosure action in fashioning relief pursuant to the doctrine of equitable estoppel, when the Court of Appeals affirmed the Trial Court's findings that Stafsholt had proven that he was entitled to remedies pursuant to the equitable estoppel defense, and estopping Nationstar from collecting a portion of the principal amount of the Mortgage Loan that was based on Stafsholt's attorney's fees was reasonably calculated to make Stafsholt "whole?"

2. In his Reply Brief of Cross-Appellant, Stafsholt argued for the first time that the Trial Court should be affirmed on the attorney's fees issue based on the independent basis that the Trial Court had the inherent authority to award attorney's fees. But the Court of Appeals refused to consider the argument because it found that doing so would be fundamentally unfair to Nationstar when Stafsholt

did not make the argument until he submitted his Reply Brief, and Nationstar did not have the opportunity to respond to it.

But, as Stafsholt pointed out in his Motion for Reconsideration, since the Court of Appeals could have affirmed based on the Trial Court's inherent authority to award attorney's fees even if Stafsholt had never raised the argument, the Court of Appeals should still have affirmed on this basis.[9] Stafsholt alternatively argued that the Court of Appeals should consider the argument after allowing Nationstar additional briefing on the issue, or include the Inherent Authority issue in its Remand to the Trial Court on the interest issue. The Court of Appeals denied Stafsholt's Motion for Reconsideration.

Issue: Did the Court of Appeals commit error by failing to affirm on the attorney's fees issue based on the Court's inherent authority to award attorney's fees and/or by failing to include the issue in its Order remanding this matter to the Trial Court?

3. On Appeal, Stafsholt requested that the Court of Appeals further reduce the amount Stafsholt owes on his Mortgage loan, in order to account for the additional attorney's fees that Stafsholt has incurred after June 3, 2015, including those incurred on Appeal. The Court of Appeals did not address this issue substantively because it found that Stafsholt was not entitled to any offset based on his attorney's fees.

[9] PA 49-66.

Issue: Did the Court of Appeals commit error when it did not account for the additional attorney's fees and costs that Stafsholt incurred from June 3, 2015, to present, and/or by not including this issue in its Order remanding the interest issue to the Trial Court?

B. WHETHER THE TRIAL COURT SHOULD BE REVERSED ON ITS ORDER ALLOWING THE MORTGAGEE TO COLLECT FROM THE MORTGAGOR INTEREST ON THE PRINCIPAL AMOUNT OF $172,108.17 AT THE RATE OF 5.88% AFTER TAXES FOR 47 MONTHS (ONE ISSUE):

4. On multiple occasions during the dispute and litigation, Stafsholt offered to pay his mortgage and interest payments for months that were not yet paid, and BOA rejected those offers by continually demanding that Stafsholt also pay for improperly-purchased LPI (even after it had promised in writing in April, 2011, that Stafsholt would not be charged for LPI),[10] and other LPI-related and foreclosure-related expenses.

As a result, Stafsholt did not make interest payments to BOA starting in September, 2010. In his April 7, 2015, Order, Judge Needham ruled that Ocwen could not recover from Stafsholt any alleged interest. But in his June 16, 2015, Order, Judge Needham allowed Nationstar to collect from Stafsholt $40,239.92, which is the amount of alleged interest at the rate of 5.88% on the principal amount of $172,108.17 from September, 2010, to August, 2014 (the interest rate on the Note is 5.875%; Ocwen rounded up to 5.88%).

[10] Exs. 68, 72-73.

On Appeal, Stafsholt contended that the Trial Court erred by allowing Nationstar to collect that interest when Stafsholt did not receive that financial benefit and doing so does not return Stafsholt to the financial position that he was in as of September, 2010, or make Stafsholt whole as Judge Needham intended. The Court of Appeals found that the Trial Court could not estop Nationstar from collecting interest from Stafsholt if the basis was the amount of Stafsholt's attorney's fees because Stafsholt could not recover attorney's fees, and remanded to the Trial Court for further proceedings on whether there are other grounds on which it was appropriate to prohibit Nationstar from recovering interest.

Issue: Did the Court of Appeals commit error when it failed to reverse the Trial Court's order allowing Nationstar to recover interest from Stafsholt, when the evidence in the record showed that Stafsholt did not receive the monetary equivalent of 5.88% interest after taxes on the principal amount of $172,108.17 during the 47 months that he was involved in a dispute with BOA and in this litigation?

ORAL ARGUMENT AND PUBLICATION OF OPINION

Oral argument has been scheduled for 9:45 am on October 23, 2017. The Court's opinion in this case should be published, as it may address whether and to what extent under Wisconsin law a mortgagee that has engaged in actionable conduct may be equitably estopped from collecting on a mortgage loan an amount that is based on the amount of attorney's fees and costs incurred by the mortgagor as a result of the mortgagee's actionable conduct.

STATEMENT OF THE CASE

I. INTRODUCTION.

This case presents two related questions for this Court to answer.

The first is whether BOA, a large banking institution that has engaged in practices that have been investigated by Federal Regulators and the State of Wisconsin, and resulted in payments from BOA to mortgagors, and a $228 million class action settlement payment by BOA, should be allowed to essentially get away with it in this case.

The second question is whether Stafsholt, who was proven at trial to have been the victim of BOA's improper practices, should suffer financial harm as a result of having stood up to, and not succumbed to, BOA and its successors.

The Trial Court heard and carefully considered the evidence, and found that the answer to both questions should be no, and that the Court should provide Stafsholt with a remedy that makes him whole by returning him to the same financial position that he was in prior to BOA's actionable conduct. Stafsholt respectfully suggests that this Court's answer to both questions should also be no. But the only way to get to that result – to make Stafsholt "whole" as the Trial Court intended – is to fashion a remedy that accounts for the fact that Stafsholt has already incurred more than $120,000 in attorney's fees and costs as a direct result of BOA's and its successors' actionable and sanctionable conduct.

The unfortunate reality in this case and in many other mortgage foreclosure actions is that mortgagees have the financial power to extract from mortgagors fees and expenses to which they are not entitled, and/or to engage in other actionable practices, because the mortgagor does not have the financial ability to pay attorneys and fight the mortgagee. And even if the mortgagor is financially able to fight, without an ability to at least seek to be made whole, including by recovering attorney's fees from the mortgagee or an offset to the amount owed to the mortgagee that account for those fees, the mortgagor is financially forced to pay the improper charges and/or otherwise give in to the improper practices. The result from this terrible imbalance of power is the type of practices that mortgagees, including BOA, have engaged in this case and many others.

Stafsholt and the Trial Court attempted to level the playing field in this mortgage foreclosure action via the equitable estoppel defense, but the Court of Appeals reversed the Trial Court on the attorney's fees issue.

But the Court of Appeals should be reversed and the Trial Court affirmed on this issue. Wisconsin law provides at least two bases upon which Stafsholt is entitled to an offset in the amount he owes Nationstar that is based on the amount of his attorney's fees and costs:

1. The Trial Court had the discretion in this mortgage foreclosure proceeding to estop Nationstar from collecting principal from Stafsholt in the approximate amount of Stafsholt's attorney's fees and costs; and

2. The Trial Court had the inherent authority to affirmatively award Stafsholt his attorney's fees and costs, irrespective of the equitable estoppel defense and without a motion or other prerequisite.

And in order to make Stafsholt whole as the Trial Court intended, the Trial Court's June 16, 2015, Order allowing Nationstar to collect interest from Stafsholt should be reversed, so that the Judge Needham's April 7, 2015, Order precluding Nationstar from collecting interest is reinstated.

II. PROCEDURAL HISTORY.

In February, 2011, Plaintiff Bank of America brought a mortgage foreclosure action against Petitioner Robert Stafsholt and his ex-wife Colleen Stafsholt. BOA contended that it was entitled to foreclose on the Stafsholts' home because the Stafsholts had failed to pay for LPI that BOA had purchased and charged the Stafsholts for, and had failed to pay their mortgage payments starting in September, 2010.

(BOA was most likely continuously purchasing unnecessary LPI for Stafsholt from 2008-2010 through Balboa Insurance Company because BOA was improperly receiving commissions from Balboa for doing so. In 2014, BOA settled for $228 million a class action lawsuit alleging that BOA received commissions on the LPI, and that the LPI was overpriced. The lawsuit and the $228 million settlement applied to LPI that BOA purchased from Balboa and

others between January 1, 2008, and February 3, 2014.[11] BOA purchased LPI from Balboa for Stafsholt during this time period, from 2008-2010, and Balboa's cost of $2,822 charged to Stafsholt in September, 2010, was $742 – approximately 36% – more than the $2,080 cost for the homeowners' insurance that Stafsholt had already purchased through Pekin Insurance Company).[12]

In response to the complaint for foreclosure, Stafsholt asserted affirmative defenses and counterclaims, including the defense and counterclaim of equitable estoppel and counterclaims for breach of contract and of the implied covenant of good faith and fair dealing. BOA assigned the subject Mortgage to Ocwen, and in 2013, Ocwen Loan Servicing, LLC was substituted as the plaintiff.

After a three-day court trial in 2014 in front of the Honorable Scott Needham, Circuit Court Judge Branch II, Judge Needham issued his Findings of Fact and Conclusions of Law on April 7, 2015 (PA 36-48). In his Order, Judge Needham found that BOA had improperly charged Stafsholts for LPI, and in September, 2010, had misrepresented to Rob Stafsholt that if he defaulted on his mortgage payments, that BOA would give his case the next level of customer service and the improper charge for LPI would be removed. (PA 41, ¶¶ 38-39). In reasonable reliance on this instruction and misrepresentation, Stafsholt quit

[11] *See* https://topclassactions.com/lawsuit-settlements/lawsuit-news/22817-bofa-agrees-228m-force-placed-insurance-class-action-settlement/; https://www.hallsettlementinfo.com/en. These facts were not presented to the Trial Court.

[12] Stafsholt did not receive notice of a claim in that lawsuit, and therefore did not file proof of a claim before the deadline. He has not received any compensation as a result of that lawsuit.

making his mortgage payment in September, 2010, with the expectation that he would receive the next level of customer service, and the improper charges for LPI would be removed. (PA 41, ¶ 44; PA 43, ¶ 2).

But instead of giving Stafsholt the promised next level of customer service, BOA declared Stafsholts in default under the Mortgage and Note, and brought a foreclosure action in February, 2011. In his Order, Judge Needham found that BOA had improperly charged Stafsholt for the LPI, had mislead Stafsholt into not making payments on the Mortgage, had improperly declared the Loan in default, and had improperly commenced the foreclosure action. Judge Needham further found that BOA and Ocwen had improperly maintained the foreclosure action from February, 2011, to present, and that the "entire dispute was caused by BOA's poor record-keeping and business practices." (PA 42, ¶ 1).

(BOA's "errors, misrepresentations, or other deficiencies made during the foreclosure process" were the subject of an action by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of Currency. (Ex. 78). That review by federal banking regulators resulted in the settlement of a class action that was to have resulted in a payment to Stafsholt (Ex. 114), although Stafsholt never received a payment. This provides further support for the Trial Court's conclusion that BOA did instruct Stafsholt to default).[13]

[13] Although the Trial Court did not admit into evidence five affidavits from former BOA employees marked as exhibits 92-96 (T2. 89:20-94:1), Stafsholt requests that this Court take judicial notice of those affidavits since they were filed in other lawsuits and they explain why BOA didn't document receipt of the Declarations Page for the 6/23/10-6/23/11 policy, and why it didn't document Stafsholt's September, 2010, phone call. In particular, in the 5/23/13 Declaration

Judge Needham ruled that Stafsholt had established his counterclaim for breach of the implied covenant of good faith and fair dealing, and his affirmative defense of equitable estoppel, and that Ocwen was estopped from attempting to collect from Stafsholt certain amounts that it attempted to collect pursuant to the Mortgage and Note, such as interest, attorney's fees, and other alleged expenses of the plaintiff. (PA 43, ¶ 6). Judge Needham ruled that Ocwen could recover only the principal balance of the Loan, which was $172,108.17.

Stafsholt timely brought a motion for reconsideration pursuant to Wis. Stat. § 805.17(3), and requested that Judge Needham amend his Order so that Stafsholt was placed in the same financial position that he was in as of September, 2010, before Stafsholts started to be harmed financially by the actionable conduct of BOA. In particular, Stafsholt contended that in order to be restored to the financial position that he was in as of September, 2010, that Ocwen needed to be estopped from collecting part of the principal amount of the Loan.

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of former BOA employee Simone Gordon (Ex. 92), Gordon testified that: 1) he worked for BOA from July, 2007, to February, 2012 (¶ 2), the time period relevant to this case; 2) "I also saw records showing that Bank of America employees had told people that documents had not been received when, in fact, the computer system showed that Bank of America had received the documents…. We were told to lie to customers and claim that BOA had not received documents it had requested… (when in fact it had)." (¶ 5); 3) BOA gave employees bonuses and gift cards "as rewards for placing accounts into foreclosure" (¶ 8); and 4) BOA "employees who did not meet their quotas by not placing a sufficient number of accounts into foreclosure each month were subject to termination. Several of my colleagues were terminated on that basis." (¶¶ 9-10). Gordon's testimony and the other affidavits therefore further support that BOA did not acknowledge receipt of Stafsholt's Declarations Page even though it had received it, and told Stafsholt to default on his mortgage.

Stafsholt argued that, in order to reach the equitable result of putting him in the same financial position that he was in as of September, 2010, the amount that Ocwen was entitled to collect from Stafsholt needed to be reduced by the $71,940.79 in attorney's fees and costs that he incurred as a direct result of BOA's actionable conduct. And since Stafsholt had paid Ocwen $90,000 on April 17, 2015, Stafsholt requested that the Court determine and declare that upon his payment of $10,167.38, Ocwen be ordered to assign the Mortgage to Stafsholt pursuant to Wis. Stat. § 846.02, and terminate the Note.

In response to Stafsholt's motion, Judge Needham issued an Order on June 16, 2015, granting in part Stafsholt's request for amended relief. Judge Needham ruled that:

> the Court agrees with Stafsholt that the relief here should serve to make him whole. The egregious nature of Ocwen's conduct in handling this particular mortgage and subsequent foreclosure action necessitates not only a legal but an equitable remedy as well.

(PA 46). Judge Needham then reduced the amount that Ocwen was entitled to collect from Stafsholts by $64,746.71, which was 90% of Stafsholt's attorney's fees and costs as of April 27, 2015 (PA 46-47).

But Judge Needham also gave Ocwen a credit in the amount of, and therefore allowed Ocwen to collect from Stafsholt, the $40,239.82 of interest that Ocwen alleged was owed but unpaid during the time period September, 2010 to the first day of trial. Ocwen alleged that Stafsholt had received the financial

benefit of 5.88% interest (after taxes) on the full $172,108.17 principal for 47 months. (PA 47).

In his April 7, 2015, Order, Judge Needham had ruled that Ocwen was estopped from collecting this interest. (PA 43, ¶ 6). Judge Needham had initially agreed with Stafsholt that Ocwen should be estopped from collecting any interest, but in his June 16, 2015, Order, Judge Needham provided that Ocwen could recover from Stafsholt $40,239.82 in interest. After giving Ocwen this credit, the amount of principal that Judge Needham ruled that Ocwen could not collect from Stafsholt was reduced by only $24,506.89 ($64,746.71 (90% of $71,940.79) in attorney's fees less $40,239.82 in interest).

Judge Needham also reduced the amount that Ocwen could collect by the $90,000 payment that Stafsholt had made to Ocwen on April 17, 2015. Judge Needham ruled that upon Stafsholt's payment of $57,601.28 by August 1, 2015, Ocwen shall assign the mortgage to Stafsholt and terminate the underlying note. (Appellant Nationstar Mortgage, LLC has since been substituted as plaintiff for Ocwen).

On July 28, 2015, Stafsholt paid Plaintiff Nationstar $57,601.28, and requested that Nationstar satisfy the Mortgage and terminate the Note pursuant to Judge Needham's June 16, 2015, Order. But Nationstar brought this Appeal on July 30, 2015 (ROA 187-5), and the judgment of the trial court has been stayed pending the outcome of this Appeal (ROA 232). Nationstar returned to Stafsholt his payment of $57,601.28.

On July 31, 2015, Stafsholt brought a Cross-Appeal. In his Cross-Appeal, and in this Appeal to the Wisconsin Supreme Court, Stafsholt seeks:

1. Reversal of that portion of the Trial Court's June 16, 2015, Order that allows Plaintiff to recover $40,239.92 in interest so that, as Judge Needham ruled in his April 7, 2015, Order, Nationstar is estopped from recovering interest from Stafsholt;

2. Affirmance of that portion of the Trial Court's June 16, 2015, Order that estops Plaintiff from recovering from Stafsholt part of the principal amount of the Loan that is based on Stafsholt's attorney's fees and costs, with an amendment of the Order to account for the additional amount of attorney's fees that Stafsholt has incurred since June 3, 2015; and

3. An Order providing that Nationstar shall, within 30 days of the Order,

    a. pay Stafsholt an amount that is calculated by taking the principal amount of $82,108.17 (172,108.17 principal less Stafsholt's $90,000 payment), and subtracting the total amount of Stafsholt's attorney's fees and costs; and

    b. Assign the Mortgage to Stafsholt pursuant to Wis. Stat. § 846.02, and terminate the underlying Note.

In response to the parties' Cross-Appeals, the Court of Appeals ruled that:

> the circuit court properly determined that BOA breached the implied duty of good faith and fair dealing, that Stafsholt prevailed on his equitable estoppel affirmative defense, and that Stafsholt was entitled to declaratory judgment on his breach of contract claim. We also conclude the court properly determined that Nationstar was prohibited from collecting certain fees that were charged to Stafsholt as a result of his default. We therefore affirm with respect to those issues. However, we conclude the court erred by awarding Stafsholt attorney fees and costs, and we reverse on that basis. For the reasons explained below, we also reverse those portions of the court's orders regarding Nationstar's ability to recover interest, and we remand for further proceedings on that issue.

(PA 3, ¶3).

ARGUMENT

I. THE TRIAL COURT SHOULD BE AFFIRMED ON ITS ORDER EQUITABLY ESTOPPING NATIONSTAR FROM COLLECTING A PORTION OF THE PRINCIPAL AMOUNT OF STAFSHOLT'S MORTGAGE LOAN THAT IS BASED ON STAFSHOLT'S ATTORNEY'S FEES AND COSTS.

A. Wisconsin Law Provides the Trial Court with the Discretion to Equitably Estop Nationstar from Collecting from Stafsholt a Portion of the Principal Balance of the Mortgage Loan that is Based on the Amount of Stafsholt's Attorney's Fees.

The doctrine of equitable estoppel provides the basis for restricting BOA and its successors from asserting "what would otherwise be an unequivocal right," such as enforcing provisions in the Mortgage and Note. *Utschig v. McClone*, 164 Wis. 2d 506, 509, 114 N.W.2d 854, 855 (1962); *see also Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 291 Wis. 2d 259, 275, 715 N.W.2d 620, 628 (Wis. 2006).

Moreover, like trust, injunction and divorce proceedings, "[f]oreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." *GMAC Mortg. Corp. v. Gisvold*, 572 N.W.2d 466, 480 (Wis. 1998). "[A] defining characteristic of an equitable remedy is that it is flexible and adaptable to the circumstances presented in a particular case." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 783 N.W.2d 294, 309 (Wis. 2010). In cases where equity jurisdiction is invoked, a court has "broad authorization to make the injured parties whole." *State v. Excel*

Management Servs., 331 N.W.2d 312, 317 (Wis. 1983) (applying Supreme Court's holding in *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946)).

The only way to make Stafsholt "whole" as the Trial Court intended is to place him in the same financial position that he was in as of September 12, 2010, which was that all of his Mortgage-related costs totaled $172,108.19, the principal amount of the underlying loan. And the only way to return Stafsholt to that financial position now is to reduce the amount of principal that he must pay to satisfy the Mortgage by the amount of his out-of-pocket expenses that he incurred during this foreclosure action, which are his attorney's fees and costs. The case law cited above gives the Trial Court the "broad authorization" to make this calculation to accomplish this equitable result.

B. The Court of Appeals' Reversal of the Trial Court Was in Error.

The Court of Appeals reversed the Trial Court and determined that neither the Court's equitable powers in foreclosure proceedings nor the doctrine of equitable estoppel provide the basis upon which Stafsholt could receive an offset in the amount of his attorney's fees and costs. In particular, the Court found that "[e]quitable estoppel operates as a shield, not a sword[,]" and that the Trial Court needs a basis other than the defense of equitable estoppel to reduce the amount that Stafsholt must pay based in part on the amount of his attorney's fees (PA 26-27, ¶¶ 61-62).

But the Trial Court did utilize the equitable estoppel defense as "a shield, not a sword." The effect of the Trial Court's order is to reduce the amount that Stafsholt is required to pay Nationstar to satisfy the Mortgage obligation, not to allow Stafsholt to affirmatively recover damages from Nationstar. Although on Appeal Stafsholt is requesting that Nationstar be ordered to pay him back, the only reason that Stafsholt seeks this relief, rather than just a reduction of what he must pay, is that he already paid Nationstar $90,000 on April 17, 2015, after the trial on the merits and the Trial Court's first Order dated April 7, 2015.

Accordingly, the practical impact of the Trial Court's application of the doctrine of equitable estoppel is as a "shield" to the amount of BOA's successors' recovery from Stafsholt, and not as a "sword" or vehicle for allowing Stafsholt to affirmatively recover damages from BOA or its successors. So Nationstar's attempt to characterize the Trial Court's order as utilizing equitable estoppel as a "sword" is misguided and should be rejected.

Moreover, the Trial Court has three independent bases for granting this relief: 1) its broad authorization granted to it in an equitable foreclosure proceeding; 2) the doctrine of equitable estoppel; and 3) the court's inherent authority to award attorney's fees (addressed below). In particular, the first two bases provide a sufficient basis upon which the Trial Court can grant this relief.

Although these two bases are not listed as exceptions to the American Rule in the *Estate of Kriefall*[14] case cited by the Court of Appeals, neither is the third, even though other Wisconsin law establishes the Court's inherent authority to award attorney's fees, as the Court of Appeals acknowledged. (PA 30, ¶ 66). So the fact that the *Kriefall* court did not mention these two additional bases upon which the Trial Court had the discretion to provide Stafsholt with the monetary equivalent of an award of his attorney's fees is not fatal to Stafsholt's argument.

And although Stafsholt does not cite a case where this relief was previously afforded to a mortgagor in a mortgage foreclosure proceeding where the mortgagor had proven his or her equitable estoppel claim, nor did the Court of Appeals cite to or rely on any case law in which that relief was requested by, and denied to, a mortgagor in a mortgage foreclosure action. The two cases dealing with equitable estoppel that the Court of Appeals cited are inapposite, since neither involved a mortgagor establishing the elements of equitable estoppel in a mortgage foreclosure proceeding.

And other particulars of both cases detract from their relevance to the attorney's fees issue in this case. In *Murray v. City of Milwaukee*[15], an attorney sought to require that the City pay for his attorney's fees and costs that his police officer clients incurred when he represented them in connection with citizen

[14]342 Wis. 2d 29, 816 N.W.2d 853 (Wis. 2012).
[15]2002 WI App 62, ¶ 15, 252 Wis. 2d 613, 642 N.W.2d 541

complaints filed against the police officers. Murray had no contract with the City, and the City did not seek to recover any damages or other amounts from Murray.

But Murray was still seeking a court order requiring the City to pay him for his legal services that he provided to the police officers. One of Murray's causes of action was for equitable estoppel. He argued that the "City's historic practices" included paying for attorney's fees like those that his clients incurred in his representation of them. The Court ruled that Murray could not require that the City pay his attorney's fees based on equitable estoppel because that doctrine "does not establish that right."

Murray is inapposite because Stafsholt is not seeking to require a third party, with whom he has no privity, to pay the attorney's fees that he incurred in another litigation. And here, unlike in *Murray*, the opposing party (BOA's successor) is seeking to require the party asserting the equitable estoppel defense (Stafsholt) to pay it money. And unlike Murray, Stafsholt is in privity with BOA and its successors by operation of the Mortgage, and he seeks only to reduce the amount that he must pay BOA's successors in order to satisfy that Mortgage. His defense of equitable estoppel is therefore being applied as a shield, and in a much different manner than Murray sought to apply it. *Murray* therefore fails to provide support for reversal of the Trial Court.

Similarly, in *Utschig v. McClone*, the Court ruled that a subcontractor seeking payment for work performed from the owner of the subject property and not the general contractor that the sub had a contract with was not entitled to

collect from the property owner based on equitable estoppel. The Court ruled that the subcontractor instead had rights and remedies to collect from the property owner pursuant to the "subcontractors' lien statutes…"

But in *Utschig* the subcontractor had not even proven the elements of equitable estoppel against the property owner, and he did not have any contract or privity with the owner, the party from whom he sought relief. Nor was the property owner attempting to collect from the subcontractor. Here, Stafsholt is being sued for money damages, and is seeking an offset against amounts allegedly owed to a party with whom he has a contract. *Utschig* is therefore also inapposite to this case.

Accordingly, there is case law supporting the Trial Court's decision on the attorney's fees issue, and no controlling or clear authority that supports the reversal of the Trial Court.

II. THE TRIAL COURT SHOULD BE AFFIRMED ON THE ATTORNEY'S FEES ISSUE BASED ON ITS INHERENT AUTHORITY TO AWARD ATTORNEY'S FEES.

A. The Trial Court had the Inherent Authority to Award Stafsholt His Attorney's Fees in this Case.

Even if the Trial Court was affirmatively awarding Stafsholt his attorney's fees and costs as a "sword," it had the inherent power to do so, independent of the equitable estoppel defense and irrespective of the American Rule. As the Court of Appeals noted in *Schultz v. Sykes,* 638 N.W.2d 604 (Wis. Ct. App. 2001), the Trial Court has the

> inherent authority to assess attorney fees as a sanction. [citation omitted]. The Supreme Court has also held that the American Rule does not bar courts from exercising their inherent power to assess attorney fees.

Id. at 621. And in *Schaefer v. Northern Assur. Co. of America,* 513 N.W.2d 615 (Wis. Ct. App. 1994), the Court determined that the trial court had the discretion to award attorney's fees and costs as a sanction, and that:

> We review the trial court's decision to assess attorney fees for an erroneous exercise of discretion.

Id. at 621. And this inherent authority is not subject to limitations under Wis. Stat. §§ 802.05 or 814.025. *Id; see also Belich v. Szymasek,* 592 N.W.2d 254, 259 (Wis. Ct. App. 1999).

The Trial Court had ample reason to award attorney's fees to Stafsholt as a sanction for BOA's and its successors' conduct before and during the litigation. The Trial Court's findings, including its Conclusions of Law 1-4, justified an award of attorney's fees to Stafsholt. (*see* PA 42-43).

Moreover, in Plaintiff's Answer to Defendant's Counterclaims dated December 3, 2013, Plaintiff denied without factual basis ¶ 38 of Stafsholt's Counterclaim in which Stafsholt alleged:

> But after the April 24, 2011, letter [Ex. 68] was received, Bank of America and/or Plaintiff refused to reinstate the mortgage before attempting to charge Stafsholt with thousands of dollars in fees and other charges that were allegedly owed due to the foregoing events.

Plaintiff responded to this allegation as follows:

> Plaintiff is without sufficient information to form a belief as to the allegations in paragraph 38 and therefore denies the same.

(ROA 92-10). This denial was not "warranted on the evidence" and it was not "reasonably based on a lack of information or belief," as required by Wis. Stat. § 802.05(2)(d).

Plaintiff had in its possession numerous documents that proved that Stafsholt's allegations in paragraph 38 were true. For example, Plaintiff had the 4/27/11 Reinstatement Calculation in which BOA was attempting to charge Stafsholt $3,644.16 for LPI, along with "uncollected late charges" of $184.56 and "Foreclosure expenses" of $225. (Ex. 69; ROA 158-21-22, ¶¶ 124-130). Plaintiff and its attorneys also had letters from Stafsholt's attorney in which Stafsholt unsuccessfully attempted to pay the then-outstanding mortgage payments and reinstate the loan. (Exs. 70, 79). And BOA knew that at the mediation in May, 2012, it rejected Stafsholt's offers to pay the then-outstanding mortgage payments, and demanded that Stafsholt pay for the LPI and other costs, including litigation costs. (T2. 77:1-78:5).

Plaintiff also had in its possession the 7/17/12 Reinstatement Quote that included $12,147.20 for LPI, "Bankruptcy attorney fees" even though Stafsholt was never in bankruptcy, $3,822 in "Foreclosure Fees," and an additional $1,172.50 in "Litigation Fees." (Ex. 82; ROA 158-24-25, ¶¶ 145-146). And Plaintiff had the documents that showed that even after it finally removed the charge for LPI on July 30, 2012, Plaintiff was still demanding from August, 2012,

through trial that Stafsholt pay between $5,418 and $10,047 in other charges that were related to the dispute, as Stafsholt alleged in paragraph 38 of his Counterclaim. (*See* Ex. 6, Plaintiff 36; Exs. 83-85, 112, 211; ROA 158-25-26, paragraphs 147-157; ROA 158-29-30, ¶¶ 173-175).

Accordingly, Plaintiff had numerous documents in its possession that demonstrated that Stafsholt's allegation in ¶ 38 of his Counterclaim was true. Plaintiff's response to that allegation, that it was "without sufficient information" and "therefore denies" the allegation, was not warranted on the evidence and was not "reasonably based on a lack of information or belief." It therefore violated Wis. Stat. § 802.05(2)(d).

And Nationstar continued to deny ¶ 38 without basis in this Appeal by contending that the charge of $607.36 per month for 20 months was only an "unknown" charge and not necessarily for LPI (Appellant's Reply Brief, pp. 5-6). But the Trial Court made that specific finding of fact. (PA 42, ¶ 52). Not only was this finding of fact supported by the evidence (*see, e.g.*, Ex. 6, Plaintiff 36; T1. 237:1-238:9), there is no competing evidence challenging this conclusion. Nationstar never even offered what it now contends that $607.36 charge was for, if it wasn't for LPI.

These baseless denials and continued charging of the LPI for 15 months after the "with no charge" letter (Ex. 68) constitutes sanctionable conduct. The Trial Court therefore had the factual and legal basis to award Stafsholt his

attorney's fees and costs. *See Schultz,* 638 N.W.2d at 621; *Schaefer,* 513 N.W.2d at 621.

B. The Trial Court Should Have Been Affirmed on this Basis.

In his Reply Brief of Cross-Appellant, Stafsholt argued for the first time that the Trial Court should be affirmed on the attorney's fees issue based on the independent basis that the Trial Court had the inherent authority to award attorney's fees. But the Court of Appeals refused to consider the argument because it found that doing so would be fundamentally unfair to Nationstar when Stafsholt did not make the argument until he submitted his Reply Brief, and Nationstar did not have the opportunity to respond to it. In its Opinion, the Court of Appeals indicated that Stafsholt:

> waited to raise the [Inherent Authority] argument until his reply brief in the cross-appeal, thus depriving Nationstar of the opportunity to respond to it.

(PA 31, ¶ 67).

But Stafsholt's attorney did not know of the argument and purposefully wait to assert it only in the Reply Brief to attempt to gain a tactical advantage. He failed to make the argument at the Trial Court level and until the Reply Brief on appeal because he inexplicably didn't find it until then. So the timing of the assertion of the argument was a mistake or series of mistakes by Stafsholt's attorney, not a tactic. (Stafsholt's attorney also requested oral argument, which would have presented Nationstar with the opportunity to address the argument.

This further demonstrates that the timing of the assertion of the argument was not intentionally delayed).

Although the *A.O. Smith* cased cited by the Court of Appeals seems to support the Court of Appeals' decision to not consider the Inherent Authority argument, there are four reasons why this Court should still consider affirming the Trial Court on this basis.

First, *A.O. Smith* is inapposite because it presented an abandonment of an argument by a Respondent on appeal, which isn't what happened in this case. The argument that Respondent Smith's attorney raised for the first time on appeal at oral argument was previously asserted by Respondents at the trial court level, and then abandoned by Respondents on appeal, until oral argument. *A.O. Smith Corporation v. Allstate Ins. Companies,* 588 N.W.2d 285, 292–293 (Wis. Ct. App. 1998). Since Stafsholt did not raise this argument at the Trial Court level and then abandon it until his Reply Brief, *A.O. Smith* is inapposite.

Second, despite having determined that the argument had been abandoned, the *A.O. Smith* Court still addressed the merits of it. *Id.* at 293. Third, considering the argument is not fundamentally unfair to Nationstar, and is therefore consistent with the holding in *A.O. Smith*. As the *A.O. Smith* court noted, the waiver rule is not a hard-and-fast rule, but rather a "rule of administration," for which there may be exceptions. The question is whether considering the argument would violate principles of "fundamental fairness." *Id.* at 292.

Here, considering the Inherent Authority argument that Stafsholt raised would not violate principles of fundamental fairness. The parties did argue to the Trial Court whether the evidence demonstrated that Appellant and its predecessors violated the standards in Wis. Stat. § 802.05(2). And the Trial Court specifically found that Plaintiff's and its predecessors' conduct was "improper" and "egregious." The Trial Court therefore already made findings of fact after briefing and argument by the parties that are sufficient for this Court to affirm based on the Inherent Authority argument.

Moreover, the Court of Appeals could have raised it *sua sponte,* and cited it as a basis for affirming the Trial Court on the attorney's fees issue, even if Stafsholt had never raised it. The Court of Appeals has held that it can "sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether [this Court does] so *sua sponte* or at the urging of a respondent." *State v. Truax*, 444 N.W.2d 174, 178 (Wis. Ct. App. 1992). *See also State v. Holt*, 382 N.W.2d 679, 687 (Wis. Ct. App. 1985).

Since the Court of Appeals could have affirmed the Trial Court on the attorney's fees issue based on the Trial Court's inherent authority to award attorney's fees without Stafsholt having ever raised it, it is not fundamentally unfair for the Court to affirm on this basis because Stafsholt's attorney failed to find and present the Inherent Authority argument earlier than the Reply Brief. In light of *Traux* and *Holt,* and the distinguishing particulars of *A.O. Smith* noted above, Stafsholt respectfully suggests that ruling on this argument would not

violate principles of fundamental fairness or be inconsistent with the holding in *A.O. Smith*. (and as discussed below, any unfairness could have been remedied by allowing supplemental briefing on the issue).

Fourth, there is more persuasive authority than *A.O. Smith* that supports considering the argument on the merits. In *State v. Kucik*, No. 2009AP933-CR, 2010 WL 4633082, at *5 (Wis. Ct. App., Nov. 16, 2010),[16] the Respondent (the State) raised an alternate basis upon which the Trial Court could be affirmed, which basis was not previously argued at the Trial Court level or on appeal (the State raised the argument for the first time at oral argument). The Court of Appeals ordered supplemental briefing on the new argument, including briefing on whether the Court should even consider it, and then ruled that "it is appropriate for us to consider the alternate basis to affirm the trial court that the State raised for the first time at oral argument." *Id.* at *6. The *Kucik* court then affirmed the Trial Court based on the new argument.

To the extent that the Court of Appeals remained concerned that considering the Inherent Authority argument would be unfair to Nationstar, that concern could have been addressed by ordering supplemental briefing, as the Court did in *Kucik*. Accordingly, Stafsholt respectfully suggests that the Court of Appeals should have considered and ruled on the Inherent Authority argument on the merits, with or without supplemental briefing.

[16] PA 55-65.

C. Alternatively, the Scope of the Remand Should Be Expanded to Include the Inherent Authority Basis for Awarding Stafsholt His Attorney's Fees.

If the Court of Appeals was still concerned that ruling on the merits of this argument at the appellate level would be unfair to Appellant, Stafsholt alternatively suggests that any unfairness could have been, and can be, removed by expanding the scope of the Remand to also include this issue. Absent reversal by this Court on the interest issue, the parties will already be back in front of Judge Needham, arguing their positions regarding why Nationstar should or should not be allowed to collect interest from Stafsholt. The parties could also address the Inherent Authority argument at the same time. This would remove any prejudice to Nationstar, and also promote judicial economy.

III. THE TRIAL COURT SHOULD AMEND ITS ORDER ON REMAND TO ACCOUNT FOR THE ADDITIONAL ATTORNEY'S FEES AND COSTS THAT STAFSHOLT HAS INCURRED SINCE JUNE 3, 2015.

When Judge Needham issued his June 16, 2015, order, he calculated an offset based on the amount of attorney's fees and costs that Stafsholt had incurred as of June 3, 2015. Stafsholt has incurred a significant amount of attorney's fees and costs since June 3, 2015. Those fees should be included in a revised calculation by the trial court on Remand.

IV. THE TRIAL COURT SHOULD BE REVERSED ON ITS SECOND ORDER REQUIRING STAFSHOLT TO PAY NATIONSTAR OVER $40,000 IN INTEREST BECAUSE MAKING STASFHOLT PAY INTEREST DOES NOT MAKE HIM WHOLE AS THE TRIAL COURT INTENDED.

In his April 7, 2015, Order, Judge Needham ruled that Appellant was estopped from collecting from Stafsholt interest and other charges. (PA 43, ¶ 6). But in his June 16, 2015, Order, Judge Needham allowed Plaintiff to collect from Stafsholt $40,239.92, which Ocwen contended was the amount of unpaid interest from September, 2010, to August, 2014. (This amount is overstated, however. The total amount of interest payments during that time period is only $37,546.10 (Ex. 103), and the interest rate that Ocwen used for its calculation, 5.88%, is slightly higher than the actual rate of 5.875%).

Judge Needham explained his reasoning for allowing the mortgagee to collect interest from Stafsholt as follows:

> Also deducted from the offset requested by Stafsholt is the $40,239.82 in interest that was already disallowed in the earlier [April 7, 2015] order. Stafsholt has already received the equitable offset for that amount and is not entitled to be placed in a better situation than he would have been in but for the actions of Ocwen. The net result is $24,506.89.

(PA 47).

But the Trial Court simply made a mistake in allowing Nationstar to collect interest from Stafsholt, because doing so made Stafsholt worse off financially then he was as of September 12, 2010. As of September 12, 2010, Stafsholt only owed

a total of $172,108.17 for the Mortgage, and had no other expenses related to the Mortgage.

The only way that Stafsholt could be placed "in a better situation than he would have been in but for the actions of Ocwen" in 2015 — the result that Judge Needham sought to avoid — is if after the Court's June 16, 2015, Order, Stafsholt incurred total expenses of less than $172,108.17 for the Mortgage. But as a result of the Trial Court's June 16, 2015, Order, Stafsholt's total expenses for the Mortgage were significantly more than $172,108.17. Specifically, the expenses that Stafsholt had for the Mortgage as of June 16, 2015, totaled $219,542.07, which included:

1. $147,601.28 of principal pursuant to the June 16, 2015, Order ($172,108.17 principal less the $24,506.89 deduct allowed in the Order); plus

2. $71,940.79 in attorney's fees and costs.

Accordingly, Stafsholt was in a significantly worse financial position after the June 16, 2015, Order, then he was in as of September 12, 2010. His total expenses related to the Mortgage were $47,433.90 higher as of June 16, 2015, than they were as of September 12, 2010:

1. Mortgage expenses as of September 12, 2010: $172,108.17;

2. Mortgage expenses as of June 16, 2015: $219,542.07.

This $47,433.90 increase in out-of-pocket expense prevented Stafsholt from being made whole, and was therefore inconsistent with the Trial Court's stated objective.

Nationstar has argued that Stafsholt received a financial benefit by not having to pay interest on the Mortgage from September 12, 2010, to April 17, 2015, when Stafsholt paid Nationstar $90,000. The Court of Appeals agreed, and remanded on the interest issue based in part on its finding that Stafsholt "benefitted from retaining the sums not paid in mortgage payments and also not having to pay interest for over four years." But allowing Nationstar to collect interest from Stafsholt is inequitable and incorrect, for at least two reasons.

First, it was BOA and its successors that prevented Stafsholt from paying the monthly mortgage payments, which included interest, from September, 2010, to present. Without limitation, BOA advised Stafsholt to not make the mortgage payments that included interest in the first place, and then ignored and rejected multiple efforts and offers by Stafsholt to pay the principal and interest payments then due and reinstate the loan.

Stafsholt offered to make all of his monthly mortgage payments on multiple occasions, including in January, 2011 (T2. 44:10-19; 45:11-15), May, 2011 (Ex. 70), and April and May, 2012 (Ex. 79; T2. 75:9-22, 77:1-25, 78:1-5). On each occasion, Stafsholt's offers were either ignored or rejected. And for at least 20 months, from December, 2010, to July, 2012, BOA repeatedly demanded that Stafsholt still pay $607.36 per month for LPI even though it represented in writing in April, 2011, that Stafsholt would have "no charge" for the LPI.

So Nationstar should be estopped from even contending that it should be allowed to recover interest from Stafsholt now, and should not be heard to argue

that Stafsholt received a financial benefit by not having paid BOA interest from September, 2010, to April, 2015.

Second, and perhaps more importantly, Stafsholt received no financial benefit from not having paid BOA interest during the dispute and litigation, and certainly not a benefit in the amount of $40,239.82. This is demonstrated by considering under what circumstances Stafsholt might have received a financial benefit from having not paid interest. For example, if Stafsholt had the principal amount of the loan of $172,108.17 sitting in a bank, or invested in stocks and bonds, that paid 5.88% interest after taxes, then Stafsholt would have received a $40,239.82 financial benefit from being able to invest all of that principal instead of paying BOA interest during the pendency of the dispute.

But Stafsholt didn't have that full principal amount of the loan in the bank or invested in an account that paid him 5.88% after taxes, so there was not a $40,239.82 financial benefit to him. In fact, there was no financial benefit to him at all because Stafsholt was unable to keep any assets in any account that would generate a return.

That is because during the same time period that BOA was preventing Stafsholt from paying interest, Stafsholt was instead paying his attorneys $66,500. (ROA 174-2, 4-35). These payments to his attorneys depleted any savings that Stafsholt had, and Stafsholt therefore never retained any of the cash that he had offered to pay as interest to BOA. Stafsholt therefore did not accumulate any

principal upon which he could generate a return, and he did not receive any financial benefit as a result of not making interest payments to BOA.

Accordingly, Stafsholt received no financial benefit from not having paid BOA interest during the time period that BOA was preventing him from doing so, and in order to make Stafsholt whole as the Trial Court intended, the Trial Court's June 16, 2015, Order must be amended so that Appellant is estopped from collecting interest from Stafsholt. This is necessary in order for Stafsholt to be placed in the financial position that he was in as of September 12, 2010, in which his total expenses relating to the Mortgage are $172,108.17.

CONCLUSION

Stafsholt therefore respectfully requests that this Court issue an Order:

1. Reversing the Court of Appeals on the attorney's fees issue, and ordering the Trial Court on Remand to:

    a. amend that portion of the Trial Court's June 16, 2015, Order so that the amount that Nationstar is entitled to recover from Stafsholt is further reduced to account for the total amount of attorney's fees and costs that Stafsholt has incurred from June 3, 2015, to the date of the Trial Court's Order on Remand; and

    b. order Nationstar to, within 30 days of the Trial Court's Order on Remand:

        i. pay Stafsholt the amount that Nationstar owes him, which is the principal amount of $82,108.17 ($172,108.17 principal less Stafsholt's $90,000 payment), less the total amount of Stafsholt's attorney's fees and costs; and

        ii. Assign the Mortgage to Stafsholt pursuant to Wis. Stat. § 846.02, and terminate the underlying Note.

2. Reversing that portion of the Trial Court's June 16, 2015, Order that allows Plaintiff to recover $40,239.92 in interest so that, as Judge Needham ruled in his April 7, 2015, Order, Nationstar is estopped from recovering interest from Stafsholt.

Dated: July 10, 2017

Respectfully Submitted,

SIEGEL BRILL, P.A.

By: _____
Nathan M. Brandenburg (WI #1083919)

By: _____
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FORM AND LENGTH CERTIFICATION FOR WIS. STAT. § 809.19(8)(d)

I hereby certify that this Brief conforms to the rules contained in § 809.19 (8)(b) and (c) for a Brief produced with proportional monospaced or serif font. The length of this Brief is 9,568 words. This certification is made in reliance on the word count feature of Microsoft Word.

Dated: July 10, 2017

Nathan M. Brandenburg

Steven J. Weintraut

ELECTRONIC FILING CERTIFICATION FOR WIS. STAT. § 809.19(12)(f)

I hereby certify that my office is submitting an electronic copy of this Brief, excluding the Appendix, which complies with the requirements of § 809.19(12), Stats.

I further certify that this electronic Brief is identical in content and format to the printed form of the Brief.

A copy of this certificate is being served with the paper copies of this Brief filed with the Court and served on all opposing parties.

Dated: July 10, 2017

Nathan M. Brandenburg

Steven J. Weintraut

STATE OF WISCONSIN, SUPREME COURT

NATIONSTAR MORTGAGE LLC n/k/a BANK OF AMERICA, NA as Successor by Merger to BAC HOME LOANS,	)	
Plaintiff-Appellant-Cross Respondent,	)	
v.	)	Case No. 15 AP 1586
ROBERT R. STAFSHOLT,	)	
Defendant-Respondent-Cross Appellant,	)	
COLLEEN STAFSHOLT, f/k/a COLLEEN MCNAMARA, unknown SPOUSE OF ROBERT R. STAFSHOLT unknown spouse of COLLEEN STAFSHOLT f/k/a COLLEEN MCNAMARA, RICHMOND PRAIRIE CONDOMINIUM PHASE I ASSOCIATION and THE FIRST BANK OF BALDWIN,	)	
Defendants.	)	

ON APPEAL FROM THE CIRCUIT COURT FOR ST. CROIX COUNTY, CASE NO. 11-CV-224

THE HONORABLE SCOTT R. NEEDHAM, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT-CROSS RESPONDENT

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NEED FOR ORAL ARGUMENT AND PUBLISHING

Oral argument is scheduled for October 23, 2017. Nationstar does not believe publication of the decision is necessary, as the issues are governed by settled case law.

STATEMENT OF THE CASE

Defendant-Respondent-Cross-Appellant-Petitioner Robert R. Stafsholt's ("Stafsholt") statement of the case is replete with improper argument, facts either not presented or denied admission in the trial court, and unsupported assertions without corresponding citations to the record. For clarity, Nationstar provides its own statement of the case here.

This matter arises out of the default on a mortgage loan in the original principal amount due of $208,000 extended by RBMG, Inc. to Colleen Stafsholt on or about October 8, 2002 (the "Subject Loan"). Record on Appeal ("ROA") 1-7 – 1-9. Stafsholt did not sign the note ("Note") evidencing the Subject Loan. *Id.* The Subject Loan is secured by a mortgage (the "Subject Mortgage") on the real estate commonly known as 1402 160th Street in New Richmond, Wisconsin. ROA 1-10 – 1-26. Stafsholt and Colleen Stafsholt each signed the Subject Mortgage. ROA 1-25.

Following a breach of the Subject Loan, the prior plaintiff filed a foreclosure complaint on February 12, 2011. ROA 1.

After being granted leave by the trial court, Stafsholt filed his verified amended answers and counterclaims on December 2, 2013. ROA 85, 94.

Stafsholt's sole affirmative defense was for equitable estoppel. ROA 94-7 – 94-8. Stafsholt also asserted counterclaims for: (1) breach of contract (ROA 94-8 -94-9); (2) breach of the implied covenant of good faith and fair dealing (94-9 – 94-10); (3) equitable estoppel (94-10 – 94-11); (4) declaratory judgment (94-11 – 94-12); and (5) assignment of mortgage (94-12 – 94-13).

Colleen Stafsholt has never appeared or participated in this litigation.

A three-day trial was held in this matter on July 24, 2014, August 4, 2014, and August 13, 2014. *See* Trial Transcript – Day 1 ("TT1"), Trial Transcript – Day 2 ("TT2"), Trial Transcript – Day 3 ("TT3").

On April 7, 2015, the trial court entered its Findings of Fact and Conclusions of Law, wherein it made 53 findings of fact and 8 conclusions of law, most of which related to conduct of prior servicers Bank of America, N.A. ("BOA") and Ocwen Loan Servicing, LLC ("Ocwen"). ROA 169; Petitioner's Appendix ("PA") 36-43.

The 8 conclusions of law are as follows:

1. "BOA improperly charged the Stafsholts for the lender-placed insurance. This entire dispute was caused by BOA's poor record-keeping and business practices. BOA caused this dispute by unnecessarily purchasing insurance for Stafsholt when he had always maintained and provided proof of a Confirming Policy. BOA improperly demanded that Stafsholt pay for the cost of the unnecessary lender-placed insurance and costs. BOA reached [*sic*]

the implied covenant of good faith and fair dealing." PA 42, ¶ 1.

2. "BOA caused the Stafsholts to default on the Mortgage and Note in September 2011. Stafsholt acted in good faith and reliance on the misrepresentations of the BOA agent. Stafsholt established the affirmative defense of equitable estoppel." PA 43, ¶ 2.

3. "BOA improperly commenced this foreclosure proceeding in February 2011 after it improperly declared the Loan in default." *Id.*, ¶ 3.

4. "BOA and its successors, including OCWEN, improperly maintained this foreclosure proceeding from February 2011 to the present." *Id.*, ¶ 4.

5. "Because BOA improperly declared the loan in default following the failure to pay the principal and interest due for September 1, 2010 and October 1, 2010, and improperly commenced the mortgage foreclosure action in February 2011, Stafsholt is entitled to a declaratory judgment that Plaintiff breached the Note or Mortgage and cannot recover the costs and expenses incurred as a consequence." *Id.*, ¶ 5.

6. "This foreclosure action is dismissed and the mortgage is reinstated effective immediately. Ocwen is entitled to be paid the $172,108.17 principal amount of the loan. No other fees or costs, including late fees, mortgage fees, bankruptcy fees or interest is

recoverable. Again, Plaintiff caused the harm and cannot benefit from its action/inaction. Interest shall again accrue at the contractual rate starting April 15, 2015. No other fees or costs, including late fees, mortgage fees, bankruptcy fees or interest, are recoverable." *Id.*, ¶ 6.

7. "Robert cannot recover any damages for his alleged inability to refinance in April 2011. Insufficient evidence was introduced and no damages are awarded." *Id.*, ¶ 7.

8. "Robert has no basis to recover attorney's fees he incurred in this action. He makes a request for attorney's fees as a sanction under Wis. Stat. § 802.05(3)(a)2, but has not established the procedural compliance with Wis. Stat. § 802.05." *Id.*, ¶ 8.

Nearly two months after the court issued its findings of fact and conclusions of law, on June 3, 2015, Nationstar was substituted as plaintiff in place of Ocwen. ROA 176-1.

Thereafter, on June 16, 2015, the trial court entered a Decision and Order wherein it amended the earlier judgment and awarded Stafsholt $24,506.89 in attorney's fees, which were to be deducted from the $172,108.17 in outstanding principal remaining on the Subject Loan. ROA 187; PA 44-48. The trial court further ruled that, after subtracting the $90,000 paid by Stafsholt on April 17, 2015, and the $24,506.89 in attorney's fees, the remaining balance owed on the Subject Loan was $57,601.28. PA 47. Finally, the trial court ruled that if Stafsholt paid the $57,601.28 by

August 1, 2015, "Ocwen shall assign the mortgage to Stafsholt and terminate the underlying note." PA 47-48.

Nationstar timely filed its notice of appeal on July 30, 2015. ROA 193-1. The judgment of the trial court was been stayed pending the outcome of this appeal. ROA 232.

On December 28, 2016, the appellate court issued a decision, concluding as follows:

> We conclude the circuit court properly determined that BOA breached the implied covenant of good faith and fair dealing, that Stafsholt prevailed on his equitable estoppel affirmative defense, and that Stafsholt was entitled to declaratory judgment on his breach of contract claim. We also conclude the court properly determined Nationstar was prohibited from collecting certain fees that were charged to Stafsholt as a result of his default. We therefore affirm with respect to those issues. However, we conclude the court erred by awarding Stafsholt attorney fees and costs, and we reverse on that basis. For the reasons explained below, we also reverse those portions of the court's orders regarding Nationstar's ability to recover interest, and we remand for further proceedings on that issue.

PA 3, ¶ 3.

On April 10, 2017, this Court granted Stafsholt's request for review.

ARGUMENT

I. Standard of Review.

"Following a bench trial, '[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'" *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶12, 331 Wis. 2d 740,

796 N.W.2d 806 (citing Wis. Stat. § 805.17(2)).

However, "[c]onclusions of law will be reviewed independently." *Heyde Cos. v. Dove Healthcare, LLC*, 2001 WI App 278, ¶6, 249 Wis. 2d 32, 637 N.W.2d 437 (citing *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 292, 294-95, 526 N.W.2d 515 (Ct. App. 1994)).

II. Stafsholt is Not Entitled to Attorney's Fees Under Equitable Estoppel.

Stafsholt erroneously argues that, contrary to the American Rule, the doctrine of equitable estoppel somehow entitles him to his attorney's fees by way of a setoff against the amount owed on the Subject Loan. *See* Petitioner's Brief, pp. 16-21. Tellingly, Stafsholt acknowledges that there is no exception to the American Rule for an equitable estoppel defense, and that he cannot cite to any case where such relief was previously granted in this context. *See* Petitioner's Brief, pp. 18-19. Stafsholt therefore presents no reason to disturb the well-settled American Rule, and fails to demonstrate he is entitled to recover his attorney's fees.

"The American Rule provides that parties to litigation typically are responsible for their own attorney fees." *Estate of Kriefall v. Sizzler United States Franchise, Inc.*, 2012 WI 70, ¶ 72, 342 Wis. 2d 29 (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)). "Limited exceptions do exist, such as where statutes provide for the recovery of attorney fees for prevailing parties, or

where the parties contract for the award of attorney fees." *Id.* (citing *Meas v. Young*, 142 Wis. 2d 95, 101, 417 N.W.2d 55 (Ct. App. 1987)). In addition, there is a limited exception where "an innocent party, wrongfully drawn into litigation with a third party, may recover those fees reasonably incurred in defending against such action." *Id.* at ¶ 73 (citing *Weinhagen v. Hayes*, 179 Wis. 62, 190 N.W. 1002 (Wis. 1922).

Stafsholt concedes none of these exceptions apply here. *See* Petitioner's Brief, pp. 18-19. Stafsholt also concedes he cannot cite to a case awarding attorney's fees in a factually analogous scenario. *Id.*, p. 19. Instead, Stafsholt simply attacks two cases cited by the appellate court, which Stafsholt argues somehow do not apply merely because they are not factually identical to this case. *Id.*, pp. 18-20 (citing *Murray v. City of Milwaukee*, 2002 WI App 62, 252 Wis. 2d 613 and *Utschig v. McClone*, 16 Wis. 2d 506, 114 N.W.2d 854 (1962)). Specifically, Stafsholt seems to argue that, because his requested award of attorney's fees essentially amounts to a setoff of the amount owed on the Subject Loan rather than a direct payment to him, the American Rule does not apply.

However, Stafsholt does not explain why it matters that the award of attorney's fees here could come in the form of a reduction in the amount owed on the Subject Loan rather than a direct payment to him. This is particularly true as Stafsholt is not even a party to the Subject Loan. Whether one considers it a setoff or direct payment, Stafsholt is improperly receiving

compensation for his attorney's fees.

Further, as noted above, Stafsholt concedes he does not have any authority providing for an exception to the American Rule when the award of attorney's fees is used as a setoff. *See* Petitioner's Brief, p. 19. Conversely, the case law relied upon by the appellate court follows a long line of precedent standing for a general proposition that a party cannot recover its attorney's fees based on an equitable estoppel defense. *Murray*, 2002 WI App 62, ¶ 15 ("Thus, Murray must establish his right to recover attorney fees from the City on some basis other than equitable estoppel; equitable estoppel does not establish that right."); *Utschig*, 16 Wis. 2d at 509 (Holding that equitable estoppel is a shield, not a sword).

In sum, the issue of an award of attorney's fees in the context of an equitable estoppel defense is well-settled, and moreover the general American Rule for attorney's fees itself has been recognized by this Court for decades. *See, e.g., Estate of Kriefall*, 2012 WI 70; *Kremers-Urban Co.*, 119 Wis. 2d 722. Stafsholt offers no support whatsoever for his belief that this Court should suddenly abandon this established principle, and overturn decades of precedent.

Accordingly, this Court should affirm the ruling of the appellate court reversing the trial court's order granting Stafsholt his attorney's fees.

III. Stafsholt is Not Entitled to Attorney's Fees Under the Trial Court's Inherent Authority.

Stafsholt next argues that the appellate court should have considered an argument he raised for the first time in his appellate reply brief that the trial court could have awarded him his attorney's fees based on its inherent authority. *See* Petitioner's Brief, pp. 21-29. Stafsholt is again mistaken. The appellate court correctly declined to address his tardily raised issue, and even if it had, Stafsholt's argument does not support his claim for attorney's fees.

A. Stafsholt's Waived His Argument.

Initially, the appellate court correctly held that Stafsholt waived the issue of whether the trial court had inherent authority to award Stafsholt his attorney's fees by failing to raise it in the trial court or in his initial brief on appeal. Notably, the law is clear that "waiver is a rule of administration only." *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). "The court decides in each individual case whether the situation warrants relief from the waiver rule." *Id.* Thus, an appellate court has discretion in determining whether to apply waiver, and each such ruling is fact specific.

Stafsholt goes to great lengths to distinguish *A.O. Smith*, which the appellate court cited in support of its decision to decline to address the issue waived by Stafsholt, and argues that the appellate Court should have instead exercised its discretion in a manner similar to the court in *State v. Kucik*, 2011 WI App 1, 330 Wis. 2d 832, 794 N.W.2d 926. *See* Respondent's Brief, pp. 25-28. Stafsholt's argument is unavailing.

Although the appellate court here could have disregarded Stafsholt's waiver and addressed the argument anyway, as the court did in *Kucik*, it was was also well within its discretion to rule as it did and decline to entertain Stafsholt's untimely argument. Such is the nature of the rule on waiver. This Court should similarly conclude Stafsholt waived his argument.

Stafsholt attempts to excuse his waiver, asserting that he did not know of the argument previously rather "[h]e failed to make the argument at the Trial Court level and until the Reply Brief on appeal because inexplicably didn't find it until then." Respondent's Brief, p. 25. However, Stafsholt's intent is irrelevant, as the waiver rule is based on "fundamental fairness." *A.O. Smith*, 222 Wis. 2d at 492.

Moreover, "judicial resources, not to mention the resources of the parties, are not best used to correct errors on appeal that could have been addressed during the trial." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). "The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *State v. Huebner*, 235 Wis. 2d 486, 492, 611 N.W.2d 727 (2000). "The rule promotes both efficiency and fairness, and 'goes to the heart of the common law tradition and the adversary system.'" *Id.* at 492-93 (quoting *State v. Caban*, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997)).

This Court should not excuse Stafsholt's plain waiver. Instead, judicial efficiency and fairness dictate that Stafsholt waived his argument

regarding the trial court's purported inherent authority to award attorney's fees, and his argument therefore need not be addressed by this Court.

B. The Trial Court Lacked Authority to Award Attorney's Fees.

Even if Stafsholt had not waived his argument that the trial court had inherent authority to award attorney's fees as a sanction, and he plainly did, Stafsholt's argument still fails, because the trial court lacked authority to award Stafsholt his attorney's fees.

Stafsholt argues that the "Trial Court had ample reason to award attorney's fees to Stafsholt as a sanction for BOA's and its successors' conduct *before* and during the litigation." Petitioner's Brief, p. 22 (emphasis added). However, contrary to Stafsholt's assertion that conduct occurring before litigation is a consideration, "a trial court has the inherent authority to sanction a party or its attorney for misconduct *during litigation* by ordering payment of the opposing party's attorney's fees and costs." *State ex rel. Godfrey & Kahn, S.C. v. Circuit Court for Milwaukee Cty.*, 2012 WI App 120, ¶43, 344 Wis. 2d 610, 823 N.W.2d 816 (emphasis in original). Thus, the conduct of the prior plaintiff before the lawsuit was filed is irrelevant.

Importantly, the alleged misconduct noted in the findings of fact and conclusions of law of the trial court involved only pre-litigation conduct of BOA. *See* PA 36-43. In fact, the trial court concluded that "[t]his entire dispute was caused by BOA's poor record-keeping and business practices. BOA caused this dispute by unnecessarily purchasing insurance for

Stafsholt." PA 42, ¶ 1. Because the trial court did not identify any specific misconduct *during* the litigation, it did not have inherent authority to award Stafsholt his attorney's fees.

Apparently aware that pre-litigation conduct is not sufficient, Stafsholt argues that Ocwen's answer to one allegation in his counterclaim was improper, and that he was, therefore, entitled to all of his attorney's fees as sanction. *See* Respondent's Brief, pp. 22-24. However, Stafsholt ignores the fact that the trial court never made a finding that Ocwen's answer was somehow inappropriate, and therefore it could not provide a basis for an award of attorney's fees. For this reason alone, Stafsholt's argument fails.

Moreover, the record demonstrates that Ocwen's answer was proper. Stafsholt takes issue with the response to paragraph 38 of his counterclaim, which alleges: "But after the April 24, 2011, letter [Ex. 68] was received, Bank of America and/or Plaintiff refused to reinstate the mortgage before attempting to charge Stafsholt with thousands of dollars in fees and other charges that were allegedly owed due to the foregoing events." ROA 94-10, ¶ 38. Ocwen answered: "Plaintiff is without sufficient information to form a belief as to the allegations in paragraph 38 and therefore denies same." ROA 92-10, ¶ 38.

Ocwen's answer was appropriate in light of the vague and ambiguous allegation asserted by Stafsholt. It is unclear what "foregoing events" Stafsholt refers to or which "fees and other charges" are being referenced.

Further, Ocwen cannot be expected to answer for alleged conduct of BOA. In light of the poorly worded allegation, it was appropriate for Ocwen to answer that it was without sufficient information to respond.

Moreover, had Stafsholt followed the correct procedure under Wis. Stat. § 802.05(3)(a)(1) and provided Ocwen with 21 days to withdraw or correct its answer, Ocwen could have clarified its response. Stafsholt failed to do so. *See* PA 43, ¶ 8 (finding that Stafsholt did "not establish[] procedural compliance with Wis. Stat. § 802.05.").

Even if Ocwen's answer arguably could have been clearer, it certainly is not the sort of "egregious practice[] which threaten[s] the dignity of the judicial process" that would warrant sanctions. *See Schultz v. Sykes*, 2001 WI App 255, ¶ 12, 248 Wis. 2d 746, 638 N.W.2d 604. This is especially true when the sanctions sought by Stafsholt were his attorney's fees for the entire litigation. Such an award would be grossly disproportionate to the alleged wrongdoing, and, as the appellate court correctly noted, "Wis. Stat. § 802.05(3)(b) limits the attorney fees that may be awarded in response to a party's motion for sanctions to 'some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.'" PA 30. Thus, a single allegedly improper answer to an allegation in the Complaint by Ocwen could not possibly entitle Stafsholt to all of his attorney's fees.

Stafsholt is also mistaken in suggesting an argument made in Nationstar's appellate reply brief challenging the trial court's finding of fact

was somehow improper. *See* Petitioner's Brief, pp. 24-25. Nationstar is certainly within its rights to challenge the trial court's finding of fact in an appellate brief, particularly where its argument was supported by citations to the record. *See* Respondent's Appendix ("RA") 7-8. Moreover, it is unclear how an argument asserted in an *appellate* reply brief could possibly retroactively justify an award of sanctions by the *trial* court.

In sum, Stafsholt does not cite to any finding of fact by the trial court of conduct occurring during the litigation that would support a sanction of attorney's fees. Thus, even if Stafsholt had not waived the argument, and he plainly did, it does not support his claim.

Accordingly, this Court should affirm the ruling of the appellate court reversing the trial court's award of attorney's fees.

IV. Nationstar is Entitled to Interest on the Subject Loan.

Stafsholt argues that by permitting Nationstar to recoup a portion of the interest owed on the Subject Loan, the trial court "made a mistake . . . because doing so made Stafsholt worse off financially than he was as of September 12, 2010." *See* Petitioner's Brief, p. 30. Stafsholt is mistaken.

Initially, although Stafsholt referenced the issue of interest as one of his "issues" in his petition for review, he did not put forth any argument supporting his position. *See* RA 37-139. Accordingly, the issue was not properly set forth in the petition for review, and he cannot raise this issue now. *See* Wis. Stat. § 809.62(6) ("If a petition [for review] is granted, the

parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the" court.); *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 16, 349 Wis. 2d 587, 601 (Issue not included with those before the Supreme Court where the only reference in the petition for review was in the recitation of the procedural history of the case).

Even if this Court does address the issue, the trial court correctly permitted Nationstar to recover interest payments owed on the Subject Loan. The terms of the Note and Subject Mortgage permit collection of interest, late fees, and other fees incurred in foreclosure. *See* ROA 1-7 - 1-26. Thus, not only is Stafsholt not entitled to the additional relief he requests, but the trial court erred when it found that Ocwen was not entitled to some of these fees and costs.

Stafsholt argues that the trial court erred when it permitted Nationstar to collect $40,239.82 in interest. However, the trial court correctly found that Stafsholt was not entitled to a setoff for interest because he "already received the equitable offset for that amount and is not entitled to be placed in a better position than he would have been in but for the actions of Ocwen." PA 47.

Stafsholt asserts that the prohibition on collection of interest is required to prevent him from being worse off financially than before the lawsuit was filed because he incurred attorney's fees, which he claims is a "mortgage expense." *See* Petitioner's Brief, p. 31. Thus, Stafsholt

essentially attempts to get around the American Rule providing that litigants are responsible for their own attorney's fees by claiming he should not have to pay interest on the Subject Loan to compensate for payment those fees. Not surprisingly, Stafsholt offers no authority whatsoever for his novel proposition, and it should be rejected for this reason alone. *See, e.g., State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. Wis. 1980) (An appellate court need not consider arguments unsupported by legal authority).

Stafsholt next asserts that Nationstar should be "estopped" from arguing that he benefitted from not having to pay interest because "BOA and its successors . . . prevented Stafsholt from paying the monthly mortgage payments, which included interest, from September, 2010, to present." *See* Petitioner's Brief, p. 32. This argument ignores that under the terms of the Subject Mortgage, once he defaulted, Stafsholt could not simply resume paying his monthly principal and interest payments whenever he felt like it, but was instead required to first reinstate the loan. *See* ROA 1-22, ¶19.

As Stafsholt conceded at trial, he never actually attempted to reinstate the Subject Loan, but instead he only offered to pay principal and interest minus expenses for his own legal costs. *See* TT3, 98-100. Moreover, Stafsholt never actually tendered any check, and he never had any intention of paying the actual amount required to reinstate the Subject Loan. *Id.* This is not sufficient for reinstatement. *See* ROA 1-22, ¶19.

In any event, regardless of the reason Stafsholt did not pay any

interest, the fact remains that failure to pay interest on the Subject Loan for nearly five years was a benefit to him, and prohibiting the collection of the interest would be a windfall placing him in a better position than he would have been in had the foreclosure action not been filed.

Stafsholt next argues, without citing to any evidence whatsoever, that he did not actually receive the benefit of not paying $40,239.82 in interest over the course of nearly five years from September 2015 through April 2015. *See* Petitioner's Brief, pp. 33-34. Specifically, Stafsholt alleges that because he did not have money sitting in a bank account collecting interest, or invested in stocks or bonds, he could not receive the benefit of not paying interest on his loan. Stafsholt's argument is both irrelevant, and completely unsupported by the facts or case law.

First, Stafsholt does not cite to any testimony or other evidence whatsoever indicating that he did not have assets collecting interest. Further, his argument is belied by the fact that he provided Nationstar with a check for $57,601.28 on July 28, 2015 in an effort to extinguish Nationstar's lien. *See* Petitioner's Brief, p. 14. Thus, Stafsholt plainly had not depleted all of his savings during the September 2010 to April 2015 time period, as he had access to $57,601.28.

Second, even if Stafsholt had no savings or other assets, he still benefits if he is not required to pay the full amount he owes under the Subject Loan, which includes mortgage interest. The fact that he did not pay any

interest on his mortgage loan for nearly five years is unquestionably a benefit to Stafsholt, regardless of his financial situation.

Not surprisingly, Stafsholt does not cite to any authority indicating that a party receives no benefit for not having to pay interest if he has other expenses during the time the interest should have been paid. This Court need not consider Stafsholt's unsupported argument. *See, e.g., Shaffer*, 96 Wis. 2d at 545-46.

Finally, Stafsholt argues that he is entitled to an offset for the interest payments because was forced to incur attorney's fees. *See* Petitioner's Brief, p. 33. This is yet another improper attempt by Stafsholt to get around the American Rule, which "provides that parties to litigation typically are responsible for their own attorney fees." *Estate of Kriefall*, 2012 WI 70, ¶72. Stafsholt is not permitted to backdoor his claim for attorney's fees under the guise of a prohibition on the collection of interest.

Accordingly, Nationstar is entitled to collect interest from Stafsholt, and this Court should affirm the ruling of the trial court to the extent it permits Nationstar to collect interest owed on the Subject Loan.

CONCLUSION

For all of the above reasons, this Court should affirm the ruling of the appellate court.

Dated: August 30, 2017

Respectfully submitted,

NATIONSTAR MORTGAGE LLC,

By: _____
One of Its Attorneys

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FORM AND LENGTH CERTIFICATION FOR WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 5,081 words. This certification is made in reliance on the word count feature of Microsoft Word.

Date: August 30, 2017

Amy M. Salberg

ELECTRONIC FILING CERTIFICATION FOR WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Date: August 30, 2017

Amy M. Salberg

Appeal No. 2015 AP 001586

State of Wisconsin

In Supreme Court

Nationstar Mortgage LLC n/k/a Bank of America, NA, as successor by Merger to BAC Home Loans,
Plaintiff-Appellant-Cross-Respondent,

vs.

Robert R. Stafsholt,
Defendant-Respondent-Cross-Appellant-Petitioner,

Colleen Stafsholt f/k/a Coleen McNamara, unknown spouse of Robert R. Stafsholt, unknown spouse of Colleen Stafsholt, f/k/a Colleen McNamara, Richmond Prairie Condominiums Phase I, Association and The First Bank of Baldwin,
Defendants.

On Appeal from the Circuit Court for St. Croix County
Circuit Court Case No. 2011 CV 224
The Honorable Scott R. Needham, Presiding

REPLY BRIEF OF DEFENDANT-RESPONDENT-CROSS-APPELLANT – PETITIONER ROBERT R. STAFSHOLT

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I. THE TRIAL COURT SHOULD BE AFFIRMED BASED ON ITS INHERENT AUTHORITY TO AWARD ATTORNEY'S FEES.

The Trial Court has the Inherent Authority to award attorney's fees for conduct that "is disruptive to the administration of justice,"[1] "where such action is necessary for the court to properly function,"[2] and where there is "bad faith" conduct or "egregious misconduct." *Schultz v Sykes,* 638 N.W.2d 604, 611 (Wis. Ct. App. 2001).

Nationstar contends that

> Because the trial court did not identify any specific misconduct *during* the litigation, it did not have inherent authority to award Stafsholt his attorney's fees.

But Nationstar simply ignores the record in making this assertion. The Trial Court found that the following misconduct occurred on or after BOA started this foreclosure action on February 25, 2011:

1. This entire dispute was caused by BOA's poor record-keeping and business practices. (PA 42, ¶ 7).

2. BOA improperly commenced this foreclosure proceeding in February 2011 after it improperly declared the Loan in default. (PA 43, ¶ 3).

3. BOA and its successors, including OCWEN, improperly maintained this foreclosure proceeding from February 2011 to present. (PA 43, ¶ 5).

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[1] *Jensen v. McPherson,* 2004 WI App 145, ¶ 35, 275 Wis.2d 604.
[2] *Godfrey & Kahn, S.C. v. Circuit Court for Milwaukee Cty.*, 2012 WI App 120, ¶ 43, 344 Wis. 2d 610.

4. BOA and Homeward continuous[ly] charged Stafsholt $607.36 per month for lender-placed insurance [even though he had a conforming policy] for 20 months, from December 2010 to July 30, 2012. (PA 42, ¶¶ 51-52).

5. On May 11, 2011, Stafsholt's attorney, James Krupa, sent a letter to BOA offering to reinstate the loan for a payment of $10,573.60, which included nine monthly payments, less $500 in expenses. BOA did not respond to that letter. Stafsholt continued to attempt to reinstate the loan prior to trial. (PA 42, ¶ 53).

6. The Court agrees with Stafsholt and that the relief here should serve to make him whole. The egregious nature of Ocwen's conduct in handling this particular mortgage and subsequent foreclosure action necessitates not only a legal but an equitable remedy as well. (PA 46).

These findings all relate to Plaintiff's conduct during the litigation, were undisturbed by the Court of Appeals, and are not under review by this Court. These findings alone are sufficient to affirm the Trial Court based on the Trial Court's Inherent Authority to award attorney's fees.

And affirmance on this basis is not fundamentally unfair to Nationstar. Nationstar has briefed the issue with this Court and will have Oral Argument to address it, and this Court can "sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether [this Court does] so *sua sponte* or at the urging of a respondent." *State v. Truax,* 444 N.W.2d 174, 178 (Wis. Ct. App. 1992). *See also State v. Holt*, 382 N.W.2d 679, 687 (Wis. Ct. App. 1985).

And the undisputed facts provide further support for the Trial Court's conclusion that Nationstar's predecessors' conduct was "egregious" and that Stafsholt should be awarded his attorney's fees to "make him whole." (PA 46).

On April 5, 2011, after BOA brought the foreclosure action, Stafsholt registered a complaint with the State of Wisconsin Office of the Commissioner of Insurance. (Ex. 66). In apparent response to the Complaint (Ex. 67), on April 24, 2011, BOA sent Colleen Stafsholt a letter, stating:

> The lender-placed insurance coverage that was purchased by BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A. at your expense has been cancelled with no charge to you.

(Ex. 68). BOA's insurance agent Balboa forwarded the same letter to the Wisconsin Commissioner of Insurance (Ex. 73), and based on that letter, the Insurance Commissioner determined that Stafsholt's complaint was "resolved." (Ex. 72).

Having no further recourse with the Insurance Commissioner, Stafsholt was left to deal with BOA in the foreclosure lawsuit, and to attempt to have BOA honor its representation. Stafsholt was ready, willing, and able to pay the missed mortgage payments of $1,230.40 per month for each month that had not yet been paid. So if BOA did what it and its agent represented to the Insurance Commissioner and Stafsholt that it would, this dispute would have ended in May, 2011.

Stafsholt requested a Reinstatement Calculation, which BOA issued on April 27, 2011, and sent to Stafsholt's attorney on May 5, 2011. (Ex. 69). But that

Reinstatement Calculation still included a demanded payment of $3,644.16 for LPI, by charging Stafsholt $607.36 per month for six months. (*see* Ex. 117, BOA 179; T1. 85:1-87:25; Ex. 6, Plaintiff 36; T1. 237:1-238:9; T2. 79:23-81:1; Ex. 62, T2. 36:2-38:12).

Not only did BOA demand that Stafsholt still pay for LPI after it had sent the "no charge to you" letter to have the Complaint with the Insurance Commissioner quashed, it also demanded that Stafsholt pay "uncollected late charges" of $184.56 and "Foreclosure expenses" of $225 in order for Stafsholt to reinstate his loan. (Ex. 69).

And when Stafsholt attempted to reinstate his Mortgage in May, 2011, by paying all of his then-outstanding mortgage payments, less $500 for attorney's fees (Ex. 70), BOA never even responded. Stafsholt continued to try to reinstate his loan prior to trial (PA 42, ¶ 53), and BOA and its successors prevented him from doing so by continuing to demand that Stafsholt pay thousands of dollars for LPI and other improper charges.

On November 30, 2011, BOA brought a motion for summary judgment, and contended that Stafsholt was in default for failing to pay the $607.36 per month charge for LPI for 11 months, from December, 2010, through November, 2011. (ROA 12-23). Stafsholt's attorney filed an affidavit, pointing out that there was no basis for the additional monthly charge of $607.36. (ROA-30). But BOA continued to seek to extract that LPI charge from Stafsholt.

At a court-ordered mediation in May, 2012, a BOA representative rejected Stafsholt's offers to pay the then-outstanding mortgage payments. The representative demanded that Stafsholt pay "only one number" to resolve the foreclosure action, and that number included $10,932.48 of LPI charges (18 months at $607.36 per month), and also included bankruptcy attorney's fees when there was no bankruptcy, foreclosure fees, foreclosure costs, litigation fees, property inspection fees, accrued late charges, and forecasted late charges. (Ex. 82; T2. 77:1-79:12).

And after the mediation, on July 17, 2012, Homeward, the new servicer, sent Stafsholt another Reinstatement Quote that demanded that Stafsholt pay $12,147.20 for LPI, "Bankruptcy Attorney Fees," $3,822 in "Foreclosure Fees," and an additional $1,172.50 in "Litigation Fees." (Ex. 82; T2. 78:6-81:1).

It wasn't until July 30, 2012, that the more than $12,000 in LPI charges were finally removed from the Reinstatement Quote, run by new servicer Homeward. But Homeward still demanded that Stafsholt pay another $5,418.08 of unsupported charges, including $2,975.00 in "Foreclosure Fees," "Bankruptcy Attorney fees," and a separate charge of $1,172.50 for "litigation fees." (Ex. 83). Homeward demanded that Stafsholt pay those charges again in October, 2012 (Exs. 84-85).

After Ocwen took over as servicer in May, 2013 (Ex. 214), in June, 2013, it inexplicably contacted Stafsholt's agent and changed his account to escrow billing, even though Stafsholt had already procured and was paying for his

homeowner's insurance, as he always had (Ex. 110, LLM 27-29). Ocwen then sent a $2,814 payment to Stafsholt's insurance company for that insurance, and later charged Stafsholt for it. (Ex. 211).

And in Ocwen's Answer to Defendant's Counterclaims dated December 3, 2013, Ocwen denied without factual basis ¶ 38 of Stafsholt's Counterclaim in which Stafsholt alleged:

> But after the April 24, 2011, letter [Ex. 68] was received, Bank of America and/or Plaintiff refused to reinstate the mortgage before attempting to charge Stafsholt with thousands of dollars in fees and other charges that were allegedly owed due to the foregoing events.

Ocwen denied this allegation (ROA 92-10) even though it had the Reinstatement Quotes that proved that Stafsholt's allegations were correct.

And at trial, Ocwen's attorney represented that in April, 2011, BOA had "cancelled the [LPI] and credited the [Stafsholt] account for the amount paid for the [LPI]" (T1. 7:7:20-8:7), which the Reinstatement Quotes and other evidence proved was not true (*see, e.g.,* Ex. 6, Plaintiff 36; ROA-30). Ocwen also contended at trial that in order for Stafsholt to pay off the Mortgage, he had to pay $4,832 for "Escrow Advance," which represented the cost of insurance for 2013 and 2014 that Ocwen inexplicably sent checks for, even though Stafsholt had already procured and was paying for that insurance (Ex. 211; T1. 222:2-226:5). (Stafsholt returned the second check to Ocwen's counsel during the trial (T2. 98:1-99:17).

Ocwen also continued to demand at trial that Stafsholt pay $3,878.00 for Broker Price Opinions for which it had only one document supporting one $85

charge for one BPO (T1. 227:2-228:23; T1. 236:1-12), "Legal Filing Service" of $1,642.50, "Foreclosure Fee" of $2,460, "Late Charges" of $1,476.48, and other unsupported charges relating to the dispute that would not have been incurred but for Ocwen's and its predecessors' egregious conduct. (Ex. 211). Ocwen also demanded payment of its attorney's fees (Ex. 216).

So Ocwen demonstrated at trial that Stafsholt's allegation that Ocwen and its predecessors were charging "Stafsholt with thousands of dollars in fees and other charges that were allegedly owed due to the foregoing events," was true.

And after Nationstar took its assignment from Ocwen in March, 2015, Nationstar contended on appeal that the charge of $607.36 per month for 20 months was only an "unknown" charge and not necessarily for LPI. But the Trial Court made that specific finding of fact, there was no competing evidence challenging this conclusion, and Nationstar has never even offered what it contends that $607.36 charge was for, if it wasn't for LPI.

The continued attempts to extract from Stafsholt thousands of dollars of LPI charges for at least 15 months after sending the "no charge" letter, the continued attempts to extract from Stafsholt thousands of dollars in other unsupported charges and expenses all the way through trial, and the continuous unsupported denials of Stafsholt's allegations regarding this conduct throughout this case that is nearly 7 years old, including on appeal, all demonstrate bad faith and that Judge Needham's findings of "egregious" conduct are well-supported.

And they provide further support for affirming the Trial Court on the attorney's fees issue based on the Trial Court's Inherent Authority to award attorney's fees.

II. THE TRIAL COURT SHOULD BE AFFIRMED BASED ON EQUITABLE ESTOPPEL.

Nationstar argues that the American Rule precludes Stafsholt's ability to recover attorney's fees because Stafsholt's equitable estoppel argument is not based on one of the "limited exceptions" to the American Rule described in *Kriefall*. But one of the exceptions in *Kriefall* is the *Weinhagen* rule, which provides that when the wrongful act of one party draws an innocent party into litigation with a third party, the party committing the wrongful act is liable for the innocent party's attorney's fees.

Stafsholt's equitable estoppel argument is supported by the *Weinhagen* rule. "Wrongfulness requires something similar to fraud or breach of a fiduciary duty." *Kriefall,* 2012 WI 70, ¶ 76. The Trial Court found that BOA engaged in a series of wrongful acts that meet this standard, including

> BOA caused the Stafsholts to default on the Mortgage and Note in September 201[0]. Stafsholt acted in good faith and reliance on the misrepresentations of the BOA agent. BOA improperly commenced this foreclosure proceeding in February 2011 after it improperly declared the Loan in default. (PA 42-43, ¶¶ 1-3, 5).

BOA engaged in these and other wrongful acts from 2010-2013, and then Ocwen stepped into BOA's shoes and continued with the litigation starting in December, 2013. As of December, 2013, innocent party Stafsholt was in litigation with third

party Ocwen based on the wrongful acts of BOA. Stafsholt therefore had an attorney's fees claim against BOA pursuant to *Weinhagen.*

Ocwen and Nationstar should be held liable for that attorney's fees claim pursuant to *Weinhagen* and the doctrine of equitable estoppel. In his Answer dated April 5, 2011, Stafsholt alleged that BOA had advised him to default "to clear up the problem" and get the LPI charge removed, which is a "wrongful act" pursuant to *Weinhagen,* and that BOA should be estopped based on that wrongful act. (ROA-6-2, ¶¶20-22).

The Mortgage was assigned to Ocwen on May 23, 2013 (Ex. 214). More than five months later, on November 11, 2013, Stafsholt brought a motion to amend his Answer. In his motion papers and at a November 12, 2013, hearing,[3] Stafsholt alleged that BOA engaged in wrongful acts, and he sought to assert Counterclaims against BOA. BOA opposed the motion, but the Trial Court granted it on November 13, 2013 (ROA-76-85).

Ocwen waited until December 3, 2013, after Stafsholt served his Counterclaims on BOA on December 2, 2013 (ROA-94-95), to bring a motion to be substituted as Plaintiff for BOA (ROA 89-90). When the Court granted that motion, Ocwen assumed any liability that BOA had to Stafsholt, including for attorney's fees pursuant to the *Weinhagen* rule.

[3] Petitioner's Supplemental Appendix, PA69-___.

Ocwen should therefore be held liable to Stafsholt for the attorney's fees that BOA caused Stafsholt to incur, as should Nationstar, since it replaced Ocwen in 2015 (Nationstar should also be held liable for any attorney's fees for which BOA or Ocwen are liable). So Stafsholt's equitable estoppel argument is based in part on one of the "limited exceptions" to the American Rule.

And even if Stafsholt's equitable estoppel argument isn't listed as one of the "limited exceptions" in *Kriefall*, that is of little import because neither is the Inherent Authority basis for awarding attorney's fees.

Nationstar next argues that "Stafsholt also concedes he cannot cite to a case awarding attorney's fees in a factually analogous scenario." But *Meas v. Young* is factually analogous, the case law that Stafsholt cites relating to mortgage foreclosure proceedings and equitable estoppel support the Trial Court's ruling on equitable estoppel and attorney's fees, and there is no factually analogous case that Nationstar cites that provides that the Trial Court was wrong as a matter of law.

In addition, the case law regarding the Trial Court's Inherent Authority to award attorney's fees also supports Stafsholt's arguments regarding equitable estoppel. In that case law, courts applied a common law basis for allowing the Trial Court to award attorney's fees, without a specific cause of action, affirmative defense, statute, or contract provision. The Inherent Authority basis for awarding attorney's fees was judicially created and recognized, and is the accepted common law in Wisconsin.

Were this Court to affirm the Trial Court on the attorney's fees issue in this mortgage foreclosure case based on equitable estoppel, it could be doing something substantively similar. So Stafsholt is not asking this Court to "overturn decades of precedent." Rather, Stafsholt is asking this Court to interpret and apply existing precedent to the particular facts of this case, which included egregious conduct of the Plaintiff and its predecessors and successors, both before and during the litigation.

Nationstar also argues that Stafsholt is trying to inappropriately utilize the doctrine of equitable estoppel as a "shield and not a sword," and that Stafsholt must have some other legal basis upon which to seek a determination that the amount of principal that Nationstar can collect is reduced based on the amount of Stafsholt's attorney's fees. But as set forth above, the *Weinhagen* rule is an independent basis.

Moreover, Stafsholt's counterclaims also provide that independent basis, and the Trial Court did apply the doctrine as a shield. BOA started this lawsuit, seeking to foreclose on Stafsholt's homestead. In partial response, Stafsholt brought Counterclaims in which he demanded assignment of the Mortgage to him upon payment to Plaintiff of the correct balance owed. (ROA 94-12-13).

When Nationstar's predecessors argued that the amount Stafsholt should be required to pay to obtain the Assignment of Mortgage is higher than what Stafsholt contends, the Trial Court reduced the amount that Stafsholt must pay, pursuant to the Court's "authorization to make injured parties whole" and the

doctrine of equitable estoppel, which the Trial Court can apply to restrict Nationstar from enforcing "what would otherwise be an unequivocal right," like the contractual right to collect the amount of principal on the Note before assigning the Mortgage to Stafsholt pursuant to Wis. Stat. § 846.02. So the Trial Court did apply the doctrine as a shield.

III. THE TRIAL COURT SHOULD BE REVERSED ON ITS ORDER REQUIRING STAFSHOLT TO PAY NATIONSTAR INTEREST.

Nationstar contends that Stafsholt did not raise this issue in his Petition for Review, but he did. (RA 44-45).

Nationstar suggests that Stafsholt does not cite "to any evidence whatsoever" in support of his contention that he did not receive a financial benefit of $40,239.82 by not having paid interest starting in September, 2010. But Stafsholt does cite to evidence in the record, including that during the same time period that BOA was preventing Stafsholt from paying interest by rejecting his multiple offers to reinstate, Stafsholt was instead paying his attorneys $66,500. (ROA 174-2, 4-35). These payments to his attorneys depleted any savings that Stafsholt had.

Nationstar contends that Stafsholt's payment to Nationstar of $57,601.28 on July 28, 2015, shows that Stafsholt did have $172,108.17 sitting in an investment that paid him 5.88% interest after taxes, which is what would be necessary for Stafsholt to have received a $40,239.82 financial benefit. But that payment was returned by Nationstar.

Stafsholt did pay Nationstar $90,000 on April 17, 2015, 10 days after the Trial Court's first Order. This immediate payment was consistent with Stafsholt's position that he would attempt to pay off this Mortgage as soon as the amount he owed was determined by the Court (T1. 14:23-15:3). The timing and amount of this payment show that Stafsholt had that $90,000 earmarked to pay the principal of his Mortgage, which is further evidence that Stafsholt did not have $172,108.17 of principal in an investment that was paying him 5.88% interest after taxes.

Dated: September 14, 2017

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION FOR WIS. STAT. § 809.19(8)(d)

I hereby certify that this Reply Brief conforms to the rules contained in § 809.19 (8)(b) and (c) for a Brief produced with proportional monospaced or serif font. The length of this Brief is 2995 words. This certification is made in reliance on the word count feature of Microsoft Word.

Dated: September 14, 2017

Nathan M. Brandenburg

Steven J. Weintraut

ELECTRONIC FILING CERTIFICATION FOR WIS. STAT. § 809.19(12)(f)

I hereby certify that my office is submitting an electronic copy of this Reply Brief, excluding the Appendix, which complies with the requirements of § 809.19(12), Stats.

I further certify that this electronic Brief is identical in content and format to the printed form of the Reply Brief.

A copy of this certificate is being served with the paper copies of this Reply Brief filed with the Court and served on all opposing parties.

Dated: September 14, 2017

Nathan M. Brandenburg

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