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Case No. 100728-1

No. 100728-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Petition from Court of Appeals No. 82162-8-I
(Consolidated with Nos. 82163-6-I, 82164-4-I, & 82165-2-I)

Appeal from Snohomish County Superior Court Case Nos. 20-2-03588-31, 20-2-03590-31, 20-2-03589-31, & 20-2-03587-31)

Gary Merritt and Jeanette Merritt

Petitioner, Appellant Plaintiffs,

— *v.* —

USAA Federal Savings Bank,

Respondent, Respondent Defendant.

RESPONDENT USAA FEDERAL SAVINGS BANK'S ANSWER TO PETITIONERS MERRITT'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Defendant USAA Federal Savings Bank ("USAA FSB"), a federally charted savings association with its principal place of business located in San Antonio, Texas. USAA FSB is the beneficiary of the Deeds of Trust for four properties owned by Petitioners Gary Merritt and Jeanette Merritt ("Merritt").

USAA FSB opposes Merritt's Petition for Review.

II. DECISION BELOW

The Unpublished Opinion *Merritt v. USAA Federal Savings Bank*, Case No. 82162-8-I (Consolidated with No. 82163-6-I, No. 82164-4-I, and No. 82165-2-I), of the Washington Court of Appeals, Division I, authored by Honorable Beth M. Andrus, Acting Chief Judge as amended on March 28, 2022, with Honorable Cecily C. Hazelrigg and Honorable Lori Kay Jones concurring. There is no request to have the opinion published.

USAA FSB timely sought Partial Reconsideration in seeking an award of attorney's fees on February 17, 2022, for the Unpublished Opinion issued on February 7, 2022. The Court of

Appeals went on grant USAA FSB's Motion for Partial Reconsideration for Attorneys' Fees. USAA FSB timely filed Attorneys' Fees Declarations—there was no objection to said Declarations—and the Court of Appeals Clerk granted USAA FSB its attorneys' fees pursuant to the unpublished opinion.

III. FACTS

A. Bankruptcy Related Procedure

In 2012, the Merritts filed for Chapter 7 bankruptcy which was ultimately discharged in 2013. (CP, Vol. 1, 173.) The Bankruptcy Court's discharge was silent as to any alterations to, or disturbances of, the Merritts' secured debts:

> The Debtor(s) filed a Chapter 7 case on November 13, 2012. It appearing that the Debtor is entitled to a discharge,
>
> IT IS ORDERED:
>
> The Debtor is granted a discharge under 11 U.S.C. § 727.

(CP, Vol. 1, 173.) Three years later, District 1 of the Court of Appeals issued an opinion in *Edmundson v. Bank of America*, 194 Wn. App. 920 (2016), holding that the deeds of trust in that case *were* enforceable despite those borrowers having received a discharge in Chapter 13 bankruptcy. (*Id.*) There has been no

other significant change in applicable statutes. The Merritts' bankruptcy case has never been re-opened. In June 2020, the Merritts filed suit in Snohomish County, Superior Court.

B. Underlying Facts of the Property and Loans

The subject properties are all investment and/or rental property, as Petitioners reside at a separate address in Marysville. Petitioners seek to quiet title to each of the four investment properties solely as to USAA FSB, while not challenging their first mortgages, which they have continued to pay following bankruptcy. For ease of reference, Respondent organizes the cases as follows:

	"Merritt 1"	**"Merritt 2"**	**"Merritt 3"**	**"Merritt 4"**
CoA No.	#82164-4-I	#82162-8-I	82163-6-I	82163-2-I
Super. Court No.	20-2-03590-31	20-2-03588-31	20-2-03589-31	20-2-03587-31
Address	7601 69th Street NE	9926 53rd Drive NE	1083 Alder Avenue	5217 63rd Drive NE
Tax No.	00838600004500	30051500307400	30052800214500	00814200000500
Loan Amt.	$74,000; $51,000	$64,500	$79,000	$98,000
Maturity Date	May 19, 2025	May 3, 2027	Jan. 29, 2027	Feb. 2, 2027

IV. ISSUE PRESENTED FOR REVIEW

USAA FSB respectfully submits the following alternative issue statement, which it raises conditionally[1] only in the event the Court grants review:

Whether a bankruptcy discharge under Chapter 7 entitles a borrower to quiet title in a mortgaged property, when the note has not matured, the note has not been accelerated, and where some, but not all, of the installments due are beyond the statute of limitations.

V. REVIEW SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO SHOW ANY RAP 13.4 GROUND FOR REVIEW AND THEY ARE WRONG ON THE LAW

When the note secured by the deed of trust has a stated maturity date, the right to seek judicial foreclosure on the deed of trust accrues on that date. (*Strong v. Sunset Copper Co.*, 9 Wn.2d 214, 221 (1941).) The subjects Notes will mature in 2025 and 2027, such that the statute of limitations would run in 2031 and 2033. (CP, Vol. 1, 92, Vol. 2, 247, Vol. 3, 441, Vol. 4, 659.) As those dates have not come to pass and the Deed of

[1] (*Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 725 (1993).)

Trust survives bankruptcy, the Deeds of Trust are intact and Petitioners may not quiet title.

First, Petitioners conceded the Deed of Trust survives bankruptcy; second, Petitioners conceded the Deed of Trust has not matured; third, Petitioners conceded the Note is an installment contract that has not been accelerated to start the statute of limitations prematurely; and fourth, Petitioners agreed that bankruptcy did "not accelerate" the Notes. "The plaintiff in an action to quiet title must succeed on the strength of his own title and not on the weakness of his adversary." (*Magart v. Fierce*, 35 Wn. App. 264, 265 (1983) (citing *Rohrbach v. Sanstrom*, 172 Wash. 405, 406, 20 P.2d 28 (1933).)

A. Petitioners Do Not Meet Any Standards for Discretionary Review under RAP 13.4(b)

The lower courts' rulings denying Petitioners' request for summary judgment, granting USAA FSB summary judgment, and then rejecting Petitioners' appeal do not meet any of the necessary criteria for the extraordinary remedy of review by this Court.

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(RAP 13.4(b).) Petitioners present arguments under subparagraphs (1) and (4). (*See* Pet'rs' Br. at 1-2.)

B. There is No Conflict with Any Supreme Court Decision

Petitioners (incorrectly) contend the Court of Appeals ruling conflicts with two Supreme Court cases, *Herzog v. Herzog* and *Pratt v. Pratt*. (Pet'rs' Br. at 8-10.) On the contrary, the Court of Appeals' decision **is consistent** with both *Herzog* and *Pratt* as shown by Petitioners' trial-court and appellate-court briefing, wherein they base all of their arguments off of an erroneous interpretation of *Edmundson v. Bank of America*. (CP, Vol. 1, 8-10, Vol. 2, 219-221, Vol. 3, 413-415.) Neither *Herzog* nor *Pratt* led to the relief Petitioners sought in bringing these lawsuits. Until this Petition, Petitioners have never argued that the trial court ruling was inconsistent with any Washington

Supreme Court Rulings. (*See* CP, Vol. 1, 8-10, Vol. 2, 219-221, Vol. 3, 413-415, Vol. 4, 631-633; *See* Pet'rs' Opening Appellate Br.; *See* Pet'rs' Reply Appellate Br.)

1. <u>There is No Conflict with *Herzog v. Herzog*</u>

The Court of Appeals' ruling here could not possibly conflict with *Herzog v. Herzog*, 23 Wn.2d 383, 161 P.2d 142 (1945), as the Merritts contend. (Pet'ers' Br. at 1-2, 8-9.) The Merritts' sought relief, on the contrary, would undercut the ancient legal doctrine for the timely recovery of *installment* payments recognized in *Herzog*. (*Id.*)

Herzog v. Herzog is a World-War-II era family-law case, wherein a divorce contract established installment payments, alimony. (*Id.*) There was no lien or other security device at issue therein and no party there sought bankruptcy. (*Id.*) In *Herzog*, the issue was whether each installment had a separate statute of limitations or whether there was a single statute of limitations for all payments, which would accrue at maturation of the divorce agreement/decree. (*Id.*) No party sought to quiet title there nor did any party argue that a bankruptcy decree effectively accelerated the divorce contract.

The opinion in *Herzog* has nothing to do with whether a bankruptcy discharge effectively starts the running of the statute of limitations before a secured debt matures. (*Id.*) *Herzog* does not even mention the statute cited by Merritts, RCW 4.16.040. To this point, Merritts never even discussed *Herzog* in their opening brief before the Court of Appeals. The only time *Herzog* is mentioned therein, is when Merritts quote the unpublished opinion in *Luv*. *See* Pet'rs' Opening Appellate Br.; *See* Pet'rs' Reply Appellate Br.)

2. <u>There is No Conflict with *Pratt v. Pratt*</u>

Pratt v. Pratt is a 100-year-old opinion wherein more than three years passed from the last payment—there was no written agreement for the loan, only a deed for a lien—and then the lender's estate impermissibly filed suit. (*Pratt v. Pratt*, 121 Wash. 298, 299 (1922).) There was no maturation or acceleration in *Pratt* because there was no written agreement. (*Id.*) In *Pratt*, there was no bankruptcy, and just like *Herzog*, there was a different statute in effect for the statute of limitations. (*Id.*) Petitioners' theory about bankruptcy discharge

initiating the statute of limitations is a completely distinct legal theory from the concepts addressed in *Pratt*. (*See* Pet'ers' Br.)

C. There is No Conflict with Any Published Court of Appeals Decision

Merritts incorrectly offer *Luv v. West Coast Servicing* as supposedly meeting the threshold for Review under RAP 13.4(2), but *Luv* is an unpublished decision by the Court of Appeals. (*Luv v. W. Coast Servicing, Inc.*, 18 Wn. App. 2d 1049 (2021), *rev. denied*, 198 Wn.2d 1035 (2022).) The respondent in *Luv*, the lender and beneficiary, also petitioned this Court for review, but was denied without comment or explanation just earlier this year. (*Luv v. W. Coast Servicing, Inc.*, 198 Wn.2d 1035 (2022).) Because the *Luv* decision is unpublished, any conflict with it does not qualify for review under RAP 13.4(2), which only applies to published decisions. (*Luv*, 18 Wn. App. 2d 1049.) This Court should deny Merritt's Petition, just as it did in *Luv*.

The presence of *Edmundson v. Bank of America* also does not satisfy RAP 13.4(2), even though it is published—it too was cited in the Petition for Review in *Luv*. (*Compare*

Pet'r's Br. No. 100188-7, *with* Pet'rs' Br.) In this case, the *Edmundson* opinion was central to the analysis before the trial court and appellate court, which both found for USAA FSB. In other words, the issue of whether this ruling conflicted with *Edmundson* has already been fully litigated and addressed in all the lower court briefings. (*Edmundson v. Bank of Am.*, 194 Wn. App. 920, 922 (2016).) The Court of Appeals has gone on to even suggest that *Luv* alone is inconsistent with *Edmundson*: "The Merritts … argument, however, is based on an erroneous reading of *Edmundson* …" (*Merritt v. USAA Fed. Sav. Bank*, 82162-8-I, 2022 WL 895949, at *2 (Wash. Ct. App. Mar. 28, 2022).)

D. There is no Substantial Public Interest

1. Petitioners are Not Common Homeowners

Merritts cannot show a "substantial public interest" based on vague claims that "this is not a unique situation." (Pet'rs' Br. at 12.) Further, Merritts are not common "homeowners" as their brief suggests and comparing them to regular homeowners is disingenuous. Merritts made investment decisions—business decisions—in acquiring these properties and renting them out.

The Merritt's efforts to turn residential properties into sources of cash flow and otherwise speculate on the real estate market in buying residential houses sets them apart from homeowners that might "involve an issue of substantial public interest." (RAP 13.4(b).) The lender in *Luv v. West Coast* sought discretionary review and was denied. In *Luv*, however, the borrower was a regular homeowner—not a speculator, investor, or business operator—and yet this Court did not find that case as involving a substantial public interest.

2. Petitioners Present "Facts" and Arguments that Do Not Apply to the Parties or this Case

Merritt's attempt to arouse sympathy for hypothetical third parties seeking to foreclose on debt bought "for pennies on the dollar" fails to advance their position whatsoever—USAA FSB is the original lender and USAA FSB is not seeking to foreclose. (*See generally* Pet'rs' Br.) If Merritts seek to sell the properties, USAA FSB is entitled to have its liens satisfied during closing of those sales, less any installments beyond the statute of limitations.

Merritts state "a reasonable statute of limitations period encourages public trust of the judiciary system." (Pet'rs' Br. at

12.) But there is no contest between the parties that the statute of limitations is anything other than a six-year period. Contrary to Petitioners' insinuations, there are reasonable limits already with six years attaching to each installment from when it is owed, and the limit on the remedy for foreclosure ending six years from maturation or acceleration. (RCW 4.16.040.) Petitioners' sought relief, on the contrary, would lead to less certainty and encourage lenders to foreclose as soon as possible following a bankruptcy, instead of allowing both parties to benefit if the property value returns.

3. Petitioners' Cited Authorities Do Not Demonstrate a Substantial Public Interest

Merritts offer *Walker v. Benson & McLaughlin, P.S.*, while insinuating (incorrectly) that USAA FSB is seeking to enforce the deed of trust without any limit in time. (*See* Pet'rs' Br. at 13-14 (citing 79 Wn. App. 739, 745-46 (1995)).) But *Walker* is a case regarding a demand note, which has different rules from installment notes. (*Walker*, 79 Wn. App. at 745-46.) Demand notes mature at their inception. Further, the *Walker* case does not involve bankruptcy, which is central to Petitioner's legal theory. (*See Walker*, 79 Wn. App. 739.) As

Walker does nothing but confirm that the statute of limitations runs from maturation—demand notes mature at their inception—Petitioners cannot credibly argue the law is undeveloped and they cannot contend that there is some void, some absence of law, that must be addressed for the sake of Washington State's public. (*Contra* Pet'ers' Br. at 12-14.)

Merritts offer *Langlois v. BNSF Railway Company*, but that is a case where the Court saved a case admittedly *beyond* the statute of limitations. (*See* Pet'rs' Br. at 14-15 (citing 8 Wn. App. 2d 845 (1995)).) The *Langlois* court found grounds to equitably toll the statute of limitations—extending it—because there was legal uncertainty on which court/venue would have proper jurisdiction, and the plaintiff there had originally filed suit in Oregon before being dismissed and filing in Washington. (*Langlois*, 8 Wn. App. 2d at 856.) Otherwise, *Langlois* is factually unrelated in that it concerned an employment dispute; it did not include an installment contract, nor a lien on real property, nor bankruptcy. (*Id.*) With this perspective, Petitioners' assertion falls flat that *Langlois* bestows some kind of public-interest value on their case. (*See* Pet'rs' Br. at 15.)

The fact that statutes of limitations have an equitable underpinning does not transform every statute-of-limitations dispute into Supreme-Court worthy material.

Petitioners' citation to *Burnett v. New York Central Railroad Company* is also ill-fated because *Burnett* involves similar legal questions to *Langlois*, again not involving bankruptcy, deeds of trust, or installment notes. (*Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428, (1965).) This Court should deny Merritts' Petition for Review.

This Court "may grant review and consider a Court of Appeals opinion if it 'involves an issue of substantial public interest that should be determined by the Supreme Court.'" (*State v. Watson*, 155 Wn.2d 574, 577 (2005) (citing RAP 13.4(b)(4)).) In *State v. Watson*, this Court acknowledged there was a substantial public interest because the prosecuting attorney's public memo would have an impact on the sentencing of a vast majority of criminal cases moving forward. (*Id.*) By contrast, the Court of Appeals' ruling here will have no impact on any cases moving forward—there is no change in law and the ruling is based solely on an interpretation of the

Court of Appeal's own opinion, *Edmundson v. Bank of America*.

E. Petitioners Fail to Articulate a Specific Legal Theory for This Court to Consider

Petitioners fail to even assign a label to their legal theory while touting its supposed public interest. USAA FSB, in its briefing before the Court of Appeals, presented analysis of all potential sources of such a legal theory, including common law with review of the applicable restatements and case law, discussion of the applicable RCW and doctrines of statutory construction, exploration of applicable Bankruptcy code, as well as an analysis of *Edmundson v. Bank of America*.

Petitioners' section entitled "ACCELERATION" further confirms that their legal theory has been so threadbare—based solely on a twisted interpretation of the *Edmundson* Court of Appeals case—that they do not meet the standards for Supreme Court Review. Petitioners admit that their theory is a "made-up" legal doctrine, only saying what their theory *is not*, rather than what it is. (*See* Pet'rs' Br.) While not saying what doctrine applies to them and its source, Merritts specifically exclude the following, articulated (1) maturation, (2) acceleration, (3)

statutory mechanism, (4) bankruptcy mechanism. (*See* Pet'ers' Br.) No reasonable homeowner in Washington state has any expectation that the property would be protected from foreclosure under these circumstances. A reading of *Edmundson* shows that that court never granted the relief sought by Merritts—that ruling enforced the applicable deed of trust.

Despite Petitioners' assertions, their cited authority conclusively demonstrates that their interpretation of *Edmundson* is a "new rule." (Pet'rs' Br. at 19.) No published Court of Appeals case and no Washington Supreme Court case has ever said that foreclosure must be brought within 6 years of any debt owed before a Chapter 7 bankruptcy. Merritts offer a confusing and tortured interpretation of *Edmondson*, (Pet'ers' Br. at 19-20,) all of which was considered by the Court of Appeals in *Copper Creek* and here. *Edmundson* discussed payments owed before bankruptcy—as belabored by Merritts—to analyze which payments' statute of limitations were tolled by the bankruptcy proceeding. Further, *Edmundson* involved a restructuring of debt under Chapter 13, as opposed to the

Chapter 7 relief received by Merritts. (*Edmundson v. Bank of Am.*, 194 Wn. App. 920, 925 (2016).) And the relief from a discharge in Chapter 7 bankruptcy is limited—it only eliminates *in personam* liability, but not *in rem* liability. (*Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).)

The Court of Appeals has otherwise already addressed the public policy of the remedy sought:

> Such a rule would attribute to a bankruptcy discharge of the debtor more than relief from personal liability. It would mean the option of the lender to accelerate or not to accelerate the maturity date of the note was eliminated. It would mean that the payment schedule no longer applied and the maturity was accelerated.
>
> Affecting the lender's rights in a negative manner is not necessary to effect the purposes of the bankruptcy discharge. The federal district court decisions do not rely on any provision in the bankruptcy code as requiring such a result. We can find no bankruptcy provision that would do so.

(*Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 82083-4-I, 2022 WL 1074984, at *9 (Wash. Ct. App. Apr. 11, 2022).) No further remedy is required to remedy any hardship the Petitioners may have previously faced—Petitioners have

already received the extraordinary relief of having their personal liability extinguished.[2]

VI. THE NATURE AND POSTURE OF THIS CASE SHOWS THAT IT LACKS ANY SUBSTANTIAL PUBLIC INTEREST

This case lacks a substantial public interest for the following reasons: (1) the opinion is unpublished and lacks precedential value, (2) this Court rejected the petition for review of *Luv v. West Coast*, which is procedurally equivalent (3) Merritts' circumstances are unique in being landlord-investors who have continued to receive rents from these properties, (4) Merritts retain their bankruptcy relief, in having no personal liability for the HELOCs, (5) Merritts have continued to pay the first mortgages following bankruptcy, and their properties will still be subject to deeds of trust even if their relief is granted, and (6) property values have rebounded, such that there is enough equity to satisfy USAA FSB's liens at the closing of a sale. Petitioners will not dispel clouds on their title

[2] A recovery against Petitioners may not be had personally because of their discharge, but Petitioners may still be held liable *in rem*, as relates to their interests in the subject properties. (*Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).)

by this action—the liens from their first mortgages will persist. Petitioners apparently seek to divest USAA FSB of its valid liens in order to enhance their own profits when they sell the properties.

A. Attorneys' Fees

USAA FSB hereby respectfully requests this Court award its reasonable costs and attorneys' fees on appeal. (See RAP 18.1.) The Notes provide for USAA FSB to recover reasonable costs and fees it incurs in defending its lien interests. (CP, Vol. 1, 38, Vol. 2, 325, Vol. 3, 442, Vol. 4, 768.) It is proper for USAA FSB to seek such fees here:

> Where, as here, the nonprevailing party makes a claim for contractual attorney fees, such party has sufficient notice that attorney fees are awardable so that CR 54(c) obligates their award to the prevailing party.

(*Kathryn Learner Family Tr. v. Wilson*, 183 Wn. App. 494, 496 (2014).) Petitioners have also requested their fees, such that it is proper for USAA FSB to maintain its request for fees here.

VII. CONCLUSION

For the foregoing reasons, USAA FSB respectfully requests this Court deny the Merritts' Petition for Review, and award USAA FSB its reasonable costs and fees in Answering and opposing the same.

VIII. WORD COUNT CERTIFICATION OF COMPLIANCE

This brief contains approximately 3,600 words, fewer than 5,000-word limit, and it is otherwise consistent with RAP 18.17.

DATED: June 8, 2022 DKM LAW GROUP, LLP

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