

No. 794973

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

REDMOND RIDGE EAST HOMEOWNERS ASSOCIATION

Respondents,

vs.

JAYAKRISHNAN K. NAIR

Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. Assignment of Error.5

1. The trial court erred in entering the order of October 26, 2018, granting Respondent’s Motion for Award of Costs and Attorney Fees and denying Appellant’s request for arbitration.5

2. The trial court erred in entering the Order of October 26, 2018, granting Respondent’s Motion for Award of Costs and Attorney Fees incurred after the sale of Appellant’s Property at a sheriff’s sale.5

3. The trial court erred in entering the Order of October 26, 2018, granting Respondent’s Motion for Award of Costs and Attorney Fees.6

B. Issues Pertaining to Assignments of Error.6

1. Does a trial court judge have authority under Washington’s Uniform Arbitration Act, RCW Chapter 7.04A, to decide whether a party has waived the right to arbitration by not properly initiating arbitration?6

2. Does Washington’s redemption statute allow that post-sheriff’s sale attorney fees and costs incurred by the judgment creditor be included as a price of redemption? ..7

3. Does a trial court abuse its discretion in awarding attorney’s fees that are disproportionately high relative to the underlying judgment?7

C. Statement of the Case.7

1. **Facts related to Respondent’s judgment and judicial foreclosure action.8**

2. **Respondent’s post-auction and post-redemption attorney fees. 13**

3. **Facts Related to Arbitration Demand. 15**

4. Hearing on Respondent’s Motion for Additional Attorney’s Fees.	18
D. Argument.	21
1. The trial court erred in denying Appellant’s request for arbitration.	21
2. Arbitration issue was addressed and before the court.	27
3. Washington’s redemption statute does not contemplate post-auction and post-redemption attorney fees be included in the redemption price.	29
4. Alternatively, the trial court abused its discretion in awarding unreasonably high post-sale and post-redemption attorney fees.	33
E. Conclusion	36

TABLE OF AUTHORITIES

Cases

<u>Berryman v. Metcalf</u> , 177 Wn. App. 644, 312 P.3d 745 (2013), <u>review denied</u> , 179 Wn.2d 1026 (2014)	34
<u>Chuong Van Pham v. Seattle City Light</u> , 159 Wn.2d 527, 151 P.3d 976 (2007)	34
<u>City of Spokane v. Rothwell</u> , 166 Wash.2d 872, 215 P.3d 162 (2009)	31
<u>City of Spokane v. Spokane County</u> , 158 Wash.2d 661, 146 P.3d 893 (2006)	32
<u>Heights at Issaquah Ridge Owners Ass’n v. Burton Landscape Group, Inc.</u> , 148 Wash.App. 400, 200 P.3d 254 (2009)	23

<u>Lake v. Woodcreek Homeowners Ass'n</u> , 169 Wash.2d 516, 243 P.3d 1283 (2010).....	31, 32
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998).....	34
<u>Mahler</u> , 135 Wn.2d at 434-35 (emphasis omitted)	35
<u>Otis Housing Ass'n v. Ha</u> , 165 Wn.2d 582, 201 P.3d 309 (2009).....	22, 23
<u>P.H.T.S., LLC v. Vantage Capital, LLC</u> , 186 Wn. App. 281, 345 P.3d 20 (2015).....	29, 30
<u>Performance Construction, LLC v. Glenn</u> , 195 Wn. App. 406, 380 P.3d 618 (2016).....	29
<u>Rest. Dev., Inc. v. Cananwill, Inc.</u> , 150 Wash.2d 674, 80 P.3d 598 (2003)	32
<u>River House Development, Inc. v. Integrus Architecture, PS</u> , 167 Wn. App. 221, 272 P.3d 289 (2012)	23
<u>Scott Fetzer Co. v. Weeks</u> , 122 Wn.2d 141, 859 P.2d 1210 (1993).....	34
<u>Swinomish Indian Tribal Cmty. v. Dep't of Ecology</u> , 178 Wash.2d 571, 311 P.3d 6 (2013)	33
<u>Verbeek Properties, LLC v. GreenCo Environmental, Inc.</u> , 159 Wn. App. 82, 246 P.3d 205 (2010)	22, 23, 24, 25, 26, 27
<u>W. Telepage, Inc. v. City of Tacoma Dep't of Fin.</u> , 140 Wash.2d 599, 998 P.2d 884 (2000)	32

Statutes

RCW Chapter 6.236, 29, 30, 31, 33
RCW Chapter 7.04A7, 24, 25, 26, 27

Other Authorities

Redmond Ridge East Homeowner’s Association’s
Declaration of Covenants, Conditions, and Restrictions
.....6, 8, 15, 16, 17
Verbatim Report of Proceedings19, 20

A. Assignment of Error.

1. The trial court erred in entering the order of October 26, 2018, granting Respondent's Motion for Award of Costs and Attorney Fees and denying Appellant's request for arbitration. The reasonableness of such fees is subject to a written arbitration agreement and the trial court lacked any authority to determine whether or not Appellant had properly moved for arbitration or had otherwise waived the right to request arbitration. Only the arbitrator has authority to decide whether a party has properly followed procedures in requesting arbitration.
2. The trial court erred in entering the Order of October 26, 2018, granting Respondent's Motion for Award of Costs and Attorney Fees incurred after the sale of Appellant's Property at a sheriff's sale. The additional fees and costs incurred after the sheriff's

sale are not contemplated as assessments under Washington's redemption statute, RCW Chapter 6.23. Such motion and the reasonableness of the attorney fees should be decided after the redemption price was paid and the property redeemed, and pursuant to the arbitration provision of the Redmond Ridge East Homeowner's Association's Declaration of Covenants, Conditions, and Restrictions ("CCRs").

3. The trial court erred in entering the Order of October 26, 2018, granting Respondent's Motion for Award of Costs and Attorney Fees. The trial court abused its discretion by awarding attorney fees that are grossly disproportionate to the amount of the underlying judgment.

B. Issues Pertaining to Assignments of Error.

1. Does a trial court judge have authority under Washington's Uniform Arbitration Act, RCW

Chapter 7.04A, to decide whether a party has waived the right to arbitration by not properly initiating arbitration?

2. Does Washington's redemption statute allow that post-sheriff's sale attorney fees and costs incurred by the judgment creditor be included as a price of redemption?
3. Does a trial court abuse its discretion in awarding attorney's fees that are disproportionately high relative to the underlying judgment?

C. Statement of the Case.

This appeal arises out of a homeowner's association collection matter. Appellant Jayakrishnan K. Nair ("Appellant") owns real property located at 11031 Elliston Way NE, Redmond, Washington (the "Property") in the Redmond Ridge East Homeowner's Association (the "Association" or "Respondent"). The Association is the Respondent herein.

1. Facts related to Respondent's judgment and judicial foreclosure action.

Appellant purchased the Property in 2008. In addition to the Property at issue here, Appellant owns four other properties on the Eastside of Seattle, Washington. (CP 547)

The Respondent Association's recorded Declaration of Covenants, Conditions and Restrictions ("CCRs") requires Appellant to pay quarterly membership assessments of \$225.00 (\$900 per year), plus fees, fines or other charges, interest and costs of collection as they come due. (CP 315) Disputes as to the validity or amount of such fees, assessments, fines or charges are subject to mediation/arbitration as outlined in the CCRs. (CP 367-369)

In February 2011, Appellant temporarily moved with his family to New Jersey for work reasons. During his absence, Appellant rented out all his properties, including the Property at issue here. (CP 548) Prior to his move, Appellant had relied on automatic bill payments he had set up through his

checking accounts in Washington State to take care of payments for mortgages, taxes, insurance, and the homeowner's association assessments for all his properties. (CP 548) After moving to New Jersey in 2011, Appellant migrated all his automatic bill payments to another bank. The automatic payments for homeowner's association fees and assessments for three of Appellant's properties following the move apparently did not get paid. (CP 548) As a result, homeowner's association assessments due to Respondent did not get paid, and Appellant became delinquent in early 2011. (CP 316, CP 548)

During this time, Appellant assumed the homeowner's association fees were being made because he did not hear from either the Respondent or any of his tenants that anything was amiss. (CP 548) Upon returning to Washington State in late 2014, Appellant learned that some of the homeowner's associations had obtained judgments against him and the properties, including the Property at issue here. (CP 548)

Respondent filed the underlying judicial foreclosure lawsuit in September 2014 to collect unpaid assessments. (CP 1-24) In February 2015, a default judgment was entered against Appellant for \$6,516.91 in assessments and costs and attorney' fees of \$3,474.77. (CP 87-89) The February 2015 judgment included a decree of foreclosure and post-judgment assessments, late charges, attorney fees and costs. (CP 87-89) This judgment was the basis for a sheriff's sale of the Property.

A sheriff's sale of the Property was scheduled for June 2015. (CP 140-141) In April 2015, Appellant filed a Chapter 13 bankruptcy case in the United States Bankruptcy Court for the Western District of Washington in order to stay the sheriff's sale and at the advice of an attorney to deal with these relatively small claims. (CP 293, CP 550-552)

Appellant was given poor advice from his bankruptcy attorney. Appellant's secured debt was above the debt limits allowed for a Chapter 13 bankruptcy. Appellant's Chapter 13

bankruptcy was therefore converted to a Chapter 11 bankruptcy in the summer of 2015, about three months after he filed for Chapter 13 bankruptcy protection. (CP 294) After spending some time in the Chapter 11 case, Appellant's case was converted to a Chapter 7. In the Chapter 7 case, with the assistance of a different bankruptcy attorney, Appellant negotiated a settlement with the Chapter 7 Trustee to pay unsecured creditors in full and the Chapter 7 trustee's administrative expenses. The Chapter 7 case was dismissed without a discharge in April 2017. (CP 298)

Respondent's attorney fees and costs increased substantially during the two years Appellant was in bankruptcy. Respondent's attorney's fees and costs up to June 2015 (two months after Appellant filed bankruptcy) amounted to approximately \$5,800.00. (CP 294) Respondent's attorney fees incurred during Appellant's bankruptcy amount to approximately \$52,200.00 for 200 hours of work. (CP 294-300) This is a large amount of fees

for a relatively small judgment (less than \$15,000.00) secured by all five of Appellant's properties.

Appellant cannot dispute the amount of attorney fees incurred by Respondent during the two years Appellant was in bankruptcy. Those attorney fees and costs became part of the redemption price of \$78,973.64 as Respondent was the high bidder and purchaser at the sheriff's sale. However, the amount of those fees may be relevant to the issue of reasonableness with respect to the attorney fees at issue in this appeal.

After Appellant's bankruptcy case was dismissed in April 2017, the Respondent moved forward with the judicial foreclosure and sheriff's sale of Appellant's Property. A sheriff's sale was set for July 28, 2017. (CP 316) Appellant, the day before the scheduled sale, as a *pro se* litigant, went before the court *ex parte* in an attempt to stay the sheriff's sale. The court denied Appellant's request for a stay, but required that the court make a determination as to the

reasonableness of Respondent's attorney fees and costs.
(CP 139)

On July 28, 2017, the sheriff's sale of the Property occurred as scheduled. The Respondent Association was the highest bidder at the sale in the amount of \$78,973.64, of which over \$60,000.00 were post-default judgment attorney fees and costs. (CP 316)

The sheriff's sale of Appellant's Property effectively extinguished any right Appellant had to challenge the reasonableness of Respondent's attorney fees because the sale made the amount of the attorney fees and costs part of the price Appellant would statutorily be required to pay to redeem the Property.

2. Respondent's post-auction and post-redemption attorney fees.

Respondent's post-auction and post-redemption attorney fees and the reasonableness of those fees are what is at issue in this appeal. After the July 28, 2017, sheriff's

sale, Respondent's attorney fees continued to increase at a rate that should be subject to review for reasonableness by arbitration as Appellant requested. Respondent's attorney fees related to the sheriff's sale and the one-year redemption period amount to approximately 41 hours of work, totaling \$10,700. (CP 301) Respondent added these attorney fees and costs to the redemption price. Appellant was therefore required to pay \$93,069.69 in trust to redeem the Property. (CP 317)

Even after paying the redemption price, Respondent's attorney fees continued to increase. Respondent brought a Motion for Costs and Attorney Fees to determine the reasonableness of its pre-auction attorney fees (which already became part of the redemption price), its post-sheriff's sale and pre-redemption attorney fees and costs, as well as the fees and costs for bringing its Motion for Costs and Attorney Fees. (CP 287-313) Respondent's attorney fees

related to bringing the Motion for Costs and Attorney Fees alone totaled \$7,000.00. (CP 301)

The hearing on Respondent's Motion for Award of Costs and Attorney Fees was October 26, 2018, and is discussed in more detail in Section 4, *infra*.

3. Facts Related to Arbitration Demand.

According to Article 14.2(f)(i) of the Redmond Ridge East CCRs governing its homeowner's association: "Actions relating to the collection of fees, Assessments, fines and other charges imposed or levied by the Association" are excluded from arbitration. However, "disputes as to the validity or amount of such fees, assessments, fines or charges" "**shall be** subject to the mediation/arbitration" provisions in the CCRs. (CP 367-370) (Emphasis added.) Therefore, the reasonableness of Respondent's attorney fees is subject to arbitration.

In relevant part, the arbitration provision in the CCRs states:

14.2 Dispute Resolution.

(a) **Mediation/Arbitration.** Any claim, controversy or dispute by or among Declarant, The Association or one or more Owners, or any of them, arising out of or related to this Declaration or the Bylaws or the Property shall be first subject to mediation and, if not timely settled by mediation, resolved by arbitration in accordance with this Section 14.2. Any party may at any time opt to forego mediation and submit the matter directly to arbitration as provided in this Declaration. The decisions and award of the arbitrator shall be final, binding and nonappealable. The arbitration shall be conducted in King County, Washington, pursuant to the arbitration statutes of the State of Washington and any arbitration award may be enforced by any court with jurisdiction. Filing for arbitration shall be treated the same as filing in court for purposes of meeting any applicable statutes of limitations or for purposes of filing a notice of pending action (“lis pendens”).

(f) **Excluded Matters.** Notwithstanding the foregoing, the following matters shall not be subject to mediation or arbitration under this Section 14.2:

- (i) Actions relating to the collection of fees, Assessments, fines and other charges imposed or levied by the Association (other than disputes as to the validity or amount of such

fees, assessments, fines or charges, which disputes shall be subject to mediation/arbitration as provided above);

(CP 367-368)

Although the record is not clear, Appellant first raised the issue of arbitration and the reasonableness of Respondent's attorney fees to the trial court when Appellant filed the ex parte motion to stay execution of the judgment and the sheriff's sale on July 27, 2017. Unfortunately, there is no record of that hearing except for the judge's order denying Appellant's request for a stay, but ordering that before any payment of attorney fees was made from the sale proceeds, the court would determine if the fees were reasonable. (CP 501)

Appellant raised the issue a second time to the trial court in response to Respondent's Motion for Award of Costs and Attorney Fees. (CP 555) Arbitration was raised a third time by Appellant and his counsel at the October 26, 2018,

hearing on Respondent's Motion for Award of Costs and Attorney Fees.

As discussed in Section 4, *infra*, the trial court judge never considered the validity of the above arbitration provision.

4. Hearing on Respondent's Motion for Additional Attorney's Fees.

Although Appellant represented himself *pro se* in this matter before the sheriff's sale, he retained attorney Charles Diesen on a limited basis to represent him at the October 26, 2018, hearing regarding Respondent's Motion for Costs and Attorney Fees. (CP 557) During the hearing, the fact that the reasonableness of the attorney fees was subject to arbitration was again brought up by Appellant and Appellant's counsel. However, the trial court summarily rejected any argument regarding arbitration.

It is important to review the conversation between the trial court judge, Appellant's attorney Mr. Diesen, and the

Appellant, when the issue of arbitration was presented to the court. Below is the relevant excerpt from the Verbatim Report of Proceedings:

MR. DIESEN: What we want an answer to is why – if the CCR's say attorney's fees subject to mandatory arbitration, why we don't get that?

THE COURT: Because you haven't asked for it. Where is your demand for arbitration?

MR. DIESEN: Well –

THE COURT: Where have you followed any of the procedures to demand arbitration at any time?

MR. NAIR: I asked my attorney for arbitration.

MR. DIESEN: Well –

THE COURT: When have you? Can you answer that question? It is a simple –

MR. DIESEN: Yes, I can. Yes, I can.

THE COURT: But you're not.

MR. DIESEN: But I will.

THE COURT: Go for it.

MR. DIESEN: All right.

There was a judgment for attorney's fees and costs, and that is past the point of arbitration.

When it comes to future fees, post judgment, we are entitled to arbitration and to put that, as Mr. Nair's –

THE COURT: Declaration?

MR. DIESEN: Yes, his declaration.

THE COURT: Right?

Okay. There has been no formal demand for arbitration that I am aware of in this case. A declaration in opposition to a motion for fees is not a demand for arbitration, counsel.

MR. DIESEN: I understand that, but –

MR. NAIR: I asked my attorney for arbitration. I want to protect my rights. And there is mandatory arbitration.

THE COURT: Whatever you ask your attorney for is up to you and your attorney, not me.

I need the judgment back here. I was just handing it to you to see the interlineation.

(Verbatim Report of Proceedings ("RP") at 34, line 8, to page 35, line 21.)

After the above discussion, the trial court entered the order awarding Respondent \$23,306.30 to be applied to delinquent assessments, late fees, interest and fines due and owing. The court further awarded Respondent attorney fees of \$76,216.50 and costs of \$3,012.56, as well as an additional \$4,500.00 for bringing its Motion for Award of Costs and Attorney Fees, for a total award of \$83,729.06. The court directed that these funds be taken from Appellant's redemption funds of \$93,069.69 held in trust, and the \$13,965.40 remaining of the awarded attorney fees and costs shall constitute a lien against Appellant's Property. (CP 594-598)

D. Argument.

1. The trial court erred in denying Appellant's request for arbitration.

In the present case, it is unclear why the trial court denied Appellant's request to refer to arbitration the validity and amount of the additional attorney fees Respondent was seeking to add to the redemption price pursuant to its October

2018 Motion for Award of Costs and Attorney Fees. Presumably the trial court ignored Appellant's request for arbitration because the court believed Appellant had waived the right to arbitrate for failing to properly initiate arbitration. However, the record is not clear because the trial court did not give any findings on why the request to arbitrate was not granted. If failure to properly initiate arbitration was the basis for denying Appellant's request to arbitrate, the trial court exceeded its authority in so ruling because the issue of whether a party has properly initiated an arbitration is a procedural issue to be decided by the arbitrator.

The Court reviews denial of a motion to compel arbitration *de novo*. Otis Housing Ass'n v. Ha, 165 Wn.2d 582, 586–87, 201 P.3d 309 (2009); Verbeek Properties, LLC v. GreenCo Environmental, Inc., 159 Wn. App. 82, 86, 246 P.3d 205 (2010). The party opposing arbitration bears the burden of showing the arbitration clause is inapplicable or unenforceable. Otis Housing Ass'n, 165 Wash.2d at 587, 201

P.3d 309; Verbeek Properties, 159 Wn. App. at 86–87, 246 P.3d at 205.

“Washington courts apply a strong presumption in favor of arbitration.” Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Group, Inc., 148 Wn. App. 400, 405, 200 P.3d 254 (2009). Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. Verbeek, 159 Wn. App. at 87, 246 P.3d at 205; Heights, 148 Wn. App. at 407, 200 P.3d 254.

The determination of whether a party waived arbitration by conduct depends on the facts of the particular case and is not susceptible to bright line rules. River House Development, Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 237, 272 P.3d 289 (2012).

In the present case, whether Appellant properly requested arbitration was not a question for the trial court to

decide. The arbitration clause at issue here is governed by Washington's Uniform Arbitration Act, RCW Chapter 7.04A. Washington's Uniform Arbitration Act ("UAA") envisions a limited role for courts. Verbeek, 159 Wn. App. at 87-88, 246 P.3d at 208. In arbitrations governed by the UAA, the trial court's role is to decide whether or not there is an enforceable agreement to arbitrate. Id. "On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate." Id.; RCW 7.04A.070(1).

Although the UAA does set forth procedures for initiating arbitration, the question of compliance with these procedures must be left to the arbitrator. Id. Therefore, the trial court here had no authority to decide whether Appellant waived the right to arbitrate by not properly initiating arbitration.

In Verbeek, this Court addressed the issue whether the trial court or the arbitrator is to decide if a party complied with procedure for initiating an arbitration as outlined in the UAA, specifically RCW 7.04A.090. In Verbeek, this Court held that the issue is squarely before the arbitrator and the trial court exceeded its authority in determining that the right to arbitration was waived for failure to properly initiate arbitration.

In Verbeek, a landowner, Verbeek, sued an environmental company, GreenCo, for breach of contract and other claims. The contract between Verbeek and GreenCo contained an arbitration clause. After a dispute arose between the parties, and Verbeek stopped paying GreenCo and GreenCo filed a lien against the property. Verbeek sent a letter invoking the arbitration clause and then subsequently filed a motion to dismiss the lien as frivolous. Verbeek then filed a summons and complaint for breach of contract and other claims. The trial court denied Verbeek's motion to dismiss the lien. Verbeek sent another letter to GreenCo

offering to stay the breach of contract action pending arbitration. GreenCo filed an answered the complaint and counterclaimed to foreclose the lien. After further inquiries, GreenCo advised Verbeek that the company was refusing to arbitrate because it believed Verbeek waived the right to arbitration. Verbeek brought a motion to compel arbitration which the trial court denied. Verbeek appealed to this Court. Id., 159 Wn. App. at 85-86, 246 P.3d at 206-207.

GreenCo argued Verbeek waived the right to arbitrate in four ways, the first of which is pertinent to the present case. GreenCo contended Verbeek waived the right to arbitration by failing to initiate an arbitration in compliance with the procedures provided by the Uniform Arbitration Act, RCW Chapter 7.04A . Specifically at issue was whether Verbeek's first letter advising it was willing to proceed to arbitration properly initiated an arbitration. This Court determined that whether Verbeek's letter properly initiated an arbitration was not an issue for the trial court to decide because the UAA

envisions a limited role for courts. Verbeek, 159 Wn. App. at 87-88, 246 P.3d at 208; *citing* RCW 7.04A.070(1) (other citations omitted). The court further stated that although the act does set forth procedures for initiating arbitration in RCW 7.04A.090, the question of compliance with these procedures must be left to the arbitrator. Id., 159 Wn. App. at 88, 246 P.3d at 208. Therefore, the court held that the trial court exceeded its authority by ruling on the procedural issue.

2. Arbitration issue was addressed and before the court.

Likewise, in the present case, there is an enforceable arbitration provision that was before the trial court and Appellant requested on more than one occasion that the matter be referred to arbitration. Nonetheless, the trial court summarily rejected Appellant's request to refer the matter to arbitration apparently on the grounds that no formal demand for arbitration had been made. The trial court is incorrect; Appellant did formally demand arbitration with respect to the

reasonableness of Respondent's attorney fees. First, when he brought his ex parte motion to stay execution of the judgment in July 2017. Second, when Appellant raised the issue in his Declaration responding to Respondent's October 2018 Motion for Attorney Fees and Costs, and third, during the October 26, 2018, hearing on Respondent's Motion for Attorney Fees and Costs.

In addition, the trial court failed to address the enforceability of the arbitration provision with respect to the issue before the court. The issue before the trial court was the reasonableness of attorney fees and costs incurred by Respondent (who is not only the judgment debtor but is also the party who purchased the Property at the sheriff's sale as the highest bidder) after the sheriff's sale and after redemption.

The trial court lacked authority to decide that Appellant had not followed procedure in demanding arbitration. The trial court's authority was to determine whether there was a valid

arbitration agreement, and the trial court did not even consider the written arbitration agreement. Therefore, Appellant requests that the Order of October 26, 2018, be vacated and this matter be remanded to the trial court to determine whether there is an enforceable arbitration provision and direct the trial court to refer the matter to arbitration accordingly.

3. Washington's redemption statute does not contemplate post-auction and post-redemption attorney fees be included in the redemption price.

RCW Chapter 6.23 controls the statutory redemption of real property sold at a sheriff's sale. P.H.T.S., LLC v. Vantage Capital, LLC, 186 Wn. App. 281, 287, 345 P.3d 20 (2015); Performance Construction, LLC v. Glenn, 195 Wn. App. 406, 408–09, 380 P.3d 618 (2016). Real property sold subject to redemption may be redeemed by the judgment debtor, judgment creditor, or their successors in interest. RCW 6.23.010. **To redeem the property from the purchaser, the**

person that redeems must pay (1) the amount bid at the sheriff's sale with interest, (2) any assessment or taxes paid by the purchaser with interest, (3) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent that payment was necessary to protect the judgment debtor, and (4) if the redemption is by a redemptioner and if the purchaser is also a creditor having a lien, judgment, deed of trust, or mortgage, the amount of such lien with interest. RCW 6.23.020 (emphasis added); P.H.T.S., 186 Wn. App. at 287.

At issue here is whether the redemption of the property by Appellant should be held hostage because of the increasing redemption price due solely to Respondent's post-sheriff's sale and post-redemption attorney fees and costs. More specifically, the issue is whether Respondent's attorney fees are a "sum paid by the purchaser {Respondent} secured by an interest in the property to the extent that payment was

necessary to protect the judgment debtor.” See RCW 6.23.020(3).

In the present case, the redemption price included Respondent’s attorney fees incurred prior to the sheriff’s sale because the amount of those fees were included in the price paid by Respondent for the Property at the sheriff’s sale. Appellant contends, that the attorney fees and costs incurred by Respondent after the sheriff’s sale are (1) not assessments and (2) not sums paid on a prior lien or obligation secured by an interest in the Property to the extent necessary to protect the judgment debtor (the Appellant) as contemplated by RCW 6.23.020.

When interpreting a statute, the Court’s objective is to ascertain and give effect to the legislature’s intent. City of Spokane v. Rothwell, 166 Wash.2d 872, 876, 215 P.3d 162 (2009). Statutory interpretation begins with the statute’s plain meaning. Lake v. Woodcreek Homeowners Ass’n, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010). When the meaning

of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. City of Spokane v. Spokane County, 158 Wash.2d 661, 673, 146 P.3d 893 (2006). If a statute is plain and unambiguous, the meaning of the statute must be determined from the wording of the statute itself. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wash.2d 599, 608–09, 998 P.2d 884 (2000). If the plain language is subject to only one interpretation, the court's inquiry is at an end. Lake, 169 Wash.2d at 526, 243 P.3d 1283.

The court “must not add words where the legislature has chosen not to include them,” and the court must “construe statutes such that all of the language is given effect.” Lake, 169 Wash.2d at 526, 243 P.3d 1283 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wash.2d 674, 682, 80 P.3d 598 (2003)). “In general, words are given their ordinary meaning, but when technical terms and terms of art are used, we give these terms their technical meaning.” Swinomish Indian Tribal

Cmty. v. Dep't of Ecology, 178 Wash.2d 571, 581, 311 P.3d 6 (2013).

The clear language of RCW 6.23.020 does not provide that payment of post-sale and post-redemption attorney fees and costs by a purchaser be included in the redemption price. Therefore, the trial court erred in including those post-sale and post-redemption attorney fees and costs as part of the price of redemption to be paid by Appellant.

Accordingly, Appellant requests this Court reverse the trial court's ruling of October 26, 2018, with respect to the award of post-sale and post-redemption attorney fees and costs and refer the issue regarding the reasonableness of those attorney fees and costs to arbitration.

4. Alternatively, the trial court abused its discretion in awarding unreasonably high post-sale and post-redemption attorney fees.

This Court reviews for abuse of discretion whether the amount of an attorney fee award is proper. Chuong Van

Pham v. Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Here, the trial court abused its discretion by awarding Respondent unreasonably high attorney fees and costs for work performed post-sheriff's sale and post-redemption.

Washington courts determine whether attorney fees are reasonable using the lodestar method. Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998). Under this method, the court multiplies a reasonable number of hours by a reasonable hourly rate to determine lodestar. Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013), review denied, 179 Wn.2d 1026 (2014). However, “[i]n assessing the reasonableness of a fee request, a ‘vital’ consideration is ‘the size of the amount in dispute in relation to the fees requested.’” Berryman, 177 Wn. App. at 60 (quoting Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993)).

“Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost

decision as a litigation afterthought. Courts should not simply accept unquestioningly the fee affidavits from counsel.” Mahler, 135 Wn.2d at 434-35 (emphasis omitted).

Here, the post-sheriff’s sale and post-redemption attorney fees awarded to Respondent totaled approximately \$22,200.00. This included \$10,700.00 for 41 hours during the one-year redemption period after the sheriff’s sale. Appellant contends that these fees are excessive in that Respondent’s attorneys were essentially monitoring the case until it was redeemed and there were no complicated redemption issues that arose, such as, for example, competing claims by redemptioners and other lienholders.

The post-redemption award included \$7,000.00 for bringing Respondent’s Motion for Award of Costs and Attorney Fees, and an additional \$4,500.00 for presenting and defending the motion at oral argument. These fees to recover fees are excessive considering Appellant was mostly *pro se* until the actual court hearing on October 26, 2018, at which

hearing the trial court judge gave little credence to any arguments raised by Appellant's counsel.

Accordingly, and in the alternative, Appellant requests that the portion of the October 26, 2018 order awarding attorney fees and costs be reversed with respect to the post-sheriff's sale and post-redemption award of attorney fees and costs.

E. Conclusion

Based on the foregoing, Appellant respectfully requests that the Order of October 26, 2018, be vacated and reversed with respect to the post-sheriff's sale and post-redemption attorney fees and costs awarded to Respondent, and further direct the trial court to determine whether there is an enforceable arbitration provision and to refer the matter to arbitration accordingly.

Alternatively, Appellant respectfully requests this Court reverse the trial court's October 26, 2018, order with respect to the post-sheriff's sale and post-redemption attorney fees

and costs awarded to Respondent on the grounds that such attorney fees and costs are unreasonable.

Dated: June 7, 2019

Respectfully submitted,

/s/ Larry B. Feinstein
Larry B. Feinstein, WSBA 6074
Vickie V. Carleton, WSBA 21187
Kathryn Scordato, WSBA 41922
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2019, I caused a true and correct copy of the foregoing Appellant's Opening Brief to be delivered to Respondents, through their attorneys in the manner indicated below:

Counsel for Respondents:

Hanson Baker Ludlow Drumheller PS
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Dated: June 7, 2019

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VORTMAN AND FEINSTEIN

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