IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID C. THOMPSON, Respondent and Cross Appellant, v. DATAMARINE INTERNATIONAL, INC., a Washington corporation; NARROWBAND NETWORK SYSTEMS, INC., a Washington corporation; and SEA INC. OF DELAWARE INC., a foreign corporation, Defendants, DOLORES DRAINA, an individual; MARCUS DUFF, and individual; and JAMES SYLVIA, an individual, Appellants and Cross Respondents.	No. 65001-7-I (consolidated with No. 65102-1-I) DIVISION ONE UNPUBLISHED OPINION FILED: September 19, 2011

Appelwick, J. — Thompson brought an action against the Datamarine companies to recover money he had loaned to them while employed there as the

president and chief executive officer. Intervening shareholders brought counterclaims, arguing that Thompson breached his fiduciary duty. The trial court granted judgment in Thompson's favor for $761,969.75. Datamarine appeals that judgment, and Thompson cross-appeals arguing that the shareholders should be individually liable for attorney fees and costs. We affirm the trial courts findings of fact and conclusions of law and its ruling that the shareholders were not individually liable for attorney fees and costs.

FACTS

Datamarine International Inc. is a Washington corporation in the business of manufacturing marine equipment and instruments for recreational consumer markets. SEA Inc. of Delaware Inc., formerly known as Stephens Engineering Associates Inc., merged with Datamarine in 1986, became a wholly owned subsidiary, and has since been operating as a division of Datamarine. Narrowband Network Systems (NNS) is also a Datamarine subsidiary. It was formed in 1995 to participate in the business of owning and managing specialized mobile radio licenses. The three entities are hereafter referred to collectively as the "Datamarine companies" or "the companies."

In approximately 1980, David Thompson became the chief executive officer of Stephens Engineering Associates Inc., which later became SEA. From the 1980s until September 2002, Thompson served as the president and chief executive officer of the Datamarine companies. He was also SEA's sole board member. In September 2002, Thompson was relieved of his duties as the chief executive officer by the Datamarine board of directors. In October or November 2002, he resumed his duties as the chief executive officer, without formal appointment to that role. On March 12, 2003, Thompson resigned from all of his positions with the companies.

In approximately 1995, Jan Kallshian began performing various financial duties for the three companies. He was elected chief financial officer in 1997, and held that role almost continuously until his departure in October 2003.

In the late 1980s, the companies expanded into land-based communications, focusing on the emerging market for 220 MHz. radio systems such as the two-way radios used by taxi companies. The market consisted of licenses issued by the Federal Communications Commission (FCC). The licenses were for a defined and limited geographical area. The value of a license largely depended on its location. Using a license issued by the FCC required significant infusions of capital to purchase equipment and manage the license. Because many license holders were individuals with limited or no experience in the industry, a license holder would typically enter into a management agreement and an equipment agreement with companies like NNS/SEA. NNS entered into such agreements with license holders in markets across the United States. Under the management agreements, NNS was responsible for constructing and developing the radio systems. NNS would then retain the revenue generated by the systems, after remitting a fixed percentage to the license holders.

While NNS set up the operating systems for each license, it did not intend to be an operator. Accordingly, in 1995 NNS entered into an operating agreement with Incom Communications Corporation for the operation of the systems in certain markets. Any revenue from the radio systems and licenses would be divided between Incom, NNS, and the license holder. In several larger markets, for example, the agreement entitled Incom to 70 percent of the revenues from the license and radio system, NNS to 20 percent, and the license holder to the remaining 10 percent.

In 1997, with the companies facing financial difficulties, at Kallshian's request, Thompson agreed to lend the companies approximately $345,000. That money was used by the companies to fund their ongoing operations, including meeting payroll. Thompson's loan was secured by a mortgage on his residence in San Francisco and made by Silicon Valley Bank (SVB). The companies agreed to and did make the monthly payment on Thompson's home loan, as well as any loan fees associated with the loan. Thompson and the companies refinanced the loan in 1999 with Greenpoint Mortgage, to obtain a better interest rate.

In 2000, Thompson agreed to lend additional money to the company. In August 2000, he loaned $500,000 to the companies. $344,000 was used to pay off a promissory note that had been issued in July 1997 for the original loan amount, and the remaining $156,000 was used as working capital.

From the mid 90s through 2000, SVB was the companies' primary lender. Through a secure line of credit SVB had a security interest in all of SEA's assets. In 2000, the companies were in default of their obligation to SVB. As a result, SVB called its indebtedness due and owing and indicated that it would foreclose on the companies' assets if it was not paid immediately. Had SVB foreclosed, the companies would have been unable to raise additional capital and would have been forced to cease operations. Thompson agreed to lend the companies an additional $312,000, to pay off $285,186.23 of SVB indebtedness and to provide some additional working capital to pay a number of the companies' bills.

In 2001, Thompson lent additional amounts to the companies to help them meet payroll and other obligations. In addition to Thompson's loans, two of his

acquaintances, Jerry DiVecchio and Danielle Steele, also agreed to loan money to the companies to help them meet payroll and continue operations. Between August 2000 and August 2001, Thompson, DiVecchio, and Steele lent the companies $591,000. Thompson subsequently purchased the DiVecchio and Steele notes, and they were assigned to him.

In 2001, both Thompson and Kallshian were foregoing significant portions of their compensation as a result of the companies' financial difficulties. In December 2001, Kallshian told Thompson and the board of directors that he could no longer continue to work without being paid. He stopped coming to work for several days. Thompson believed that retaining Kallshian was critical to the companies' continued viability, due to the important relationships he had with the companies' vendors, lenders, and major investors. Thompson agreed that the companies would start paying Kallshian his regular compensation and a regular payment of $1,250 a week towards the back compensation he was owed. During this same time period, the companies continued to make the regular payments on the loan Thompson had secured against his residence.

In 2003, the companies were facing severe cash problems. Thompson signed an agreement to sell NNS's equipment and property rights, under the applicable management agreements, for three FCC licenses in Southern California, to Gene Clothier. As with other large market licenses, the radio systems under these three licenses were operated by Incom, which received 70 percent of the generated revenue. The license holders received 10 percent of any revenue. And, NNS's interest included the remaining 20 percent of any revenue collected from the radio system subscribers.

Under the operating agreement between NNS and Incom, Incom had a right of first refusal before NNS went through with a sale. Incom did not exercise that right. Clothier, a principal at Incom, testified that Incom did not have enough cash to make the purchase at that time. Instead, Clothier himself made the purchase, paying $75,000 for NNS's equipment and for its rights to 20 percent of any revenue, under the management agreements for the three licenses. The Datamarine companies' board was aware of the transaction and supported it.

When Thompson resigned his positions in March 2003, he was owed over $1,000,000 from the companies. In October 2004, he voluntarily forgave over $800,000 of the amount owed to him. This forgiveness included the entire principal and accrued interest on the $500,000 promissory note. After Thompson's departure, the Datamarine companies continued to operate and have not filed for bankruptcy.

Thompson filed this action on June 28, 2006, bringing claims based on the August 4, 2000 promissory note ($312,000), the addendum to that note ($93,000), the DiVechio note ($10,000), the Steele note ($20,000), and credit card debt arising from the companies' use of Thompson's personal credit cards. The Datamarine companies asserted counterclaims in that action. On October 29, 2007, the companies voluntarily dismissed their counterclaims without prejudice. The interveners, Dolores Draina, Marcus Duff, and James Sylvia, filed their motion to intervene in February 2008, and brought derivative counterclaims against Thompson, including claims of fraud, breach of fiduciary duty, and tortuous interference with a business relationship. The trial court concluded that the interveners' claims are subject to a three-year statute of limitations. But, the claims were not time-barred in this case because they were asserted as

defenses and set-offs to Thompson's claims.

The trial court ruled in Thompson's favor on all of the claims but one.[1] In January 2010, the trial court entered judgment in favor of Thompson against the companies in the amount of $797,164.42. That judgment included Thompson's claims, as well as fees and costs. Fees and costs were assessed against the companies, but not individually against the interveners.

The trial court denied the interveners' motion for reconsideration. On February 16, 2010, the interveners filed their notice of appeal. Thompson filed a notice of cross-appeal on March 2, 2010.

DISCUSSION

When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law and judgment. Sunnyside Valley Irrigation Dist. v. Dickie, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002), aff'd, 149 Wn.2d 873, 73 P.3d 369 (2003). Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. Id.

The interveners do not assign error to the trial court's findings of fact. Those facts are thus accepted as verities on appeal. State v. Eriksen, 170 Wn.2d 209, 215

[1] He was held personally liable under the interveners' counterclaim, based on the finding that he breached his fiduciary duty when he became aware of and permitted the companies to divert tax and 401(k) withholdings from the Internal Revenue Service and employee trust accounts and instead use those funds for the daily operations of the companies. As a result, the court concluded that the interveners were entitled to $93,835.30 as a set-off against Thompson's judgment against the companies.

n.4, 241 P.3d 399 (2010). Instead, they dispute three specific conclusions of law (CL), D, F, and G, where the trial court concluded that the interveners had failed to support their breach of fiduciary duty claims against Thompson. The interveners also assign error to the trial court's decision to award Thompson attorney fees and costs.

I. The Sale To Clothier (CL D)

The interveners first argue that Thompson breached his fiduciary duty by making the business decision to sell company assets. At trial, the interveners bore the burden of proof, as the party asserting the breach of fiduciary duty claim. Senn v. Nw. Underwriters, Inc., 74 Wn. App. 408, 414, 875 P.2d 637 (1994); Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 509, 728 P.2d 597 (1986). Thompson, in turn, bore the burden of proving that he acted in good faith. Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 79, 180 P.3d 874 (2008). Thompson negotiated the sale at issue with Clothier for $75,000. NNS sold its rights, under the management agreements, to 20 percent of any revenue generated by the three Southern California licenses and the equipment associated with those licenses.

The interveners assign error to the trial court's conclusion of law on this matter, which provided, in relevant part:

> 1. The Court finds that Thompson and Clothier negotiated the sale of the licenses[2] in good faith and that the companies received fair value. In reaching this conclusion, the Court notes that between 1997 and 2002, the three licenses generated a total of $71,923.50, of which SEA was entitled to 20%.

But, the interveners do not challenge the conclusion that Thompson acted in good faith.

[2] While the trial court and parties sometimes refer to the "sale of licenses," what was actually being sold was the companies' right, under the management agreements, to 20 percent of any revenue generated by those licenses.

Indeed, at trial, the interveners never alleged that Thompson acted in bad faith, nor did they present any evidence that his actions were fraudulent, dishonest, or incompetent. Thompson put on evidence at trial that he acted in good faith, testifying that he negotiated the sale with the best interest of the companies in mind. Substantial evidence supports the trial court's conclusion that Thompson negotiated the sale in good faith.

Instead of challenging the finding of good faith, the interveners focus solely on the trial court's conclusion that the companies received fair value in the sale. They argue that the finding of fair value was in error, because it was based on an underestimation of how much revenue the three licenses generated for NNS. In finding of fact Q(4) and in conclusion of law D(1), the trial court stated that the licenses generated $71,923.50 in revenue between 1997 and 2002, of which "*SEA was entitled to 20%*." (Emphasis added.) They argue this shows a misunderstanding by the trial court.[3] According to exhibit 41, the $71,923.50 figure was the share of the revenue that the companies were entitled to under the management agreements, and the total revenue generated over that span was five times greater, or $359,617.50.[4] Because the NNS revenue from the licenses over that five-year period was $71,923.50—rather than 20 percent of $71,923.50—the interveners argue that the sale price of $75,000 did

[3] Thompson does not dispute the figures, but argues any confusion that was caused by exhibit 41 is of no consequence.

[4] Exhibit 41 shows specific revenue brought in between 1997 and 2002, over 21 quarters. It states that the revenue was: "[approximately] 17,000 in revenue per [quarter] for the three licenses," "[average] 1900 per license per month or 5700 per month which we received 20%." If the three licenses brought in approximately $17,000 per quarter for 21 quarters, the total revenue would be approximately $357,000 (a number that closely resembles $359,617.50), and the companies 20 percent share of $357,000 would be $71,400 (a number that closely resembles $71,923.50).

not constitute fair value. In essence, they argue that the trial court could not have concluded the companies received fair value for the assets sold, if it correctly understood that $71,923.50 was the revenue to NNS for a five-year period. Therefore, Thompson sold for less than fair value and should be liable for breach of fiduciary duty.

But, negotiating an unfavorable business transaction—even one where the companies did not receive fair value—is alone not grounds to sustain the interveners' breach of fiduciary duty claim. Under the "business judgment rule," corporate directors and officers are immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith. Scott v. Trans-Sys. Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003). The business judgment rule prevents courts from substituting their judgment for that of the directors, where there is no evidence of fraud, dishonesty, or incompetence. In re Spokane Concrete Prods., Inc., 126 Wn.2d 269, 279, 892 P.2d 98 (1995).

The interveners have not presented any argument on appeal that Thompson acted in bad faith, nor was there any evidence at trial to support such an argument. Their focus on the alleged lack of fair value alone does not establish prima facie fraud, dishonesty, or incompetence, as is necessary under the business judgment rule to support Thompson's liability. Indeed, the interveners' briefing completely fails to discuss what fiduciary duties Thompson owed or allegedly breached.[5] They have not

[5] Under RCW 23B.08.300 and .420, directors and officers have discretionary authority to act on behalf of their corporations. They must do so (a) In good faith; (b) With the care an ordinarily prudent person in a like position would exercise under

satisfied their burden of proof on the claim of breach of fiduciary duty. We hold that Thompson did not breach his fiduciary duty with regard to the Clothier sale.

II. Thompson's Receipt Of Payments For The Loans (CL F)

The interveners argue that Thompson breached his fiduciary duty by receiving payments on the loans he had made while the companies were insolvent, in preference to other creditors. They argue first that the trial court erred by importing affirmative defenses from federal bankruptcy law. The parties concede this is not a bankruptcy case. The Datamarine companies have continued to operate steadily since Thompson's departure without ever filing for bankruptcy protection. The trial court was not required to apply bankruptcy law. But, it was entitled to consider bankruptcy law for guidance in addressing this issue. St. John Med. Ctr. v. Dep't. of Soc. & Health Servs., 110 Wn. App. 51, 60, 38 P.3d 383 (2002). The trial court did so in part because of the paucity of authority under Washington law, and presumably also in part to help define the term "preference," a term used by the interveners, and a feature of federal bankruptcy law. 11 U.S.C. § 547. The court did not err by looking to bankruptcy law for guidance.

Interveners next argue that even if bankruptcy law defenses against a preference were applicable in this case, the court erred in applying them by placing the burden of proof on the intervening shareholders, rather than on Thompson. Citing Chrysler Credit Corp. v. Hall, 312 B.R. 797, 803 (E.D. Va. 2004), vacated in part on other grounds by In re JKJ Chevrolet, Inc., 412 F.3d 545 (4th Cir. 2005), the

similar circumstances; and (c) in a manner the director or officer reasonably believes to be in the best interests of the corporation. RCW 23B.08.300, .420.

interveners correctly point out that in bankruptcy cases, "[t]he creditor has the burden of establishing defenses to a preference under 11 U.S.C. §547(c)." But, even if the applicable legal standard was provided for in federal bankruptcy law as interveners suggest, their argument still fails. This is because a creditor would only be required to demonstrate affirmative defenses *after* the trustee/debtor had shown the existence of a preference in the first place. Under federal bankruptcy law:

> [A] trustee may avoid any transfer of an interest of the debtor in property --
>
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made --
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if --
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The trustee in a bankruptcy case bears the burden to prove all five of the elements above. Chrysler, 312 B.R. at 803. Thus, to the extent that the interveners wish to apply federal bankruptcy law and avoid the transfer to Thompson as a preference, the trial court would have *properly* imposed the burden of proof on them, to demonstrate each of the elements. In other words, the interveners would have needed to show that Thompson's receipt of payments was a preference in the first place. "*If* the Trustee carries this burden, the creditor then has the burden to prove the

nonavoidability of the transfer under subsection (c) of [11 U.S.C.] § 547." Id. (emphasis added). But, each of the trial court's conclusions of law that the interveners assign error to actually reflect that the interveners have failed to carry their preliminary burden of proof in establishing the existence of a preference. In light of the trial court's express conclusions that the payments were not a preference in the first place, the interveners' focus on defenses to a preference is premature. They have not demonstrated that the trial court erred by placing the burden of proof on the interveners rather than on Thompson.

Ultimately, the claim at issue was not a bankruptcy claim—rather, it was the interveners' claim that Thompson breached his fiduciary duty. The trial court's conclusion and judgment on this claim was properly evaluated under the same legal standard as the other two breach of fiduciary duty claims. At trial the party asserting a claim for breach of fiduciary duty bears the burden of proof. Senn, 74 Wn. App. at 414. The trial court's conclusions reflected this exact analysis, in addition to discussing the bankruptcy defenses:

> 6. . . . The interveners have failed to meet their burden that the companies' regular payments on [Thompson's] loans constituted preferences.
>
> . . . .
>
> 8. Interveners have failed to meet their burden of proof that Thompson breached his fiduciary duties to the Datamarine Companies regarding "preference" payments made to him.
>
> 9. Thompson has met his burden of proof that his actions were made in good faith.
>
> 10. Judgment should be entered in favor of Thompson and against the interveners on [this preference claim].

We hold that the trial court applied the correct legal standard in evaluating the interveners' counterclaim of breach of fiduciary duty. The trial court did not abuse its discretion by looking to federal bankruptcy law for guidance, and the court properly concluded that Thompson was entitled to receive payments on the loans he had made to the companies.

III. Thompson's Receipt of Reimbursement for his Personal Expenses (CL G)

The interveners next argue the trial court erred by entering judgment against their counterclaim that Thompson breached his fiduciary duty with respect to payments made by the companies on his personal credit cards. They contend that the trial court's conclusion of law improperly placed the burden of proof on them, rather than on Thompson. The relevant conclusion of law stated:

> Interveners have failed to meet their burden of proof that Thompson breached his fiduciary duties to the Datamarine Companies when he received reimbursement for legitimate business expenses. The interveners have failed to identify specific expenses that were personal to Thompson but not reimbursed by him.

The interveners' counterclaim alleged that Thompson breached his fiduciary duty by wrongfully obtaining personal benefit from purchases on company credit cards.[6] The party asserting a claim for breach of fiduciary duty bears the burden of proving that claim. The interveners asserted their counterclaim in an effort to establish an amount to be offset against any judgment in favor of Thompson. As a matter of law, it was their burden to prove that Thompson had retained money or benefits to which he was not entitled.

[6] This is distinguished from Thompson's original complaint, where he alleged the Datamarine companies were liable to him for $30,598 that he had advanced to the companies by the use of his personal credit cards.

On review we look to whether the trial court's findings of fact are supported by substantial evidence, and if so, whether the findings support the conclusions of law and judgment. Sunnyside, 111 Wn. App. at 214. Here, the trial court found, in relevant part:

> 3. Thompson's business expenses . . . as well as expenses of other employees, were typically charged on credit cards in Thompson's name on behalf of SEA.
>
> 4. When the monthly credit card statement was received, there would be an accounting, and business expenses were allocated to the appropriate internal company account. Thompson would reimburse the companies for any personal expenses.

The interveners did not assign error to the trial court's findings of fact, so they are treated as verities on appeal. Eriksen, 170 Wn.2d at 215 n.4. And, even if the interveners had assigned error to this finding, there is substantial evidence to support it. There was testimony that Thompson repaid his personal expenses, from both Thompson and from Debbie Vandermyn, the companies' accounting department supervisor and the individual responsible for overseeing the payment of the companies' expenses. Vandermyn also testified that the credit cards at issue, while in Thompson's name, were used by all of the companies' employees to charge company expenses. This testimony met the substantial evidence test. And, the trial court's finding of fact that Thompson reimbursed the companies for any personal expenses supports the conclusion of law that Thompson did not breach his fiduciary duty. The interveners do not point to any specific evidence of Thompson making improper charges or retaining money he was not entitled to, in breach of his fiduciary duty. The trial court applied the correct legal standard and did not err in concluding that the interveners had thus failed

to meet their burden of proof.

IV. Cross Appeal: The Interveners' Individual Liability

Thompson argues that the trial court erred by limiting his ability to recover the postintervention fees and costs from the companies, but excluding the interveners from liability individually. He argues that the interveners, by asserting counterclaims on the companies' behalf, stood in the companies' shoes and should accordingly be accountable for the award of fees and costs. The trial court's decision was based on RCW 23B.07.400(4), which provides: "On termination of the proceeding the court may require the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause." In excluding the interveners from individual liability, the trial court stated: "While the Court found against the interveners on most issues, the Court finds that the proceeding was not 'commenced without reasonable cause.'" Thompson does not dispute this conclusion or argue that the court improperly applied RCW 23B.07.400(4). Instead, he argues that the trial court could have found other means besides RCW 23B.07.400(4) to support the award of fees against the interveners individually.

A court has no power to award attorney fees as a cost of litigation in the absence of a contract, statute, or recognized ground of equity providing for fee recovery. Dayton v. Farmers Ins. Gp., 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Here, there is no applicable contract with the interveners, and Thompson concedes that the applicable statute does not support his argument. RCW 23B.07.400(4). Instead, Thompson relies on two cases to support his contention that the interveners, having

stood in the shoes of the companies, should be liable for the fees and costs.

The first case is Globe Construction Co. v. Yost, 169 Wash. 319, 325, 13 P.2d 433 (1932). That case involved a quiet title action in which a plaintiff, on its own motion, was substituted for a defendant in a pending action. Id. at 319. The Washington Supreme Court held:

> We are fully in accord with the trial court's ruling to the effect that the appellant, having by its own motion become substituted in the former action in the place of a defendant through whom it claims title, is bound by that judgment to the same extent that it would have been had it been originally made a party therein.

Id. at 325. Globe Construction is distinguishable from this case. In Globe Construction, the appellant acquired a property interest from another party and fully substituted in that party's stead. Id. at 321. In the present case, by contrast, the interveners were not substituted in the place of the Datamarine companies, but were merely asserting a derivative action.

The second case Thompson relies on is Brusso v. Running Springs Country Club, Inc., 228 Cal. App. 3d 92, 278 Cal. Rptr. 758 (1991). In that case, the California Court of Appeals held that interveners who had not signed the contracts containing an attorney fee provision could nevertheless be held personally liable. Id. at 111. But, that case does not represent Washington law, and provides only persuasive authority to this court. Where the Washington State Legislature has already directly addressed the issue of liability for fees and costs in a derivative action, we need not rely on authority from other jurisdictions. RCW 23B.07.400(4).

We hold that the trial court properly relied on RCW 23B.07.400(4) and affirm the

trial court's decision to limit liability for the attorney fees and costs solely to the companies.

V. Attorney Fees and Costs

This court reviews an award of attorney fees and costs on an abuse of discretion basis. Boeing Co. v. Heidy, 147 Wn.2d 78, 90, 51 P.3d 793 (2002). The trial court awarded Thompson costs and attorney fees in the amount of $278,848.97.[7] The court concluded that these fees and costs should be assessed against Datamarine companies, but not against the interveners individually for their derivative action and assertion of affirmative defenses as offsets.

The parties agree that the trial court's sole basis for awarding fees was an attorney-fee provision contained in the promissory notes evidencing Thompson's loans to the companies. That provision read:

> If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

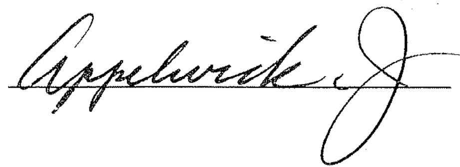
The interveners argue that many of the legal fees and costs associated with this case arose from his defense against their counterclaims and were unrelated to Thompson's collection process. The interveners' argument is unpersuasive. Their counterclaims arise directly out of Thompson's claims, and the only way that Thompson could enforce his notes and collect on them was to defend and prevail against those counterclaims. Indeed, the interveners argued at trial that the statute of limitations

[7] The court determined that the fees and costs incurred prior to the motion to intervene were $90,478.16 and the fees and costs incurred after intervention were $188,370.81.

should not bar their counterclaims, since they arose directly from the promissory notes. The trial court agreed, concluding: “All of the claims asserted by the interveners arise out of Thompson’s claims inasmuch as they are being asserted as defenses and set-offs to Thompson’s claims.” Accordingly, Thompson’s costs and attorney fees in responding to the interveners’ counterclaims were recoverable under the provision in the promissory notes. The trial court did not abuse its discretion in awarding attorney fees and costs to Thompson.

Both parties request attorney fees for the current appeal pursuant to RAP 18.1. Thompson is the prevailing party on the three breach of fiduciary duty claims and is entitled to attorney fees, based on the same fee provision in the promissory notes that was applied by the trial court. The interveners, however, are the prevailing party on the issue of individual liability and are entitled to fees for that issue, in accordance with RCW 4.84.330.

We affirm and award fees as indicated above.



WE CONCUR: