SUPREME COURT OF THE STATE OF WASHINGTON

---

UMPQUA BANK,

Appellant,

v.

CHARLES A. GUNZEL, III, et al,

Respondent

No. 1002408

---

# RESPONDENT'S ANSWER IN OPPOSITION TO PETITION FOR REVIEW

---

Bret Uhrich, WSBA #45595
Attorney for Charles A. Gunzel III, Respondent

1333 Columbia Park Trail, Ste. 220
Richland, WA 99352
(509) 735-4444 – Telephone
(509) 735-7140 – Fax

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

The Court should deny the petition for review. Almost ten years after a promissory note came due in full, appellant Umpqua Bank sought to enforce a personal guaranty against respondent Charles Gunzel. Under Oregon law, the governing law in the agreement, "the cause of action against the guarantor accrues upon the maturity of the note…" *Eustis v. Park-O-Lator Corp.*, 435 P.2d 802, 804 (Or. 1967). The six-year statute of limitation expired prior to the commencement of this action.

The court of appeals further concluded that Oregon, like every other state to consider the issue, prohibits a prospective waiver of the statute of limitations. This is because the Oregon Supreme Court has said such prospective waivers violate public policy. *Mitchell v. Campbell*, 13 P. 190, 192 (Or. 1886).

Finally, the court of appeals did not abuse its direction when declining to consider new evidence because Umpqua Bank failed to meet the RAP 9.11 elements. The record demonstrates that the bank failed to present the proposed evidence to the court below even though the same legal arguments and factual

assertions were raised at the trial court. Because the decisions below were correct, and because the petition does not establish a basis for review, the petition should be denied.

## I. RESTATEMENT OF ISSUES PRESENTED

1. Whether the court of appeals correctly concluded that payments made upon an underlying promissory note did not extend the statute of limitations for the separate personal guaranty.

2. Whether the court of appeals abused its discretion in declining to consider additional evidence after the decision on review where the moving party could not meet the factors set forth in RAP 9.11.

## II. STATEMENT OF THE CASE

On May 28, 2004, Cornerstone Building Company (Cornerstone) as borrower executed a promissory note in the amount of $100,000.00 in favor of Umpqua Bank (Umpqua Bank) as lender. *CP 169.* On the same date, appellant Charles A. Gunzel III (Gunzel) executed a "commercial guaranty" in

which Gunzel personally guaranteed the Cornerstone loan. *CP 66-68*. Over the next several years, the loan between Cornerstone and Umpqua Bank was modified on multiple occasions. *See CP 169-80*. As part of these modifications, Gunzel executed further, substantially similar guarantees. *See CP 41-73*. The last modification occurred on June 27, 2007. *CP 175*.

Under the June 27, 2007 "Change in Terms Agreement," Cornerstone agreed to pay Umpqua Bank the principal amount of $200,000.00. *Id*. The maturity date of the note set forth therein was May 28, 2009. *Id*. On the same date, Gunzel executed a new commercial guaranty (Guaranty Agreement) which contained integration provisions overriding any previous terms and conditions. *CP 70-73*; *see also CP 72*. The governing law set forth in the Guaranty Agreement is the laws of the State of Oregon. *CP 72*.

Under the terms of the Guaranty Agreement, Gunzel guaranteed "full and punctual payment and satisfaction of the

indebtedness of Borrower to Lender…" *CP 70*. Gunzel's obligations under the guarantee were immediate upon receipt by the lender and were ongoing:

> This Guaranty will take effect when received by the Lender without necessity of any acceptance by the Lender […] and will continue in full force until all the Indebtedness incurred or contracted for […] have been fully and finally paid and satisfied and all of Guarantor's other obligations under the Guaranty shall have been performed in full.

*CP 70*. The Guaranty Agreement purported to waive effectively all defenses to collection under the agreement, including statutes of limitation-related defenses. *CP 71*. The Guaranty Agreement further contained a savings clause, providing that "if such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy." *CP 72*.

On May 28, 2009, Cornerstone defaulted on its obligations under the promissory note by failing to pay the note as due in full. *CP 75*; *CP 175*. In turn, Gunzel defaulted on his obligation in the Guaranty Agreement to make full and punctual payment.

*CP 70*. While Cornerstone continued to make payments on the note until 2013, no payments were made by Gunzel in regard to the Guaranty Agreement. *CP 75-81*; *CP 220*.

**Procedural History – Trial Court**

On March 28, 2019, Umpqua Bank commenced this action against Charles Gunzel and Ginelle Gunzel. *CP 1*. Thereafter, Gunzel propounded discovery to Umpqua Bank seeking copies of all loan documents between plaintiff and defendants as well as "copies of all records showing payments on the obligation and the balance owing after each such payment." *CP 21-22*. On June 7, 2019, Umpqua Bank produced a series of commercial guaranties and corporate resolutions to borrow, along with a "Note Transcript Statement." *See CP 21-22*; *CP 26-68*; *CP 75-81*. Umpqua Bank did not produce any promissory notes or loan agreements between Umpqua Bank and Cornerstone. *CP 19*. In a second set of discovery, Gunzel requested production of "all loan documents and/or other agreements between Plaintiff and Cornerstone…" *CP 85*. Umpqua Bank did not produce any

additional documents in its July 11, 2019 response, relying on the previous production. *CP 85-86*. Several months later, Umpqua Bank produced the promissory note requested. *See CP 169-71*.

On July 16, 2019, Gunzel moved for summary judgment based on the expired statute of limitation and the lack of liability to the marital community. *CP 4-17*. In doing so, Gunzel raised the arguments set forth in this appeal that under Oregon law, the statute of limitations on a personal guaranty is independent from the underlying obligation, and that waiver of the statute of limitations violates Oregon public policy. *CP 9-12*; *CP 9-16*. In support of the motion, Gunzel asserted that "Cornerstone Building Co. continued to make payments through December 16, 2013." *CP 7*. The basis for this factual assertion was Umpqua Bank's own responses to discovery showing the payment history on the promissory note and its matching account number #124790 as opposed to the Guaranty Agreement with account

number #525164. *CP 7* (*citing CP 75*); *compare also CP 75 with CP 169*.

In opposition to the motion, Umpqua Bank submitted the declaration of Lisa Redcay. *CP 111-12*. The declaration provided a subset of the same documents previously submitted by Gunzel. *Compare CP 113-40 with CP 26-73*. Umpqua Bank and Ms. Redcay did not submit any evidence rebutting the fact that Cornerstone made the payments on the promissory note as shown on the Note Transcript Statement. *See CP 111-12*.

The trial court dismissed the claims against the marital community, but concluded the payments on the promissory note by Cornerstone extended the statute of limitations on the separate Guaranty Agreement. *CP 156-57*.

**Procedural History – Court Of Appeals**

On March 25, 2021, the Washington Court of Appeals for Division III issued a decision reversing the trial court. *Umpqua Bank v. Gunzel*, 16 Wn. App. 2d 795, 483 P.3d 796 (2021) (*Gunzel I*). In reaching its decision, the court of appeals agreed

that the Oregon Supreme Court decision *Eustis* established that under Oregon law, a personal guaranty and a promissory note are separate contracts which can have different dates of accrual. *Id*. at 800 (*citing Eustis*, 435 P.2d 802). The court also noted that this was consistent with "the majority, if not universal, rule in the United States…" *Gunzel I*, 16 Wn. App. 2d at 801. In concluding the section, the court acknowledged that other jurisdictions have allowed a personal guaranty to be extended if the guarantor approves or ratifies the late payments extending the underlying promissory note. *Gunzel I*, 6 Wn. App. 2d at 802. However, Umpqua Bank never argued that Gunzel had approved of or ratified the payments on the promissory note. *Id*.

Following the decision, Umpqua Bank moved for reconsideration in the form of asking the court of appeals to consider additional evidence under RAP 9.11. *Umpqua Bank v. Gunzel*, __ Wn. App. 2d __, pgs. 1-2 (August 24, 2021) (*Gunzel II*). Umpqua Bank sought to submit additional checks dated July 2013 to December 2013 from a bank account titled in Charles

Gunzel's name. *Id. at pg. 11*. The court of appeals denied the motion as untimely because the motion to supplement was made after the court had rendered its decision on review. *Gunzel II, pg. 13*. The court further analyzed the elements of RAP 9.11 and concluded that Umpqua Bank failed to meet the required elements. *Id*. The court concluded that Umpqua Bank was on notice of the issue prior to the court reaching its decision, and that the proffered new evidence should have been submitted to the trial court and provided as responsive to discovery requests. *Id*. at 13-14.

## III. ARGUMENT

The Court should deny the petition for review. The petition does not establish any conflict with the decisions of this Court, nor does it raise issues of Constitutional or public importance.

### A. Criteria For Review And Standard Of Review.

A petition for review will be accepted by the Supreme Court only: (1) if the decision is on conflict with a decision of

this Court; (2) creates a conflict between the intermediate courts; (3) raises significant question of constitutional law; or (4) raises an issue of substantial public interest.

As a preliminary matter, it is difficult to see how the decision of the court of appeals could be in conflict with a decision of this Court or a decision of the court of appeals. Here, the Guaranty Agreement provides that the contract will be governed by the laws of Oregon. *CP 72*. Gunzel was unable to locate any decision of this Court where review was accepted in regard to the application of foreign law by a court of appeals under RAP 13.4(b)(1) or (b)(2).

Here, both parties agree that Oregon law governs the dispute. Further, as discussed *infra*, the decision of the court of appeals is consistent with decisions of the Supreme Court of Oregon and the intermediate courts.

As to the second assignment of error, Umpqua Bank frames the error as a deprivation of due process. *Pet. for Review, pg. 27*. The basis for this error is the court of appeals declining

to accept new evidence under RAP 9.11 after the court had rendered its decision, whether the question was litigated before the trial court, and perhaps whether the court of appeals created an appearance of fairness issue by critiquing Umpqua Bank and counsel in its decision. *See Gunzel II, pgs. 13; 16-19; Pet. for Review, pgs. 14; 32*. Supplementation of record on review is explicitly discretionary. RAP 9.11(a). Further, criticism of counsel for conduct occurring before the court does not demonstrate bias or perceived bias. *Spangler v. Sears, Roebuck & Co.*, 759 F. Supp. 1327, 1331-1335 (S.D. Ind. 1991) (evidence of bias must arise from an extradjudicial source and "[a] court need not shrink from using colorful or forceful language" in describing counsel's litigation conduct).

### B. The Decision Of Court Of Appeals Is Consistent With Oregon Case Law.

The Court should deny the petition for review because the court of appeal's decision Oregon case law. In reaching this conclusion, there are three primary issues: (1) when did the cause

of action accrue on the Guaranty Agreement, triggering the statute of limitations; (2) did the payments on the promissory note extend the statute of limitations on the Guaranty Agreement; and (3) whether the Guaranty Agreement's purported waiver of the statute of limitations defense violates Oregon public policy.

### 1. Oregon Law Provides That The Accrual Of Cause Of Action Commences On Breach.

Statutes of limitation are unsurprisingly a question of statute. ORS 12.010 ("Actions shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."). "Depending on the case, the question of when harm occurs may be a question of fact or a question of law." *Stevens v. Bispham*, 851 P.2d 556, 560 (Or. 1993). This means "'harm" in the legal sense, *i.e.*, a collection of facts that the law is prepared to recognize as constituting the 'harm' element of a claim…." *Id* (*citing Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979)).

It is undisputed that the "harm," or in this case, the "damage" element of a breach of contract claim occurred when Gunzel breached the Guaranty Agreement in May of 2009 and the underlying note became due in full. *See Moini v. Hewes*, 763 P.2d 414, 417 (Or. App. 1988). As discussed further *infra*, nothing in the Guaranty Agreement suggests that accrual of the cause of action was delayed to a later date or that Umpqua Bank suffered a new or distinct injury after the note became due in full. *CP 70*.

**2. Under Oregon Law, A Personal Guaranty Is Separate From The Underlying Promissory Note For The Purposes Of The Statute Of Limitations.**

Oregon law provides that payments of principal and interest will extend the statute of limitations on payment of a promissory note. ORS 12.240 *accord* RCW 4.16.280. However, this extension is specific to payments "upon an existing contract, whether it is a bill of exchange, promissory note, bond, or other evidence of indebtedness." *See* ORS 12.240 (emphasis added).

In *Eustis*, plaintiff O.B. Eustis loaned money to Park-O-Lator Corporation. *Id*. at 803. As consideration for this loan, defendant Abe Zaha agreed he would be personally liable for payment of the promissory note, but only in the event Park-O-Lator were to file "a petition in bankruptcy or shall be adjudicated a bankrupt, […] or if the corporation shall become insolvent." *Id*. The commercial promissory notes were dated September 1, 1956 and payable on September 1, 1957, resulting in expiration of the statute of limitations for the promissory notes on September 1, 1963. *Id*. The parties agreed that Park-O-Lator became insolvent in 1965 with the notes remaining unpaid, and Eustis brought an action on the personal guaranty. Zaha argued that the statute of limitations on the guarantee expired with the underlying note while Eustis argued the cause of action did not accrue until 1965 when Park-O-Lator became insolvent. *Id*. at 803-04.

On appeal, the Oregon Supreme Court began by recognizing the general proposition that "[i]n the usual contract

in which the guarantor guarantees the payment of a note, the cause of action against the guarantor accrues upon the maturity of the note and the statute of limitations runs on the guaranty at the same time it runs on the note." *Id*. at 804. However, the court noted that in this specific case, Zaha's guaranty was conditioned upon a specific event, the insolvency of the corporation, and therefor did not accrue until the occurrence of this event. *Id*. As a result, while acknowledging the general rule that the statute of limitations on a personal guaranty accrues upon maturity of the underlying debt, the judgment against Zaha was appropriate because guaranty had a different trigger for accrual of the obligation. *Id*. Recently, the Court of Appeals for Oregon reaffirmed the distinction between the statute of limitations for a personal guaranty and the underlying promissory note. *State by & through Bus. Dev. Dep't v. Huttenbauer*, 456 P.3d 340, 344 (Or. App. 2019).

Under the law as articulated in *Eustis*, the statute of limitations on the personal guaranty executed by Charles Gunzel

accrued no later than May 28, 2009 when the final extension of the loans made to Cornerstone Building Co. became mature and payable in full. As set forth in the Guaranty Agreement, the guaranty was a "continuing guarantee of payment and performance" obligating Gunzel to "absolutely and unconditionally guarantee full and punctual payment and satisfaction of the indebtedness of the Borrower to Lender." *CP 70*. In the section addressing the duration of the guaranty, the agreement states that "[t]his Guaranty will take effect when received by the Lender […] will continue in full force until all the Indebtedness incurred or contracted for […] have been fully and finally paid and satisfied and all of Guarantor's other obligations under the Guaranty shall have been performed in full." *Id*.

In other words, as set forth in *Eutis*, the Guaranty Agreement between Umpqua and Gunzel is the "usual" situation where "the cause of action against the guarantor accrues upon the maturity of the note…" *Id*. at 804. While the payments extended

the statute of limitations on the underlying note, ORS 12.240, the Guaranty Agreement is a separate contract and no payments were made under the Guaranty Agreement. *CP 75-81*; *CP 220*.

Notably, this is the default rule in jurisdictions which have addressed the issue. "In most of the jurisdictions in which the point has arisen, it has been held that a payment by a principal debtor will not operate to toll the Statute of Limitations as to a guarantor of the debt…" *See Acknowledgement, New Promise, or Payment by Principal as Tolling Statute of Limitations as Against Guarantor*, 84 A.L.R. 729 (1933); *see also JB Mortg. Co., LLC v. Ring*, 56 N.E.3d 866 (Mass. App. Ct. 2016)*; Corona v. Corona*, 329 P.3d 701, 708 (N.M. Ct. App. 2014); *Marinelli v. Lombardi*, 196 A. 701 (N.J. 1938); *Fed. Deposit Ins. Corp. v. Petersen*, 770 F.2d 141 (10th Cir. 1985). Because the court of appeals correctly concluded that payments on a promissory note do not extend the statute of limitations on a personal guaranty under Oregon law, the Court should deny the petition for review.

### 3. A Prospective Waiver Of A Statute Of Limitations Violates Oregon Public Policy.

Under Oregon law, statutes of limitations are matters of legislative policy and should not be altered or extended except by the legislature. *See Waxman v. Waxman & Assocs., Inc.*, 198 P.3d 445, 453 (Or. App. 2008).

In the petition for review, Umpqua Bank argues that Oregon courts allow for blanket waivers of defenses by contract. *Pet. for Review, pg. 24* (*citing W. J. Seufert Land Company v. Greenfield*, 496 P.2d 197, 201 (Or. 1972)). In *Greenfield*, the defendants executed an agreement in which they agreed to "assert no defense whatsoever to any action" on the contract. *Id*. at 198. The defendants argued that this clause rendered the agreement void in its entirety in violation of public policy. *Id*. The court on appeal disagreed that the entire contract was rendered void. *Id*. at 200. Instead, the court reasoned that each defense and purported waiver thereof must be considered individually. *Id*. As to waivers of the statute of limitations, the

Supreme Court for the State of Oregon has spoken: such waivers are void for violation of public policy. *See Mitchell v. Campbell*, 13 P. 190, 192 (Or. 1886); *Evans v. Finley*, 111 P.2d 833, 834 (Or. 1941).

> Suppose, then, an agreement made by the maker of a note that he would not set up the defense of usury. Would an action lie for a breach of that agreement? It appears not; and the reason is that the right to make the defense is not only a private right to the individual, but it is founded on public policy, which is promoted by his making the defense, and contravened by his refusal to make it. The same principle is applicable to the policy of the statute of limitations; and, with regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy.

*Mitchell*, 13 P. at 192 (Or. 1886) (*quoting Crane v. French*, 38 Miss. 503, 509 (1860)) (emphasis added).

> It is in its nature a statute of limitations. The right of the state of prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive.

*Evans*, 111 P.2d at 836-37 (*quoting Vance v. Vance*, 108 U.S. 514, 517 (1883) (emphasis added)).

Umpqua Bank asserts that the form of the Guaranty Agreement is routinely used by lenders throughout the country. *Pet. for Review, pgs. 18-19*. However, notably absent from this argument is any citation to case law upholding the prospective waiver contained in this allegedly ubiquitous Guaranty Agreement form. Oregon is not alone in recognizing that prospective waivers of the statute of limitations are void for public policy. The conclusion is near-universal. *See e.g. Haggerty v. Williams*, 855 A.2d 264, 268 (Conn. App. 2004); *accord Ahmad v. Eastpines Terrace Apartments, Inc.*, 28 A.3d 1, 8 (Md. App. 2011); 51 Am.Jur.2d 686, Limitation of Actions § 377 (2000).

In this case, by its very terms, the Guaranty Agreement purports to waive the statute of limitations at the commencement of the contract. This provision violates Oregon public policy and the court of appeals did not err in so concluding.

### C. The Court Of Appeals Correctly Denied Umpqua Bank's Motion To Supplement The Factual Record As Untimely And Inequitable, And Correctly Concluded That The Issue Was Raised And Litigated Before The Trial Court.

The Court should deny the petition for review because the court of appeals correctly rejected Umpqua Bank's motion for reconsideration and motion to supplement the record under RAP 9.11. The court of appeals further correctly concluded that the decision in *Gunzel I* was decided based on the same arguments made and litigated before the trial court.

#### 1. The Court Of Appeals Did Not Abuse Its Discretion By Rejecting The Motion To Supplement The Record.

Following the adverse decision in *Gunzel I*, the motion for reconsideration submitted by Umpqua Bank relied almost exclusively on its request to submit additional evidence to the court on review, citing the factors set forth in RAP 9.11. *Mtn. for Reconsideration, pgs. 1; 20-21*. RAP 9.11(a) provides as follows:

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if:
>
> (1) additional proof of facts is needed to fairly resolve the issues on review,
>
> (2) the additional evidence would probably change the decision being reviewed,
>
> (3) it is equitable to excuse a party's failure to present the evidence to the trial court,
>
> (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive,
>
> (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and
>
> (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

All six elements must be met before the appellate court will take or consider the additional evidence. *Pub. Hosp. Dist. No. 1 of King Cnty. v. Univ. of Washington*, 182 Wn. App. 34, 327 P.3d 1281, 1289 (2014). Supplementation of the trial court record is only allowed in extraordinary cases. *E. Fork Hills Rural Ass'n v. Clark Cnty.*, 92 Wn. App. 838, 845, 965 P.2d 650, 653 (1998),

*as amended* (Nov. 13, 1998). As the court of appeals noted, RAP 9.11 only allows for supplementation "before the decision of a case on review…." RAP 9.11(a); *Gunzel II, pg. 13*.

In addition to rejecting the motion as untimely, the court proceeded to review a subset of the elements required under RAP 9.11. *Gunzel II, pgs. 13-16*. In the petition for review, Umpqua Bank complains that the court made "equitable findings" regarding Umpqua Bank's failure to present the proposed evidence to the trial court. *Pet. for Review, pg. 33*. Perhaps recognizing the heavy burden required to supplement the record under RAP 9.11, Umpqua Bank equates the denial to a discovery sanction of dismissal. *See Pet. for Review, pgs. 32-33*. However, this review was necessarily invited by Umpqua Bank's motion to supplement the record as both RAP 9.11(a)(3) and RAP 9.11(a)(6) require the movant to establish the equity of allowing for supplementation of the record. As the court of appeals noted, the record demonstrated that Umpqua Bank could not show it

was equitable to excuse its failure to present the evidence to the trial court. *See Gunzel II, pg. 14*.

Finally, while unaddressed by the court of appeals, it is important to note that Umpqua Bank makes a bare allegation that Gunzel committed perjury. The allegation appears to exclusively based on the fact that account name on the checks means that the payments were made by Gunzel. The ownership of funds within a bank account is not controlled by who is named on the account. RCW 30A.22.130. While the payor financial institution may rely on the form of the account "absent actual knowledge of the existence of dispute between depositors, beneficiaries, or other persons claiming an interest in funds deposited in an account," this "protection accorded to financial institutions under RCW 30A.22.120… shall have no bearing on the actual rights of ownership to deposited funds by a depositor, and/or between depositors...." RCW 30A.22.120 (first quotation); RCW 30A.22.130 (second quotation).

Moreover, Oregon statutory law provides that a corporation's existence to continues post-dissolution for winding up corporate affairs.

> A dissolved corporation continues the corporation's corporate existence but may not carry on any business except that appropriate to wind up and liquidate the corporation's business and affairs, including:
>
> (a) Collecting the corporation's assets;
> …
> (c) Discharging or making provision for discharging the corporation's liabilities;
> …
> (f) Doing other acts necessary to wind up and liquidate the corporation's business and affairs.

ORS 60.637(1) (emphasis added); *see also Wohrman v. Rogers*, 362 P.3d 704, 708 (Or. App. 2015) (discussing post-dissolution liability of members in the context of limited liability companies). Because Umpqua Bank's motion to supplement the record was untimely and because it failed to establish the elements necessary for supplementation, the court of appeals did not abuse its discretion in rejecting the motion.

### 2. The Court Of Appeals Correctly Determined That The Decision On Review Was Based On The Same Legal Arguments Litigated Before The Trial Court.

The Court should deny the petition for review because the court of appeals correctly concluded that the decision in *Gunzel I* was based on the same questions litigated below. In the petition for review, Umpqua Bank devotes a substantial portion of its argument asserting that the court of appeals decision rested on an "issue [that] was never developed or litigated in either summary judgment proceeding." *Pet. for Review, pg. 28*. As the court of appeals identified, this assertion is based on "arguments that misrepresent or misconstrue the record before the trial court and before this court." *Gunzel II, pg. 16*.

In his motion for summary judgment, Gunzel asserted that "[t]hereafter, Cornerstone Building Co. continued to make payments through December 16, 2013." *CP 7*. As discussed *supra*, the basis for this factual assertion was Umpqua's own responses to discovery showing the payment history on the

promissory note and its matching account number #124790 as opposed to the personal guaranty with account number #525164. *CP 7* (*citing CP 75*); *compare also CP 75 with CP 169*. The identity of the payor and upon which obligation the payments were made was the argument raised in the motion for summary judgment itself. *CP 9-10*. In opposing summary judgment, Umpqua Bank chose to rely on the waiver of statute of limitations and that *Eustis v. Park-o-Lator* was distinguishable from the case before the court. *CP 97-100*; *CP 101*. It did not attempt to establish that Gunzel had ratified or approved of the payments on the underlying note. *Id*; *see Gunzel I*, 6 Wn. App. 2d at 802.

Thereafter, Umpqua made its own motion for summary judgment. *See CP 158*. Gunzel opposed the motion on the basis that the extension of the promissory note was done without consent of the guarantor, relieving the guarantor of its obligations under the guaranty. *CP 215-218* (*citing Marc Nelson Oil Prod., Inc. v. Grim Logging Co.*, 110 P.3d 120, 123, (Or. App. 2005) *as*

*modified*, 115 P.3d 935 (2005)). Umpqua submitted a reply which disputed this argument. *See CP 226*. In other words, the decision of this Court was not "un-litigated" at the trial court, it was extensively litigated, and Umpqua simply disagreed with the legal argument. The court of appeals correctly analyzed the record on review.

### D. Attorney's Fees Under RAP 18.1(j).

The Court should award Gunzel attorney's fees related to answering the petition for review pursuant to RAP 18.1(j). Under the Guaranty Agreement, Gunzel agreed to pay "Lender's attorney fees and legal expenses, incurred in connection with enforcement of the Agreement." *CP 70*. This provision includes attorney's fees incurred on appeal. *Id*. Under ORS 20.096, attorney's fees clauses in contract are deemed to be bilateral, regardless of the contract's provisions. *Accord* RCW 4.84.330.

## IV. CONCLUSION

The Court should deny the petition for review in this matter because the petitioner has failed to meet any of the criteria

for review under RAP 13.4(b). In addition to not meeting the criteria for review, the petition fails to seriously engage with the decisions of the court of appeals. At no point does the petition cite the leading Oregon case law on personal guaranties, *Eustis*. The petition makes no mention of *Mitchell* or *Evans* which establish that a prospective waiver of the statute of limitations violates Oregon public policy. These decisions are discussed extensively in the opinion below. *Gunzel I*, 16 Wn. App. 2d at 800; 808-09. Instead of explaining how these cases are inapplicable or distinguishable, Umpqua Bank simply pretends that they do not exist.

Similarly, Umpqua Bank does not contend with the court of appeals' detailed review of the record regarding what was argued before the trial court. *Gunzel II*, *pgs. 17-18*. It does not address why Petitioner should have been allowed to submit additional evidence after the decision on review had been reached where the evidence was not only submitted to the trial court, but responsive and unproduced in discovery. *Id. at pg. 14*.

The petition for review does not even cite RAP 9.11(a), the very relief requested in its motion to supplement the record. The inability to confront the bases of the decisions evinces the petition's lack of merit. As a result, the Court should deny the petition for review.

Pursuant to RAP 18.17(b), the undersigned certifies that this document was produced using word processing software, and contains 5,000 words exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits.

DATED this 25th day of October 2021.

_____

BRET UHRICH, WSBA #45595

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 25th, 2021 I e-mailed and served by electronic service via the Court of Appeals eFiling with Appellate Courts Portal, a true and correct copy of the foregoing ***Respondent's Answer in Opposition to the Petition for Review*** to:

Sean Leake
Williams Kastner
601 Union St # 4100
Seattle, WA 98101
(206) 628-6600
sleake@williamskastner.com

Daniel Brown
Williams Kastner
601 Union St # 4100
Seattle, WA 98101
(206) 628-6600
dbrown@williamskastner.com

DATED this 25th day of October, 2021 at Richland, WA.

/s/ Bret Uhrich
Bret Uhrich, WSBA #45595

## WALKER HEYE MEEHAN & EISINGER PLLC

## October 25, 2021 - 3:01 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 100,240-8 |
| **Appellate Court Case Title:** | Umpqua Bank v. Charles A. Gunzel III, et ux. |
| **Superior Court Case Number:** | 19-2-00789-1 |

**The following documents have been uploaded:**

- 1002408_Answer_Reply_20211025150114SC496506_1832.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  *The Original File Name was Answer To Petition for Review.pdf*

**A copy of the uploaded files will be sent to:**

- dbrown@williamskastner.com
- sleake@williamskastner.com

**Comments:**

---

Sender Name: Bret Uhrich - Email: buhrich@walkerheye.com
Address:
1333 COLUMBIA PARK TRL STE 220
RICHLAND, WA, 99352-4713
Phone: 509-735-4444

**Note: The Filing Id is 20211025150114SC496506**