NO. 100918-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation,

Petitioner,

v.

SHAWN A. KURTZ and STEPHANIE A. KURTZ, husband and wife and the marital or quasi-marital community composed thereof; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation,

and

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a CHRISTIANA TRUST, not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Court of Appeals, Div. I, No. 82083-4-I

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I. INTRODUCTION

The case arises out of unique circumstances: Mr. Shawn Kurtz and Ms. Stephanie Kurtz (collectively the "Kurtzes") defaulted on their mortgage, filed for Chapter 7 bankruptcy protection, and the bankruptcy court discharged their personal liability on the installment note. Copper Creek (Marysville) Homeowners Association (the "HOA") initiated judicial foreclosure of its junior lien for the accrued dues the Kurtzes failed to pay post-bankruptcy. The HOA later amended the suit to challenge the enforceability of the mortgage and obtained title to the home. The Court of Appeals ruled that bankruptcy discharge of the Kurtzes did not accelerate the installment note or trigger the statute of limitations on enforcing the mortgage, so the HOA was liable for any installment payments that remained enforceable under the statute of limitations.

The Court of Appeals' decision follows well-established precedent. This Court has long held that "mere default alone will not accelerate the note," *A. A. C. Corp. v. Reed*, 73 Wn. 2d 612,

615, 440 P.2d 465 (1968), and that, for an installment note, the statute of limitations runs against each installment from the time it becomes due—that is, from the time when an action might be brought to recover it, *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). Petitioner's mischaracterization of the Court of Appeals' statute of limitations ruling does not warrant review under RAP 13.4(b).

II. IDENTITY OF RESPONDENTS

Respondents are Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as trustee from Pretium Mortgage Acquisition Trust ("Wilmington"), successor beneficiary under the deed of trust ("DOT") encumbering the real property, and its servicer, Selene Finance LP ("Selene") (Wilmington and Selene collectively referred to as "Lender").

III. RESTATEMENT OF ISSUE PRESENTED

1. Whether the Court of Appeals' reversal of the trial court's misapplication of the statute of limitations was in conflict

with *Pratt v. Pratt*, 121 Wash. 298, 209 P. 535 (1922), or *Herzog*, 23 Wn.2d 382.

IV. RESTATEMENT OF THE CASE

For purposes of answering the Petition for Review, Lender largely relies on the Court of Appeals' statement of facts,[1] but also offers the following short summary of facts and proceedings below.

On January 2, 2019, the HOA initiated a judicial proceeding to foreclose on its junior lien for unpaid assessments on real property at 8524 81st Drive NE, Marysville, WA 98270 (the "Real Property"). CP 1089-95. Initially, the HOA named only the owners of the Real Property, the Kurtzes, as defendants. *Id.* It did not name or serve Lender or its predecessor-in-interest,[2] a publicly recorded senior lienholder on the Real Property. *Id.*

[1] The Court of Appeals' reissued published opinion is attached as Appendix B to the Petition for Review. It can also be found at *Copper Creek (Marysville) Homeowners Association v. Kurtz*, 508 P.3d 179 (Wash. Ct. App. 2022). The statement of facts can be found at Op. 2-7.

[2] Citibank assigned the DOT to Wilmington in April 2019, and Wilmington subsequently appointed Selene as the loan servicer. CP 574-76.

The Kurtzes bought the Real Property in 2007, when they obtained a loan of $303,472.00 pursuant to a Note from CTX Mortgage Company, LLC (the "Note") to purchase the Real Property. *See* CP 1029-53 (DOT). The Note was secured by a DOT (together, the Note and DOT are referred to as the "Loan"). *See id*. The Kurtzes defaulted on the Loan sometime in 2008 or 2009 and on the HOA's assessments in July 2010. CP 1022-25, 1090, CP 407-412.

In 2010-2011, the Kurtzes separately filed for, and obtained, Chapter 7 bankruptcy protection and discharge of debts, including the Note. Stephanie Kurtz filed for Chapter 7 bankruptcy protection in February 2010, which included the Real Property secured by the DOT on her bankruptcy schedule of creditors holding secured claims and stated her intention to surrender the Real Property. CP 864-870; 911-960. Stephanie received a bankruptcy discharge in June 2010; the Note was among the claims discharged without payment. *Id.* Shawn Kurtz filed a separate Chapter 7 bankruptcy in March 2011, which

included the Real Property secured by the DOT, and stated his intention to surrender it. CP 871-00879; 961-1005. Shawn received a bankruptcy discharge in July 2011; the Note was among the claims discharged without payment. *Id.* ***Neither Stephanie's nor Shawn's bankruptcy proceeding discharged the DOT on the Real Property***. CP 864-870; 871-00879; 911-960; 961-1005.

In April 2019, the HOA and the Kurtzes entered an agreed order for appointment of a custodial receiver in the HOA's judicial foreclosure action, which authorized the HOA to repair and rent the Real Property. CP 1012, 1018-21. According to the HOA, the cost of repairs was $22,470.24. Petition at 5 (citing CP 1630, 1635-39). On September 25, 2019, the Real Property was rented. Petition at 5 (citing CP 1630, 1635-39).[3]

[3] The HOA's citations to the record for this proposition appear incorrect. CP 1630 is a page of the HOA's motion to continue Lender's motion to dismiss filed in the trial court on June 16, 2020. CP 1635-39 is part of the HOA's amended complaint. Neither document seems to support the cost or timeline of the rental of the Real Property.

The HOA's Petition for Review suggests, without citation to the record, that Lender's non-judicial foreclosure was timed to "take unfair advantage" of the HOA's renovations to the Real Property. On October 30, 2019, Quality Loan Service Corporation of Washington initiated a nonjudicial foreclosure of Lender's senior lien on the Real Property, on behalf of Lender, and provided notice of the same to the HOA. CP 1024-27.[4] The record shows that the HOA had not given the senior lienholder notice of its court action or any pleadings until February 27, 2020, and even then only gave notice in response to Lender's nonjudicial foreclosure. CP 1057-66; Petition at 6. At that time, the HOA amended its complaint to add a quiet-title claim against Lender, alleging that Washington's six-year statute of limitations

[4] The record also does not support the HOA's assertion that Lender's nonjudicial foreclosure prevented the HOA from collecting rental proceeds. To the contrary, the HOA continued receiving monthly rent of $1,999 through November 2020. CP 1013, 1173-78. The HOA stopped renting the Real Property in late 2020 when it served notice of termination on its tenant. *Id.*

for actions on written contracts had expired and Lender was barred from enforcing the DOT. CP 1057-66.

After it was served with the amended complaint in February 2020, Lender promptly moved to dismiss the HOA's quiet-title claim because the HOA did not own the Real Property and lacked any legal right to assert a quiet-title claim against a senior lienholder. CP 1701-1709. The HOA then attempted to come to an agreement with the Kurtzes, who still owned the Real Property. CP 49-68. The Kurtzes were initially uninterested; however, they ultimately agreed to assign their ownership interests in the Real Property to the HOA through a deed in lieu of foreclosure on June 10, 2020. CP 550-57. Lender also tried to reach agreement with the Kurtzes, asking in May 2020 if the Kurtzes would execute a waiver of the statute of limitations on the Loan in exchange for compensation. CP 1570. Shawn Kurtz did not respond and notified the HOA. *Id.*

During the summer of 2020, the HOA and Lender engaged in motions practice and a discovery dispute. The HOA issued

discovery requests to Lender on or around April 9 but ***had never recorded the DOT*** and failed to amend its complaint to claim that it was the owner of the Real Property. CP 801-823. Because the HOA had failed to take any steps to establish an ownership interest in the Real Property, Lender sought dismissal of the quiet-title claim for lack of standing, and additionally pursuant to a tolling argument based on the language of the Servicemember Civil Relief Act. *See generally* CP 640-46 (factual background). Lender sought a protective order to stay discovery while the dispositive motions were pending.

The HOA eventually amended its complaint to reflect that it recorded the deed in lieu on June 10 and was, therefore, on record as the title owner of the Real Property. CP 647-57. The trial court continued Lender's motion to dismiss but ordered Lender to respond to the HOA's discovery requests and pay its attorney fees incurred in the discovery dispute. CP 1069-71. Lender unsuccessfully moved the trial court to reconsider the order compelling discovery and lost the dispositive dismissal

motion. CP 640-46, 1067-68, 522-24, 400-02. The trial court also ordered that Lender would be in default unless Lender completed discovery in 10 days' time, which it subsequently did. CP 520-21; RP 56:5-18, 57:3-16 (Hearing Vol I); CP 504-07 (trial court order vacating default because Lender "satisfactorily provided discovery"). The court awarded the HOA's fees incurred in this secondary discovery dispute and motions practice.

The HOA subsequently moved for summary judgment on its quiet-title claim against Lender. CP 428-40. The court granted summary judgment and quieted the HOA's title to the Real Property, ordering that Lender's DOT is unenforceable and void because the statute of limitations for enforcement had run. CP 250-53. The court further ordered that "[the HOA] is awarded its reasonable attorney's fees, costs, and expenses incurred in this action," without any findings of fact or legal bases for this ruling. CP 250-53.

The HOA brought a subsequent motion for fees, which Lender opposed. The trial court granted and awarded the HOA's

fees and costs in the amount of $96,779.09. CP 20-22. The fee award, drafted by the HOA, contains no applicable authority to support an award of attorney fees and costs and no findings of fact. The fee award summarily states the HOA was entitled to its attorney fees and costs "as a matter of equity because [Lender's] bad faith and misconduct shown repeatedly and throughout this case." CP 20-22. The trial court did not specifically describe any improper behavior or state that attorney fees were being awarded to the HOA as a "sanction," CR 11 or otherwise, against Lender.

Lender timely appealed. CP 1-45. The Court of Appeals reversed. Slip op. at 20-21. It ruled that the trial court improperly granted summary judgment in favor of the HOA based on a misinterpretation of *Edmundson v. Bank of America*, 194 Wn. App. 920, 387 P.3d 272 (2016). Slip op. at 20-21. It also ruled that Lender was entitled to its attorney fees and costs, both on appeal and below, under the attorney fees provision in the DOT. *Id.* at 21-22. However, it upheld the trial court's award of equity

fees to the HOA, with a single statement that the trial court "strongly believed" in the fee award. *Id.* at 23.

V. THE HOA'S PETITION FOR REVIEW SHOULD BE DENIED

The Court of Appeals' reversal of the trial court's erroneous statute of limitations ruling does not conflict with Washington Supreme Court precedent. The HOA's petition fails to establish any of RAP 13.4(b)'s grounds for review. Review is not warranted.

A. The HOA Mischaracterizes the Trial Court's Erroneous Statute of Limitations Ruling and Precedent of the United States and Washington Supreme Courts

The HOA frames the issue as whether the bankruptcy discharge of a borrower's personal liability on an installment note renders a mortgage unenforceable. Petition at 11. This ignores the actual basis for the Court of Appeals' reversal of the trial court's grant of summary judgment to the HOA. The Court of Appeals considered whether the bankruptcy discharge of a borrower's personal liability on an installment note

automatically modifies the schedule of payments or accelerates the maturity date. Slip op. at 1-2.

The Court of Appeals correctly ruled that, pursuant to long-standing United States Supreme Court precedent, a bankruptcy discharge has no effect on the enforceability of the mortgage *in rem*. While discharge of debts in bankruptcy extinguishes the "'personal liability of the debtor,'" it "leav[es] intact the option to enforce a claim against a debtor *in rem*." Slip op. at 9-10 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.5, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991) (quoting 11 U.S.C. § 524(a)(1))). In other words, "[a] lien on real property passe[s] through bankruptcy unaffected" and a lender may enforce its lien on the real property through foreclosure. *Dewsnup v. Timm*, 502 U.S. 410, 418, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992).

The Court of Appeals also correctly ruled that this Court had long held that "'mere default alone will not accelerate the note.'" Slip op. at 11 (quoting *A. A. C. Corp.*, 73 Wn. 2d at 615). Finally, the Court of Appeals correctly ruled this Court had long

held that, for an installment note, the statute of limitations runs against each installment from the time it becomes due. *Id.* at 10 (citing *Herzog*, 23 Wn.2d at 388).

Based on these well-established precedents by the United States Supreme Court and this Court, the Court of Appeals ruled that, ***absent any evidence in the record that that the Lender had accelerated the Note***, the trial court erroneously concluded that the Kurtzes' bankruptcy discharges accelerated the Note or triggered the statute of limitations on enforcing the DOT. *Id.* at 21. Because the bankruptcy discharge had not accelerated the Note, the Court of Appeals concluded that any installment payments on the Note that were still within the six-year statute of limitations, *i.e.*, installments that came due within the six-year period immediately preceding the initiation of Lender's nonjudicial foreclosure—or from November 2013 onward—were enforceable. *Id.*

B. The HOA Finds No Support in *Pratt, Herzog*, or *Edmundson*

The HOA relies on *Pratt* and *Herzog* to argue that the Court of Appeals is in conflict with this Court's precedent, but neither supports its position. In *Pratt*, this Court held a mortgage creates a lien in support of the debt that it is given to secure. *Pratt*, 121 Wash. at 300. Therefore, when a debt is time-barred, no action may be maintained upon the mortgage securing the debt. *Id.* at 303. The Court of Appeals followed these holdings, stating "[t]he note represents the debt, whereas the deed of trust is the security for payment of the debt," Slip op. at 7 (citing *Boeing Emps.' Credit Union v. Burns*, 167 Wn. App. 265, 272, 272 P.3d 908 (2012)), and "[t]o the extent that the statute of limitations runs on the underlying note, it also runs to the same extent on the enforcement of a deed of trust," *id.* at 11 (citing *Walcker v. Benson & McLaughlin, PS*, 79 Wn. App. 739, 740-41, 904 P.2d 1176 (1995)).

Herzog also does not support the HOA's position. In *Herzog*, this Court held that, for an installment note, the statute

of limitations runs against each installment from the time it becomes due. *Herzog*, 23 Wn.2d at 388. The Court of Appeals cited and relied on this central proposition. Slip op. at 20 ("Under *Herzog* . . . the statute of limitation on Kurtz's installment debt would have begun to run on each payment individually from its due date.").

The HOA points to *Edmundson*, 194 Wn. App. 920, a published opinion by the Court of Appeals Division I, to argue that the Court of Appeals ignored "[t]he rule that subsequent courts have pointed to arising from *Edmundson*." Petition at 8-9, 12. The "rule" was that bankruptcy discharge automatically accelerates or otherwise modifies the payment schedule of an installment note, which the HOA further argues in the petition is "a logical extension of *Pratt*." *Id.*

The HOA contends that *Pratt* is the real source of the "rule" associated with *Edmundson*, going so far as to call it the "*Pratt* rule" instead of the "*Edmundson* rule." *Id.* at 13. Nowhere in *Pratt* did this Court suggest, much less hold, that "where the

personal obligation under the note ceases to be enforceable, the lien created by the mortgage is also unenforceable . . . ." *Id.* at 11. No Washington case has ever so held. The Court of Appeals' decision was consistent with *Pratt*. There is no "conflict" that would warrant review. In fact, the HOA admits as much. It concedes that its ***preferred*** interpretation of *Edmundson* would be an "extension" of the holding in *Pratt*. *Id.* at 13-14.

The Court of Appeals' decision in *Copper Creek* examined *Edmundson* at length. Slip op. at 12-20. The Court of Appeals correctly clarified that *Edmundson* did not announce a "rule" that "discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation." *Id.* at 15, 20. Courts that have interpreted *Edmondson* in that way were wrong:

> In *Edmundson*, this court did not say that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. We did not say that the discharge kickstarts the running of the deed of trust's final statute of limitations period. We did not say that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation. We did not say we were announcing any new rule. Rather, we simply

> applied settled law from *Herzog*, that the statute of limitations runs on each installment of a promissory note from the date it is due. *Edmundson*, 194 Wn. App. at 931.
>
> The federal district court cases rely solely on the *Edmundson* decision as the basis for the state law they apply. Their interpretation of *Edmundson* is erroneous.
>
> *Edmundson* does not stand for the proposition that bankruptcy discharge of personal liability of the debtor accelerates the obligation on an installment note or commences the statute of limitations on both the outstanding balance of the note and on enforcement of the DOT. The trial court erred in relying on *Edmundson* for such a proposition.

Id. at 19-20.

Far from representing "the prevailing interpretation of Washington law," the interpretation of *Edmundson* that the HOA would have preferred is erroneous. The Court of Appeals followed this Court's precedent in *Pratt*—not the extension of *Pratt* advocated by the HOA. There was no conflict with *Pratt* and no basis for review. The Court of Appeals committed no error when it reversed the trial court's erroneous statute of limitations ruling. The HOA has failed to demonstrate that this

issue warrants review under any of the criteria listed in RAP 13.4(b).

C. Cross-Petition for Review of the Trial Court's Attorney Fee Award

In the event the Court accepts the HOA's Petition for Review, Lender cross-petitions for review of the trial court's $96,779.09 attorney fee award to the HOA. At the trial level, the court ordered that the HOA was awarded its "reasonable attorney's fees, costs, and expenses incurred in this action," without making any findings of fact or providing legal bases for this ruling. CP 250-53. The subsequent fee award contains no applicable authority to support an award of attorney fees and costs, no actual findings of fact, and merely summarily "finds" that the HOA was entitled to its attorney fees and costs "as a matter of equity because [Lender's] bad faith and misconduct shown repeatedly and throughout this case." CP 20-22. The trial court did not describe any "improper behavior," nor did it state that attorney fees were being awarded to the HOA as a sanction against Lender.

In order to award fees as a sanction, the trial court must provide sufficient findings of fact and conclusions of law. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). The trial court did neither.[5] Under well-established Washington law, the trial court could not award nearly six figures of attorney fees in "equity" without specifying the basis or any factual findings. *See State v. S.H.*, 102 Wn. App. 468, 479, 8 P.3d 1058 (2000) ("[I]n the absence of an express finding, we will not assume that the judge found bad faith . . . ."). The Court of Appeals improperly deferred to the trial court's erroneous attorney fee award, without any analysis, and should be reversed in that regard.

D. Attorney Fees and Costs

Lender requests an award of attorney fees and costs incurred in answering the HOA's Petition for Review pursuant

[5] Nor could the trial court have found a factual basis for an equity fee award. While Lender ultimately lost the motions practice and discovery dispute described *supra* at pp. 7-9, it took positions that it reasonably thought were justified under the law, and when the court denied the relief sought, Lender promptly complied with all court orders.

to RAP 18.1(j). As a result of the Court of Appeals' decision, Lender was the prevailing party on appeal and the Court of Appeals awarded attorney fees on appeal to Lender pursuant to the DOT's mandatory attorney fee provision. Slip op. at 23. Should this Court deny the Petition for Review, RAP 18.1(j) grants this Court the discretion to award Lender's reasonable attorney fees and expenses incurred in preparing and filing this Answer.

VI. CONCLUSION

For all of the reasons stated, the HOA's Petition for Review should be denied.

"I certify that this document contains 3236 words, pursuant to RAP 18.17."

DATED: July 11, 2022.

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