COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1586 **Cir. Ct. No. 2011CV224**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NATIONSTAR MORTGAGE LLC N/K/A BANK OF AMERICA, NA, AS SUCCESSOR BY MERGER TO BAC HOME LOANS,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ROBERT R. STAFSHOLT,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

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.

APPEAL and CROSS-APPEAL from orders of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Nationstar Mortgage LLC, n/k/a Bank of America, NA, appeals orders that: dismissed its foreclosure action against Robert Stafsholt and others; reinstated the underlying mortgage with a principal balance of $172,108.17; and permitted a $24,406.89 offset against that balance to account for attorney fees Stafsholt incurred in the foreclosure proceedings. Nationstar argues the circuit court erred by: (1) concluding Bank of America (BOA), one of Nationstar's predecessors in interest, breached the implied covenant of good faith and fair dealing; (2) concluding Stafsholt prevailed on his equitable estoppel affirmative defense; (3) granting Stafsholt declaratory judgment on his breach of contract claim; (4) granting Stafsholt an offset against the mortgage's principal balance for his attorney fees and costs; and (5) prohibiting Nationstar from collecting certain fees and interest.

¶2 In a cross-appeal, Stafsholt argues the circuit court erroneously exercised its discretion by reducing his requested attorney fees and costs to account for $40,239.92 in interest the court had already determined Nationstar could not collect from him. Stafsholt also argues the award of attorney fees and costs should be amended to account for additional fees and costs he has incurred in the circuit court and on appeal. Finally, Stafsholt argues in the alternative that, pursuant to WIS. STAT. § 802.05(3)(a)2., Nationstar should be ordered to show cause as to why Stafsholt is not entitled to recover his attorney fees and costs as a sanction for the wrongful conduct of Nationstar's predecessors in interest.[1]

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 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.

BACKGROUND

¶4 Stafsholt and his former wife, Colleen Stafsholt, owned property in New Richmond, Wisconsin.[2] On October 8, 2002, Colleen executed a note in the amount of $208,000 in favor of RBMG, Inc. The note was secured by a mortgage on the couple's New Richmond property, which both Stafsholt and Colleen granted to Mortgage Electronic Registration Systems, Inc., (MERS) as nominee for RBMG. At some point, the note was endorsed in blank, and it ultimately came into possession of Ocwen Loan Servicing, LLC. On January 31, 2011, the mortgage was assigned from MERS to BAC Home Loans Servicing, L.P. Between 2008 and 2011, the mortgage was serviced by Countrywide Home Loans, BAC Home Loans, and BOA.

[2] Throughout the remainder of this opinion, we refer to Robert Stafsholt as "Stafsholt" and Colleen Stafsholt as "Colleen."

¶5 BAC Home Loans filed this foreclosure action against Stafsholt, Colleen, and various other parties on February 25, 2011. The complaint alleged Stafsholt and Colleen had defaulted on the terms of the note and mortgage by failing to pay past-due payments as required. On May 31, 2012, BOA, successor by merger to BAC Home Loans, assigned the mortgage to Homeward Residential, Inc., f/k/a American Home Mortgage Servicing, Inc. Homeward Residential subsequently assigned the mortgage to Ocwen. Ocwen was substituted as plaintiff in this action in December 2013.

¶6 On December 3, 2013, with leave of the court, Stafsholt filed a verified amended answer and counterclaims. Stafsholt asserted as an affirmative defense that Ocwen was "estopped from foreclosing on the property" because the acts of its predecessors in interest had "created the dispute" and "induced" the default. Stafsholt also asserted counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, equitable estoppel, declaratory judgment, and assignment of mortgage under WIS. STAT. § 846.02.

¶7 A three-day trial to the court was held in July and August 2014.[3] The circuit court issued an order containing findings of fact and conclusions of law on April 8, 2015. As relevant to this appeal, the court found the following facts.

¶8 Section 5 of the mortgage required the Stafsholts to "keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term 'extended coverage,' and any other

[3] Although Colleen never formally appeared in the foreclosure proceedings, she attended two days of the trial.

hazards ….” Under section 3 of the mortgage, the Stafsholts were required to “furnish to Lender receipts evidencing payment [of insurance premiums] within such time period as Lender may require.” Section 3 further provided that, if the Stafsholts failed to do so, the lender could “exercise its rights under Section 9 and pay such amount,” and the Stafsholts would then be obligated to repay the lender.

¶9 In 2008, Countrywide Home Loans, which was then the servicer of the mortgage, sent Colleen two notices requesting that she provide evidence of insurance coverage for the subject property and informing her that, if Countrywide did not receive proof of coverage by a specified date, it would purchase lender placed insurance (LPI). Countrywide subsequently notified Colleen it had purchased LPI, and it charged the cost of the LPI to the loan account. Countrywide later received proof of coverage, after which it cancelled the LPI and credited the loan account for its cost. A similar sequence of events occurred in 2009, at which point the loan was being serviced by BOA.

¶10 On July 8, 2010, BOA sent Colleen a letter asking her to provide evidence of insurance coverage effective June 23, 2010—the expiration date of the previous policy—within thirty days. The letter advised Colleen that BOA would purchase LPI if it did not receive the requisite proof of coverage. The letter further informed Colleen that either she or her insurance agent could provide the required information through BOA’s website, by faxing a copy of the policy’s declarations page to BOA, or by mailing a copy of the declarations page to BOA using the return address shown on the letter. The letter stated that if BOA received proof of insurance, any LPI that had been purchased would be cancelled at no charge to the Stafsholts. BOA sent Colleen a second notice, containing the same information, on July 22, 2010.

¶11 On September 3, 2010, BOA posted a debit of $2,822 to the Stafsholts' loan account for the cost of LPI. On September 8, BOA sent Colleen a letter indicating it had purchased LPI for the policy period from June 23, 2010, to June 23, 2011. BOA again advised Colleen that she would be credited for the cost of the LPI if she provided proof of insurance.

¶12 As of September 8, 2010, Stafsholt had a homeowner's insurance policy that complied with section 5 of the mortgage. After Stafsholt received the September 8, 2010 notice from BOA regarding its purchase of LPI, he called BOA because he was "'irritated' that BOA still failed to recognize that he had and had always maintained a 'Conforming Policy.'" During that phone call, Stafsholt asked a BOA representative what he needed to do to have the LPI charge removed from his account. The representative responded that Stafsholt had to pay the LPI charge because BOA "had already taken out the hazard insurance premium and … she couldn't do anything about it." Stafsholt then asked who he needed to speak to in order to get the charge removed from his account, and the representative informed him he would need to speak to "the next elevated level of customer service." She further informed Stafsholt that "the only way that [he] could get to that next level of customer service would be if he skipped a mortgage payment and became delinquent on the mortgage."

¶13 Stafsholt made his August 2010 mortgage payment on September 12, 2010; BOA received the payment on or about September 16. Stafsholt failed to make the September 2010 payment. On September 16, 2010, BOA mailed Stafsholt a notice of default and intent to accelerate. Stafsholt subsequently failed to make the October 2010 payment. BOA therefore mailed him a second notice of default and intent to accelerate on October 18, 2010. Stafsholt had the financial ability to make the September and October 2010

mortgage payments. His intent in not doing so "was to follow the advice he received from the BOA representative; that if he skipped a mortgage payment, a higher ranking customer service representative could be reached and the [LPI] issue finally resolved."

¶14 On December 14, 2010, BOA generated a reinstatement calculation stating Stafsholt would have to pay $8,528.16 by December 27, 2010, to cure the default and reinstate his loan. That amount included the cost of the LPI, as well as fees for uncollected late charges, property inspection fees, foreclosure attorney/trustee fees, and foreclosure expenses. Between December 30, 2010, and January 27, 2011, Stafsholt called BOA five times in attempt to have the improper LPI charge removed from his account. BOA did not do so.

¶15 As of January 27, 2011, Stafsholt owed six months of mortgage payments, which amounted to $7,382.40. The reinstatement calculation BOA sent him on that date, however, demanded payment in the amount of $12,397.46, which included the cost of LPI. BOA and a subsequent mortgage servicer continued to charge Stafsholt $607.36 per month for LPI until July 30, 2012.

¶16 Based on these findings of fact, the circuit court made several conclusions of law. First, the court concluded BOA had improperly charged the Stafsholts for LPI. The court stated:

> 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 insurance and provided proof of a Conforming Policy. BOA improperly demanded that Stafsholt pay for the cost of the unnecessary lender-placed insurance and other costs.

For these reasons, the court concluded BOA had breached the implied covenant of good faith and fair dealing.

¶17 Second, the circuit court concluded BOA "caused the Stafsholts to default on the Mortgage and Note," and Stafsholt "acted in good faith and reliance on the misrepresentations of the BOA agent." The court therefore concluded Stafsholt had established the affirmative defense of equitable estoppel.

¶18 Third, the circuit court concluded BOA improperly commenced foreclosure proceedings against the Stafsholts after improperly declaring their loan in default.[4] Fourth, the court concluded BOA and its successors, including Ocwen, improperly maintained the foreclosure action. Fifth, the court concluded that, because BOA improperly declared the loan in default and improperly commenced foreclosure proceedings, Stafsholt was entitled to a declaratory judgment that BOA breached the note or mortgage, and Ocwen therefore "[could not] recover the costs and expenses incurred as a consequence."

¶19 Based on these conclusions, the circuit court dismissed the foreclosure action against the Stafsholts and reinstated their mortgage. The court stated Ocwen was entitled to be paid $172,108.17, the principal balance of the loan. However, the court ruled Ocwen could not recover any other "fees or costs, including late fees, mortgage fees, bankruptcy fees or interest." The court explained, "Plaintiff caused the harm and cannot benefit from its action / inaction." The court ordered that interest would "again accrue at the contractual

[4] The foreclosure action was actually filed by BAC Home Loans, not BOA. However, in its decision, the circuit court referred to Countrywide Home Loans, BAC Home Loans, and BOA collectively as BOA.

rate starting April 15, 2015." The court rejected Stafsholt's request for attorney fees, stating there was "no basis" to award them. The court also declined to award Stafsholt attorney fees and costs as a sanction against Ocwen under WIS. STAT. § 802.05, concluding Stafsholt "ha[d] not established procedural compliance with" that statute.

¶20 Stafsholt moved for reconsideration. He asked the circuit court to declare that the principal balance of the mortgage was $10,167.38, which he calculated by subtracting two amounts from $172,108.17: (1) $71,940.79 in attorney fees and costs he had incurred during the foreclosure proceedings; and (2) a $90,000 payment he made on April 17, 2015. With respect to attorney fees and costs, Stafsholt argued that, because he had expended significant attorney fees to defend himself against the foreclosure action, he was "left in a worse financial position than he would have been had he just done what most homeowners do …: capitulate and pay the improper charges that BOA and Ocwen were attempting to extract from him in order to remove the threat of foreclosure." For that reason, Stafsholt contended reducing the loan's principal balance by the attorney fees and costs he incurred in the foreclosure proceedings was necessary to place him "in the financial position that he should have been as of September 1, 2010," before BOA engaged in the conduct that caused him to default.

¶21 On June 16, 2015, the circuit court entered a written order granting Stafsholt's reconsideration motion in part. In its decision, the court began by observing that the doctrine of equitable estoppel "is used to 'prevent the assertion of what would otherwise be an unequivocal right.' ***Utschig v. McClone***, 16 Wis. 2d 506, 509[,] 114 N.W.2d 854 (1962) (citations omitted)." The court further explained it agreed with Stafsholt that "the relief here should serve to make him whole" and that "[t]he 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." The court therefore determined Stafsholt was entitled to recover a portion of his claimed attorney fees and costs. However, using the "Lodestar Method," the court determined a ten-percent reduction in Stafsholt's claimed attorney fees and costs was warranted.

¶22 From that reduced amount—$64,746.71—the circuit court then deducted "the $40,239.82 in interest that was already disallowed in the earlier order." The court explained, "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." This resulted in a net award of $24,506.89 in attorney fees and costs. The court deducted that amount from the loan's principal balance—$172,108.17—to reach a new principal balance of $147,601.28. After deducting the $90,000 payment Stafsholt made on April 17, 2015, the court determined the loan's remaining balance was $57,601.28. The court ordered that, if Stafsholt paid that amount by August 1, 2015, Ocwen would be required to "assign the mortgage to Stafsholt and terminate the underlying note," pursuant to WIS. STAT. § 846.02.

¶23 The record reflects that Ocwen transferred the servicing of Stafsholt's mortgage to Nationstar as of March 1, 2015. The circuit court therefore ordered Nationstar substituted for Ocwen as plaintiff. Nationstar now appeals from the order dismissing the foreclosure action and from the order granting in part Stafsholt's motion for reconsideration, and Stafsholt cross-appeals.

DISCUSSION

I. Breach of the implied covenant of good faith and fair dealing

¶24 Nationstar first argues on appeal that the circuit court erred by concluding BOA breached the implied covenant of good faith and fair dealing. "Parties to a contract have a duty of good faith to each other." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58, *opinion clarified on denial of reconsideration*, 2007 WI 23, 299 Wis. 2d 174, 727 N.W.2d 502 (per curiam).

> [T]here is an implied undertaking in every contract on the part of each party that he [or she] will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Id. (quoting ***Ekstrom v. State***, 45 Wis. 2d 218, 222, 172 N.W.2d 660 (1969)).

¶25 The circuit court concluded BOA breached the implied covenant of good faith and fair dealing by "unnecessarily purchasing insurance for Stafsholt when he had always maintained insurance and provided proof of a Conforming Policy," and by improperly charging Stafsholt for the unnecessary LPI. Nationstar argues we must overturn this legal conclusion because it is not supported by the circuit court's factual findings. *See* ***Wisconsin Nat. Gas Co. v. Gabe's Constr. Co.***, 220 Wis. 2d 14, 24 & n.6, 582 N.W.2d 118 (Ct. App. 1998) (on a given set of facts, whether a party breached the implied covenant of good faith and fair dealing is a question of law). Specifically, Nationstar asserts the circuit court "made no determination regarding when BOA became aware of the insurance policy [Stafsholt] purchased commencing June 23, 2010."

¶26 Nationstar is correct that the circuit court did not make an express factual finding regarding when BOA became aware that Stafsholt had purchased a conforming policy. However, "[e]ven if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision." ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. Here, the circuit court found that BOA "unnecessarily purchased" LPI for Stafsholt when he had "always … provided proof of a Conforming Policy." The court further found that BOA charged Stafsholt for the LPI on September 3, 2010. When read together, these express findings demonstrate the court implicitly found that Stafsholt provided proof of a conforming policy prior to September 3, 2010. Contrary to Nationstar's assertion, the court was not required to make an explicit finding regarding the precise date Stafsholt provided proof of a conforming policy.

¶27 Nationstar next argues the evidence presented at trial "irrefutably demonstrated" that BOA did not receive proof of the June 23, 2010 policy until April 2011, at which point BOA promptly credited Stafsholt for the cost of the LPI. When we review a circuit court's factual findings following a bench trial, we apply a deferential standard of review. The court's findings of fact "shall not be set aside unless clearly erroneous." WIS. STAT. § 805.17(2).

¶28 A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. On appeal, we search the record for evidence that supports the findings the circuit court made, not for evidence that would support a finding the court did not make. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). "When evidence supports the

drawing of either of two conflicting but reasonable inferences, the [circuit] court, and not this court, must decide which inference to draw." ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 776, 528 N.W.2d 446 (Ct. App. 1994). Moreover, when the circuit court acts as the finder of fact, it is the ultimate arbiter of the witnesses' credibility and the weight to be given to their testimony. ***Id.*** at 775. Credibility findings will not be overturned on appeal unless they are "inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶29 Applying these standards to the instant case, we conclude the circuit court's implied finding that Stafsholt provided BOA proof of insurance before September 3, 2010, is not clearly erroneous. At trial, evidence was introduced that, in May 2010, Stafsholt's insurer, Pekin Insurance, mailed the declarations page for a conforming policy for the period from June 23, 2010, to June 23, 2011, to BOA at Post Office Box 961291 in Fort Worth, Texas. Nationstar asserts the last two digits of that post office box number were incorrect, and the declarations page should have been sent to Post Office Box 961206. Because the declarations page was mailed to the wrong address, Nationstar asserts BOA did not receive the declarations page.

¶30 However, the record reveals that BOA had previously provided the post office box number ending in "91" to Stafsholt's insurance agency as its mailing address. Pekin had used that address to mail BOA the declarations page for the policy that went into effect on June 23, 2009, and that mailing was not returned. The May 2010 mailing regarding the policy that went into effect on June 23, 2010, was not returned to Pekin either. This evidence supports a

reasonable inference that BOA received the declarations page Pekin sent to it in May 2010, before BOA purchased LPI.

¶31 The evidence also supports a finding that the declarations page was faxed to BOA in July 2010. As noted above, on July 8, 2010, BOA sent Colleen a letter requesting proof of insurance. Stafsholt testified at trial that he typically received letters from BOA ten days to two weeks after they were dated. Based on that undisputed testimony, Stafsholt likely received the July 8 letter between July 18 and 20. The July 8 letter indicated proof of insurance could be faxed to BOA at a particular number. Stafsholt testified that, upon receipt of the July 8 letter, he drove to the office of his insurance agent, Cathy Melberg, and asked her to fax the declarations page for his then-current policy to BOA. Stafsholt testified he then watched Melberg fax the declarations page to BOA. Melberg similarly testified she had faxed a declarations page to BOA at Stafsholt's request, and she "could have" done so in July 2010.[5] Based on Stafsholt's and Melberg's testimony, the circuit court could reasonably find that the declarations page for the relevant policy was faxed to BOA in mid-July 2010.

¶32 Nationstar cites evidence supporting a contrary conclusion that BOA did not receive proof of insurance for the relevant policy period until April 2011. However, Nationstar's arguments in this regard ignore our standard of review, essentially urging us to again weigh the evidence and second-guess the circuit court's credibility determinations.

[5] Melberg initially testified she faxed the declarations page in July 2011. However, she subsequently clarified it "could have been 2010."

¶33 For instance, Nationstar observes that Melberg's records do not contain internal documentation indicating that the declarations page was faxed to BOA in July 2010. Nationstar also notes that Melberg failed to mention a July 2010 fax in an email she sent Stafsholt in March 2011 outlining the acts she took to provide BOA with proof of insurance. Admittedly, one reasonable inference from this evidence is that Melberg did not fax the policy's declarations page to BOA in July 2010. Other evidence in the record, however, provides a plausible explanation for the lack of an internal log entry regarding the July 2010 fax and for Melberg's failure to mention that fax in her March 2011 email to Stafsholt.

¶34 In particular, Stafsholt testified that, when he went to Melberg's office after receiving the July 8, 2010 letter, he "caught [Melberg] just leaving the office." He asked Melberg to fax his policy's declarations page to BOA, he watched her fax the document, "and then [they] both left." If Melberg faxed the declarations page at the end of the work day, immediately before leaving her office, it is reasonable to infer she did not document the fact that the fax had been sent before she left. It is also reasonable to infer that she inadvertently failed to document the fax when she next returned to work. The lack of internal written documentation regarding the fax provides a reasonable explanation for Melberg's failure to reference the fax in the email she sent Stafsholt in March 2011, approximately eight months later. These reasonable inferences support the circuit court's implied finding that BOA received the requisite proof of insurance before September 3, 2010.

¶35 Nationstar also notes that BOA's records indicate it did not receive proof of insurance for the relevant policy period until April 2011, at which point it promptly credited Stafsholt's loan account for the cost of the LPI. Nationstar cites BOA employee Heather Pollock's trial testimony that, had BOA received proof of

insurance before April 2011, that fact would have been noted in its records. The circuit court, however, found that "[t]his entire dispute was caused by BOA's poor record-keeping and business practices."

¶36 The record supports the circuit court's negative opinion regarding the accuracy of BOA's records. As one example, the record shows that, on February 24, 2014, Stafsholt's attorney served a subpoena on BOA requesting production of thirteen categories of documents relating to this dispute. In response, BOA produced 257 pages of documents. However, BOA subsequently produced an additional 105 pages of documents in response to a trial subpoena served on it by Ocwen, which contained essentially the same requests as Stafsholt's earlier subpoena. At trial, Pollock testified the additional documents produced in response to the trial subpoena were found in a computer system for the servicing location, which was separate from the "imaging system" used to produce the initial 257 pages of documents. Pollock testified she did not know why the additional documents were not produced by BOA in response to Stafsholt's subpoena.

¶37 In light of this and other evidence calling into question the reliability of BOA's record-keeping practices, BOA's failure to produce documents showing receipt of the May 2010 mailing or July 2010 fax does not convince us the circuit court's implied finding that BOA received proof of insurance from Stafsholt before September 3, 2010, was clearly erroneous. Again, that finding was supported by the testimony of Stafsholt and Melberg, which the court was entitled to find credible. *See* ***Plesko***, 190 Wis. 2d at 775 (circuit court is ultimate arbiter of witnesses' credibility and weight to be given their testimony); ***Global Steel Prods.***, 253 Wis. 2d 588, ¶10 (credibility findings upheld unless inherently or patently incredible or in conflict with uniform course of nature or fully established or

conceded facts). The court's implied finding that Stafsholt provided proof of insurance before September 3, 2010, supports its legal conclusion that BOA breached the implied covenant of good faith and fair dealing by unnecessarily purchasing LPI for Stafsholt and improperly charging him for its cost.

II. Equitable estoppel

¶38 Nationstar next argues the circuit court erroneously concluded Stafsholt established the affirmative defense of equitable estoppel. Equitable estoppel has four elements: (1) action or inaction; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either by action or inaction; and (4) which is to the relying party's detriment. ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620. The party asserting equitable estoppel as a defense must prove these elements by clear, satisfactory, and convincing evidence. ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 12 n.14, 571 N.W.2d 656 (1997). "[W]hen the facts are undisputed, or when the facts are disputed and the circuit court's factual findings are not clearly erroneous, this court reviews the application of equitable estoppel de novo." ***Affordable Erecting***, 291 Wis. 2d 259, ¶21.

A. Action or inaction by BOA

¶39 Nationstar argues there is insufficient evidence to support a conclusion that BOA committed any "wrongful action." However, the circuit court concluded BOA committed acts that caused Stafsholt to default on the mortgage. The court's factual findings support that conclusion.

¶40 Specifically, the circuit court found that: (1) although Stafsholt provided BOA with proof of insurance prior to September 3, 2010, on September 8 BOA mailed Colleen a notice indicating it had purchased LPI; (2) after Stafsholt received the September 8 notice, he called BOA because he was "irritated" that BOA "still failed to recognize that he had and had always maintained a 'Conforming Policy'"; and (3) during that phone call, Stafsholt asked what he needed to do to have the LPI charge removed from his account, and a BOA representative informed him he would need to skip a payment and become delinquent on his mortgage in order to receive the next level of customer service. These findings of fact are supported by Stafsholt's trial testimony, which the circuit court expressly found credible. The court's findings support a conclusion that BOA committed a wrongful action that caused Stafsholt to default on the mortgage.

¶41 Nationstar asserts the circuit court's factual findings regarding Stafsholt's call to BOA are clearly erroneous because Stafsholt "cannot even definitively state if [the call] took place before or after [he received] the September 8, 2010 communication" informing him BOA had purchased LPI. Nationstar notes that Stafsholt's counterclaim alleged the call occurred in August 2010. Nationstar also observes that Stafsholt expressed uncertainty during his trial testimony regarding whether the call occurred in August or September.

¶42 For two reasons, however, these discrepancies do not convince us the circuit court's finding that the call occurred in September 2010 was clearly erroneous. First, the timing of the notices BOA sent Stafsholt, in relation to Stafsholt's last mortgage payment, supports the court's finding that the call occurred in September. Prior to the September 8, 2010 letter, the last letter Stafsholt received from BOA was dated July 22, 2010. Based on Stafsholt's

undisputed testimony that he generally received letters from BOA ten days to two weeks after they were dated, it is reasonable to infer that he received the July 22 letter sometime between August 1 and August 5. Because Stafsholt subsequently made a mortgage payment on September 12, 2010, it does not make sense that the call in which BOA advised him to skip a mortgage payment would have occurred in August 2010, after Stafsholt received the July 22 notice. Instead, the circumstances reasonably indicate the call would have occurred after Stafsholt received the September 8 notice, sometime between September 18 and 22.

¶43 Second, the substance of Stafsholt's call to BOA suggests it occurred in September 2010 rather than in August. Stafsholt testified he called BOA to find out what he needed to do to have the LPI charge removed from his account. BOA did not purchase the LPI until September 3, 2010. As a result, it would not follow that the call to BOA, as described by Stafsholt, occurred in August.

¶44 Nationstar insinuates that, because Stafsholt's testimony suggested the phone call occurred in August, rather than September, he must have been lying about whether the call occurred in the first place. However, the circuit court expressly found Stafsholt's testimony regarding the call credible, and the circuit court was in a far better position than this court to judge Stafsholt's credibility. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260. Moreover, a fact-finder is free to piece together portions of the testimony it finds credible to construct a chronicle of the circumstances of the case. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Here, the court could reasonably accept Stafsholt's testimony regarding the occurrence and substance of the call and, based on other evidence in the record, conclude the call occurred in September 2010.

¶45 Nationstar also argues the circuit court's factual findings regarding the September 2010 call are clearly erroneous because there is no record of the call in BOA's records. Nationstar observes that BOA's call logs "recap conversations with the borrower during the term of the loan," and "the only entry in August or September of 2010 is a notation that a payment was made on September 15, 2010." This argument is unavailing. As we have already noted, the circuit court found that "[t]his entire dispute was caused by BOA's poor record-keeping and business practices," and the record supports that finding. Moreover, Stafsholt points to seven other communications regarding the Stafsholts' loan that were not documented on BOA's call log.

¶46 Finally, Nationstar asserts the September 2010 call must not have occurred because "it was the policy of BOA never to advise a borrower to go into default for any reason." Nationstar relies on Pollock's testimony in support of this assertion. However, the circuit court expressly found that Pollock's testimony in this regard was not credible, and Stafsholt's contrary testimony regarding the September 2010 call was credible. There is no basis for us to overturn these credibility findings. For these reasons, we reject Nationstar's argument that Stafsholt failed to establish any wrongful action by BOA.

B. Reasonable reliance

¶47 Nationstar next argues that, even if the September 2010 phone call occurred as Stafsholt described it, the evidence is insufficient to establish that Stafsholt reasonably relied on the advice he received during that call. The circuit court concluded Stafsholt "detrimentally relied on what the BOA representative told him regarding how to get the next level of customer service," and the court implicitly concluded that reliance was reasonable. Those conclusions were

supported by the court's factual findings that: (1) Stafsholt had the financial ability to make his mortgage payments; and (2) his intent in not doing so "was to follow the advice he received from the BOA representative; that if he skipped a mortgage payment, a higher ranking customer service representative could be reached and the [LPI] issue finally resolved." Stafsholt's trial testimony, which the court expressly found credible, supports these findings.

¶48 Nationstar argues the circuit court's findings regarding reasonable reliance are clearly erroneous for five reasons. First, Nationstar asserts that Stafsholt had a history of making late mortgage payments before September 2010, and he did not explain at trial why he failed to make the August 2010 payment until September 12. Nationstar contends this evidence shows that Stafsholt's failure to make the September 2010 and subsequent payments must not have been due to his reliance on the advice he received during the September 2010 call to BOA. That is one reasonable inference that could be drawn from the evidence. However, an equally reasonable inference is that, regardless of Stafsholt's history of making late payments prior to the September 2010 call, his failure to make payments after the September 2010 call was due to the advice he received from the BOA representative. Again, "[w]hen evidence supports the drawing of either of two conflicting but reasonable inferences, the [circuit] court, and not this court, must decide which inference to draw." ***Plesko***, 190 Wis. 2d at 776.

¶49 Second, Nationstar asserts Stafsholt's failure to make his mortgage payments in September 2010 and the following months could not have been due to his reliance on the advice he received during the September 2010 phone call because he made the August 2010 payment after that call occurred. However, there is sufficient evidence in the record to support a conclusion that Stafsholt made the August 2010 payment before the September 2010 call. The notice

Stafsholt received from BOA regarding its purchase of LPI was dated September 8, 2010. Based on Stafsholt's testimony, it is reasonable to infer he did not receive the notice until sometime between September 18 and 22. It is therefore reasonable to infer that the September 2010 call to BOA occurred sometime after September 18. Stafsholt testified he made the August 2010 payment on September 12, and BOA received that payment on or about September 16. Based on this evidence, a factfinder could reasonably conclude Stafsholt made the August 2010 payment before the September 2010 phone call.

¶50 Third, Nationstar observes that BOA sent Stafsholt notices of intent to accelerate on September 16 and October 18, 2010, and the bank's attorney sent him a letter on December 15, 2010, but Stafsholt did not contact BOA regarding his loan until December 30, 2010. Nationstar queries, "If [Stafsholt] relied on BOA's supposed instruction to default of the Subject Loan so he could reach the next level of customer service, why did he wait over three months after receiving a notice of default to contact BOA …?"

¶51 In making this argument, Nationstar again fails to account for evidence in the record supporting a competing reasonable inference. In particular, Stafsholt specifically testified he did not take any action in response to the September 16, 2010 and October 18, 2010 notices of intent to accelerate *because of* the advice he received from BOA during the September 2010 phone call. Moreover, Stafsholt testified he received the December 15, 2010 letter from BOA's attorney "sometime after" December 15, and it is undisputed he contacted BOA regarding the status of his loan less than two weeks later.

¶52 Fourth, Nationstar argues that, when Stafsholt contacted BOA on December 30, 2010, he did not "ask to speak to the 'next level' of customer

service." This argument elevates form over substance. When describing his December 30, 2010 phone call to BOA, Stafsholt testified:

> I called in and asked if there was anybody, live human being I could sit down at a table and say, here's my insurance and you guys placed insurance, and we just sit down and work it out. I offered to travel across the United States to Texas or wherever it might be that they would have a branch office that I could go into.
>
> ….
>
> Their response was that since my loan had been uploaded from Countrywide and not taken out at one of their branch offices, that it was inside their computer system, per se, and that there was not a branch office or a retail outlet that would have my file in their system, so, basically, there was no retail branch I could go sit down at.

This testimony supports a finding that, although Stafsholt did not use the specific words "next level of customer service" during the December 2010 phone call, he was, in substance, requesting a higher level of customer service—specifically, an in-person discussion to resolve his dispute with BOA regarding its purchase of LPI.

¶53 Fifth and finally, Nationstar argues Stafsholt "should have known" he did not need to default in order to have the LPI charge removed from his account because: (1) the notices BOA sent him on July 8, July 22, and September 8, 2010, advised him any charge for LPI would be reimbursed if he provided proof of insurance; and (2) in previous years, Stafsholt's account had been credited for the cost of LPI after proof of insurance was provided. In light of this history, Nationstar argues that, "[t]o the extent [Stafsholt] actually believed going into default was required, such reliance was not reasonable."

¶54 This argument ignores the circuit court's implied finding that BOA improperly charged Stafsholt for LPI on September 3, 2010, after he had provided BOA with proof of insurance. Moreover, Stafsholt testified he was charged for LPI in 2008, even though he had already provided proof of insurance for the relevant policy period. This evidence suggests that Stafsholt's own experience contradicted BOA's assertions that Stafsholt would not be charged for LPI if he provided proof of insurance and supports the circuit court's implicit conclusion that Stafsholt's reliance on the advice he received during the September 2010 phone call was reasonable.

C. Conclusion

¶55 For the reasons set forth above, we conclude the circuit court's factual findings, which are not clearly erroneous, support its conclusions that BOA committed a wrongful action by advising Stafsholt to default on his mortgage in order to have the LPI charge removed from his account, and that Stafsholt reasonably relied on that advice when he failed to make the September 2010 and subsequent payments. Nationstar does not dispute that this reliance was to Stafsholt's detriment. *See* ***Affordable Erecting***, 291 Wis. 2d 259, ¶33 (to establish equitable estoppel, party must show its reliance was detrimental). On this record, the circuit court properly concluded Stafsholt established the affirmative defense of equitable estoppel.

III. Breach of contract

¶56 Nationstar next argues the circuit court erred by concluding Stafsholt was entitled to a declaratory judgment that "Plaintiff breached the Note or Mortgage and cannot recover the costs and expenses incurred as a consequence."

Nationstar asserts there is no evidence to support a conclusion that it breached the note or mortgage.

¶57 We disagree. Under sections 3 and 5 of the mortgage, the Stafsholts were required to purchase homeowner's insurance and provide BOA with proof they had done so. Section 3 provided that, if the Stafsholts failed to meet these requirements, BOA could "exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount." Section 5 similarly provided that, "If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense."

¶58 Pursuant to these provisions, BOA was permitted to purchase LPI and charge the Stafsholts for its cost only if the Stafsholts failed to purchase homeowner's insurance and provide BOA with proof they had done so. Here, the circuit court made an implied finding that Stafsholt provided BOA with proof of insurance before BOA purchased LPI on September 3, 2010, and we have already determined that finding was not clearly erroneous. Based on that finding, and other evidence in the record, the court reasonably concluded BOA unnecessarily purchased LPI and improperly charged Stafsholt for its cost. By doing so, BOA breached the terms of the mortgage. Accordingly, the circuit court properly determined Stafsholt was entitled to a declaratory judgment on his breach of contract claim.

IV. Attorney fees and costs

¶59 In his posttrial brief, Stafsholt asked the circuit court to award him attorney fees and costs, arguing the "affirmative defense of equitable estoppel should result in reducing the amount that Stafsholt[] must pay to satisfy the

Mortgage and Note by the amount of Stafsholt's attorney's fees and costs in this action." In the alternative, Stafsholt asked the court to order Nationstar to "show cause why it should not be required to pay Stafsholt's attorney's fees and costs … pursuant to WIS. STAT. §§ 802.05(2) and (3)." In its initial order, the circuit court concluded there was "no basis" for Stafsholt to recover the attorney fees and costs he had incurred in the foreclosure proceedings, and it further concluded he was not entitled to attorney fees and costs as a sanction under § 802.05.

¶60 Stafsholt moved for reconsideration, asking the circuit court to reduce the principal balance of his loan by the amount of attorney fees and costs he incurred to defend himself against the foreclosure claim. Stafsholt argued the court had authority to do so based on its conclusion that he prevailed on his equitable estoppel affirmative defense. The court granted Stafsholt's motion in part, reducing the principal balance of the mortgage by a portion of Stafsholt's claimed attorney fees and costs. The court reasoned the relief awarded "should serve to make [Stafsholt] whole," and the "egregious" conduct of BOA and its successors "in handling this particular mortgage and subsequent foreclosure action" required "not only a legal but an equitable remedy as well."

¶61 Whether a party is entitled to attorney fees under a particular factual scenario is a question of law that we review independently. ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶16, 342 Wis. 2d 29, 816 N.W.2d 853. Under the American Rule, "parties to litigation typically are responsible for their own attorney fees." ***Id.***, ¶72. Exceptions to the American Rule exist where statutes provide that a prevailing party may recover his or her attorney fees, and where the parties contract for an award of attorney fees. ***Id.*** In addition, there is a limited exception to the American Rule providing that "an innocent party, wrongfully drawn into litigation with a third party, may recover those fees

reasonably incurred in defending against such action." ***Id.***, ¶73 (citing ***Weinhagen v. Hayes***, 179 Wis. 62, 63-66, 190 N.W. 1002 (1922)).

¶62 As Nationstar correctly notes, the circuit court did not rely on any of these exceptions as the basis for awarding Stafsholt attorney fees and costs. Instead, the court apparently agreed with Stafsholt that it could award him attorney fees and costs based on its conclusion he had established the affirmative defense of equitable estoppel. We agree with Nationstar that the court lacked authority to award Stafsholt attorney fees and costs on that basis. Equitable estoppel operates as a shield, not a sword. ***Utschig***, 16 Wis. 2d at 509. In other words, it is "a bar to the assertion of what would otherwise be a right; it does not of itself create a right." ***Murray v. City of Milwaukee***, 2002 WI App 62, ¶15, 252 Wis. 2d 613, 642 N.W.2d 541. In the instant case, because Stafsholt prevailed on his equitable estoppel defense, Nationstar was barred from asserting its right to foreclose Stafsholt's mortgage, in spite of Stafsholt's default. However, equitable estoppel did not create an affirmative right for Stafsholt to recover his attorney fees and costs from Nationstar. Although Stafsholt cites the general proposition that a court sitting in equity has "broad authorization to make the injured parties whole," *see* ***State v. Excel Mgmt. Servs., Inc.***, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983), he does not cite any authority specifically holding that attorney fees may be awarded based on a party's successful assertion of equitable estoppel as an affirmative defense, and we are unaware of any such authority.

¶63 Stafsholt raises three alternative arguments on appeal in support of the circuit court's attorney fee award. First, he argues the circuit court could have ordered Nationstar to pay his attorney fees and costs as a sanction under WIS.

STAT. § 802.05(3). Section 802.05(3) permits a court to sanction an attorney, law firm, or party for violating § 802.05(2).[6] Sanctions may be initiated either by a motion filed by one of the parties or on the court's own initiative. Sec. 802.05(3)(a). With respect to the first option, a motion for sanctions "shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2)." Sec. 802.05(3)(a)1. In addition, the motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." ***Id.*** Stafsholt does not, and cannot, argue he complied with these requirements.

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[6] WISCONSIN STAT. § 802.05(2) provides:

> REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

¶64 As for the second option, the statute provides that, "On its own initiative, the court may enter an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order." WIS. STAT. § 802.05(3)(a)2. Pursuant to this subdivision, Stafsholt argues the circuit court "could have ordered [Nationstar] to show cause why Stafsholt's attorney's fees should not be awarded" based on a violation of § 802.05(2)(d).[7] Although the circuit court failed to issue such an order, Stafsholt argues this court should do so.

¶65 There are at least two problems with this argument. First, Stafsholt does not cite any authority in support of his assertion that this court, rather than the circuit court, may issue an order to show cause under WIS. STAT. § 802.05(3)(a)2. Second, attorney fees are available as a sanction under § 802.05 only if the sanction is "imposed on motion." *See* § 802.05(3)(b). If imposed on the court's own initiative, sanctions are limited to "directives of a nonmonetary nature" and "an order to pay a penalty into court." ***Id.*** Thus, even assuming we could issue an order to show cause under § 802.05(3)(a)2., Stafsholt would not be entitled to recover his attorney fees and costs as a sanction for any violation of § 802.05(2) that Nationstar or its predecessors in interest committed. We therefore reject

[7] Stafsholt actually asserts the conduct of BOA and its successors violated both WIS. STAT. § 802.05(2)(c) and (d). However, the only specific violation he describes is an alleged violation of § 802.05(2)(d).

Stafsholt's argument that § 802.05 provides an alternative basis for the circuit court's award of attorney fees and costs.[8]

¶66 Stafsholt next argues the attorney fee award may be upheld as a proper exercise of the circuit court's inherent authority. Stafsholt correctly notes that circuit courts have inherent authority to award attorney fees and costs as sanctions for egregious conduct committed during the course of litigation. *See* ***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. The test for imposing attorney fees as a sanction is whether the sanctioned party "acted in bad faith or engaged in egregious misconduct." ***Schultz v. Sykes***, 2001 WI App 255, ¶48, 248 Wis. 2d 746, 638 N.W.2d 604. Stafsholt observes the circuit court specifically found that Nationstar's predecessors committed "egregious" conduct in their handling of Stafsholt's mortgage "and [the] subsequent foreclosure action."

¶67 The problem with Stafsholt's inherent authority argument is that it was raised for the first time in his reply brief in the cross-appeal. We generally decline to consider arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). "The grounds for such a rule are fundamental fairness. It is inherently unfair for an appellant to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from

[8] In addition, we observe that 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." (Emphasis added.) Stafsholt cites only one specific example of conduct by Nationstar or its predecessors that he alleges violated § 802.05(2). While he seeks to recover all of the attorney fees and costs he has incurred in this litigation, he does not explain how all of those fees and costs were incurred as a direct result of the single violation he alleges.

the opposing party." ***Id.*** Here, Stafsholt could have raised his inherent authority argument in his respondent's brief in Nationstar's appeal, in response to Nationstar's argument that the circuit court improperly awarded Stafsholt attorney fees and costs. He also could have raised the argument in his brief-in-chief in the cross-appeal. Instead, he waited to raise the argument until his reply brief in the cross-appeal, thus depriving Nationstar of the opportunity to respond to it. In addition, because the argument was not raised in the circuit court, Nationstar was also prevented from responding to it in that forum. Under these circumstances, affirming the circuit court's award of attorney fees and costs based on Stafsholt's inherent authority argument would be fundamentally unfair to Nationstar. We therefore decline to consider the argument.

¶68 Lastly, Stafsholt argues the circuit court had authority to award him attorney fees and costs under WIS. STAT. § 814.025 as a sanction for the commencement and continuation of the foreclosure action in bad faith. However, once again, this argument was raised for the first time in Stafsholt's reply brief in the cross-appeal, and we therefore decline to consider it. *See* ***A.O. Smith Corp.***, 222 Wis. 2d at 492. In any event, we note that § 814.025 was repealed in 2005. *See* ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶3, 302 Wis. 2d 299, 735 N.W.2d 1. Stafsholt's argument that he is entitled to attorney fees and costs under that statute is therefore without support.

¶69 For the foregoing reasons, we conclude the circuit court lacked authority to award Stafsholt the attorney fees and costs he incurred in these foreclosure proceedings. We therefore reverse the award of attorney fees and costs. Because we conclude there is no basis to award Stafsholt attorney fees and costs, we need not address Stafsholt's argument that he is also entitled to recover additional attorney fees and costs he incurred in the circuit court and on appeal.

V. Mortgage fees and interest

¶70 The last issue raised in the appeal and cross-appeal is whether Nationstar should be permitted to recover certain fees that were charged against Stafsholt as a result of his default, as well as the interest that accrued on the mortgage from the date of default until April 15, 2015. It its initial order, the circuit court concluded Nationstar was entitled to be paid the principal amount of Stafsholt's loan, but it could not collect any "other fees or costs, including late fees, mortgage fees, bankruptcy fees or interest." However, the court subsequently reversed course in its decision on Stafsholt's motion for reconsideration, concluding the attorney fees and costs awarded to Stafsholt should be reduced by the amount of interest that accrued on the loan between September 2010 and April 15, 2015.

¶71 We conclude the circuit court properly exercised its discretion by prohibiting Nationstar from recovering any fees that were charged as a result of Stafsholt's default. Foreclosure proceedings are equitable in nature, and the circuit court has authority to exercise discretion throughout the proceedings. ***Walworth State Bank v. Abbey Springs Condo. Ass'n, Inc.***, 2016 WI 30, ¶24, 368 Wis. 2d 72, 878 N.W.2d 170. A court sitting in equity "is given a broad authorization to make the injured parties whole." ***Excel Mgmt. Servs.***, 111 Wis. 2d at 490. Here, the court reasonably concluded the way to make Stafsholt whole was to place him, as closely as possible, in the same financial position he would have occupied had he not defaulted in September 2010 in reliance on BOA's erroneous advice. The court reasoned that, because Nationstar's predecessors in interest caused the default, Nationstar should not be able to benefit from their actions. Absent the default, Stafsholt would not have been charged the

fees Nationstar now seeks to recover. The court therefore reasonably determined Nationstar should be prohibited from collecting those fees.

¶72 Whether the circuit court should have prohibited Nationstar from collecting the interest that accrued on the loan between September 2010 and April 15, 2015, is a more complicated question. As noted above, the court initially prohibited Nationstar from recovering the interest that accrued during that period. However, in its subsequent order granting in part Stafsholt's motion for reconsideration, the court essentially permitted Nationstar to recover interest by reducing Stafsholt's award of attorney fees and costs by the amount of interest Nationstar sought to recover. Given that we have reversed the circuit court's decision to award Stafsholt attorney fees and costs, it is no longer possible for the attorney fee award to be reduced by the interest that accrued on the loan following the date of default. The question therefore becomes whether the court, in its initial order, properly prohibited Nationstar from recovering interest.

¶73 When the circuit court's initial order is read in isolation, the basis for the court's decision to prohibit Nationstar from recovering interest is unclear. However, when that order is read in conjunction with the subsequent order granting in part Stafsholt's motion for reconsideration, it appears the court's rulings regarding the recovery of interest were linked to its rulings regarding attorney fees. The court appears to have initially determined that, absent an award of attorney fees and costs to Stafsholt, it was appropriate to prohibit Nationstar from collecting interest in order to more closely approximate the financial position Stafsholt would have occupied but for the default. However, when the court thereafter changed its mind and decided to award Stafsholt attorney fees and costs, it determined it was necessary to deduct the amount of interest from the attorney fee award because Stafsholt had "already received the equitable offset for that

amount," and he was not "entitled to be placed in a better situation than he would have been in but for the actions of" Nationstar's predecessors.

¶74 When considered in conjunction with its rulings regarding attorney fees, the circuit court's rulings on the interest issue make sense, from an equitable perspective. Had Stafsholt not defaulted on his loan, he would not have incurred any attorney fees, but he would have been responsible for paying interest each month. Due to his default, he incurred over $70,000 in attorney fees and costs, but he also benefitted from retaining the sums not paid in mortgage payments and also not having to pay interest for over four years. Thus, if Stafsholt were able to recover his attorney fees and costs from Nationstar, it would make sense to allow Nationstar to recover interest because doing so would most closely approximate the financial position Stafsholt would have occupied but for the default. Conversely, absent an award of attorney fees and costs, allowing Nationstar to recover interest would place Stafsholt in a far worse financial position than he occupied before the default. Thus, without an award of attorney fees and costs, it appears reasonable, as a matter of fairness and in the interest of making Stafsholt whole, to prohibit Nationstar from collecting the interest that accrued during the period of default.

¶75 The analysis set forth in the preceding paragraph appears to be a fair and logical way to resolve the parties' dispute over Nationstar's recovery of interest. It comports with the notion that a court in equity has "broad authorization to make the injured parties whole." ***Id.*** However, in practice, applying this analysis in the instant case would result in accomplishing by indirect means what we have already determined cannot be done directly: awarding Stafsholt a portion of his attorney fees and costs. By prohibiting Nationstar from recovering interest *because of* the fact that Stafsholt has incurred significant attorney fees in this

foreclosure action, we would essentially be offsetting the interest against Stafsholt's attorney fees. As discussed in the previous section, Stafsholt has not properly raised on appeal any valid basis for an award of attorney fees and costs. *See supra*, ¶¶59-69. We therefore reverse that portion of the circuit court's original order prohibiting Nationstar from recovering interest.

¶76 The record on appeal is insufficient for us to address whether there are other grounds on which the circuit court could have determined it was appropriate to prohibit Nationstar from recovering interest. We therefore remand to the circuit court for further proceedings on this issue.

¶77 No WIS. STAT. RULE 809.25(1) costs to either party.

By the Court.—Orders affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.