101505-4

Case No. 839594

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WEST COAST SERVICING, INC.,

Appellant,

vs.

PRINCE ERIC LUV,

Respondent.

PETITION FOR SUPREME COURT REVIEW

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Cases

I. NAME AND DESIGNATION OF PETITIONER

The petitioner is West Coast Servicing, Inc.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals opinion, *West Coast Servicing, Inc., v. Luv*, 83959-4-I, 2022 WL 17246712 (Wash. Ct. App. Nov. 28, 2022).

III. ISSUE PRESENTED FOR REVIEW

Whether a bankruptcy discharge causes future secured debt installments to become immediately due and enforceable – in other words, whether a bankruptcy discharge "accelerates" secured installment debt.

IV. STATEMENT OF THE CASE

As the Supreme Court is aware, the Court of Appeals has issued conflicting opinions on the above-described rule. The Supreme Court has accepted review of the issue. *Copper Creek Homeowners Ass'n v. Wilmington Sav. Fund Soc'y,* 200 Wn.2d 1001, 516 P.3d 377 (2022); *Merritt v. USAA Fed. Sav. Bank,* 200 Wn.2d 1001, 516 P.3d 372, 373 (2022).

The present case involves the same facts and law and issuing court as *Copper Creek* and *Merritt*. The Supreme Court has already deemed review appropriate of these cases under RAP 13.4. The Supreme Court should accept review of this companion case and consolidate with *Copper Creek* and *Merritt*.

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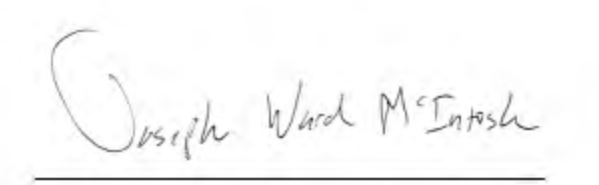
DATED November 29, 2022



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Attorney for Petitioner

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11/28/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WEST COAST SERVICING, INC., Appellant, v. PRINCE ERIC LUV, Respondent.	No. 83959-4-I UNPUBLISHED OPINION

CHUNG, J. — In a previous appeal, West Coast Servicing, Inc. (WCS) challenged a 2020 trial court order that determined it could no longer foreclose on a deed of trust because the statutory limitation period had expired. Several months after we affirmed that trial court order in an unpublished decision,[1] we issued a published decision in another case, Copper Creek (Marysville) Homeowners Ass'n v. Kurtz, 21 Wn. App. 2d 605, 508 P.3d 179 (2022), and reached a different conclusion about the commencement of the statutory limitation period to initiate a foreclosure proceeding. WCS then filed a motion in the trial court seeking to vacate the same order we had previously affirmed, arguing that Copper Creek changed the applicable law. The trial court denied the motion, concluding that at most, the prior decision was wrong due to an error of law, not a change in the law. We affirm.

[1] Luv v. W. Coast Servicing, Inc., No. 81991-7-I (Wash. Ct. App. Aug. 2, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/819917.pdf.

FACTS

In 2005, Prince Eric Luv obtained a home equity line of credit that was secured by a deed of trust against real property in Everett. See Luv v. W. Coast Servicing, Inc., No. 81991-7-I, slip op. at 1 (Wash. Ct. App. Aug. 2, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/819917.pdf. The accompanying promissory note obligated Luv to repay the loan in installments over a 20-year period. Id. at 1-2. Luv filed for bankruptcy in December 2008. Id. at 2. He stopped making payments on the home equity loan at some point, and on March 11, 2009, the bankruptcy court discharged Luv's personal liability on the note. Id. His last missed payment prior to the bankruptcy discharge was due on March 1, 2009. Id. at 6.

In 2018, after the beneficiary of the deed of trust transferred its interest to WCS, WCS initiated nonjudicial foreclosure proceedings. Id. at 2. In 2019, Luv filed a quiet title action against WCS, asserting that the statute of limitations expired six years after the last missed payment before the bankruptcy discharge of his personal liability for repayment of the loan, so enforcement was time-barred after March 1, 2015. Id. at 2, 6. On September 28, 2020, the trial court agreed that foreclosure was time-barred and entered an order that extinguished the deed of trust and quieted title in Luv. Id. at 2.

WCS appealed to this court. Id. at 1. On appeal, we upheld the trial court's order in an unpublished decision. Id. Relying on our 2016 decision in Edmundson v. Bank of America, N.A., 194 Wn. App. 920, 378 P.3d 272 (2016), we held that "the six-year statute of limitations to enforce a deed of trust commences from the

date the last payment on the note was due prior to the discharge of a borrower's personal liability in bankruptcy." Id. In so holding, we rejected WCS's arguments that the "Edmundson rule" was "not rooted in state law" and was instead the product of inadvertent language inserted from a federal court case and inconsistent with bankruptcy law. Id. at 6. The Washington State Supreme Court denied review. Luv v. W. Coast Servicing Inc., 198 Wn.2d 1035, 501 P.3d 135 (2022).

Approximately five months after we issued the opinion in WCS's appeal, and before the mandate issued, this court issued a published decision in Copper Creek.[2] Reversing the trial court's decision that the statute of limitations barred enforcement of a deed of trust, we clarified that Edmundson did not establish a rule that bankruptcy discharge starts the statutory limitation period for the entire debt. Copper Creek, 21 Wn. App. 2d at 608, 617. The Copper Creek court rejected the interpretation of Edmundson by several federal courts and expressly noted that the decision in WCS's prior appeal was "contrary to the outcome here [in Copper Creek]." Id. at 617-18, 624 n.12.

After we issued our initial decision in Copper Creek, WCS unsuccessfully attempted to renew its motion for reconsideration in this court and renew its petition for review in the Supreme Court. The decision in Luv became final when we issued the mandate on February 17, 2022.

On March 2, 2022, WCS filed a CR 60(b) motion in the trial court seeking to vacate the 2020 trial court order that extinguished the deed of trust, arguing that

[2] This court issued its decision in Copper Creek on January 18, 2022, but later withdrew the initial opinion, granted reconsideration as to an attorney fee issue, and issued a substitute opinion on April 11, 2022.

the decision in Luv was rendered "obsolete" by Copper Creek, an "intervening change of law." Luv argued in response that "to the extent that there was an error, it was an error of law." Luv also pointed out that contrary to WCS's position, this court did not "reverse itself" or overrule the appellate decision in Luv, since that decision in Luv was not published, and "as the opinion in Copper Creek makes clear, there was no change in the law."

The trial court denied WCS's motion. In its written ruling, the court observed that whether Luv was "wrong due to an error of existing law as opposed to having become wrong due to a change in the law is critical in determining whether a CR 60[(b)] motion can be granted." The trial court concluded that "the defect in the trial court's original judgment was, according to Copper Creek, an error in law, and Copper Creek did not change the law but correctly applied the already existing law." The court further relied on the fact that Copper Creek expressly "held it was not changing the law and that the prior Luv appeals decision was an erroneous nonbinding interpretation of the law as then existed."

WCS appeals.[3]

ANALYSIS

I. CR 60(b) Motion

CR 60(b) permits a trial court to vacate a final judgment, order, or proceeding. The rule sets forth 10 specific bases for vacation, CR 60(b)(1) to (10),

[3] After the briefing was complete in this case, the Supreme Court granted review of Copper Creek and Merritt v. USAA Federal Savings, No. 82162-8-I (Wash. Ct. App. Mar. 28, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/821628.pdf, a decision of this court that applied the holding of Copper Creek. See Copper Creek Homeowners Ass'n v. Wilmington Sav. Fund Soc'y, 200 Wn.2d 1001, 516 P.3d 377 (2022); Merritt v. USAA Fed. Sav. Bank, 200 Wn.2d 1001, 516 P. 3d 372 (2022).

and one catchall provision, CR 60(b)(11). WCS relies on CR 60(b)(11), the catchall provision, which allows a court to relieve a party from a final judgment or order for "[a]ny . . . reason justifying relief from the operation of the judgment." CR 60(b)(11) is "intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies." Shandola v. Henry, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). Courts should apply CR 60(b)(11) "sparingly to situations 'involving extraordinary circumstances not covered by any other section of the rules.' " In re Marriage of Knutson, 114 Wn. App. 866, 872-73, 60 P.3d 681 (2003) (internal quotation marks omitted) (quoting In re Marriage of Irwin, 64 Wn. App. 38, 63, 822 P.2d 797 (1992)).

We review a trial court's ruling on a CR 60(b) motion for abuse of discretion. Jones v. Home Care of Wash., Inc., 152 Wn. App. 674, 679, 216 P.3d 1106 (2009). "Discretion is abused where it is exercised on untenable grounds or for untenable reasons." Id. Appellate review of a denial of a motion to vacate "is limited to the propriety of the denial not the impropriety of the underlying judgment." Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

WCS contends the trial court abused its discretion when it denied its motion to vacate based on the subsequent published decision in Copper Creek. As below, WCS asserts that our decision in Luv resolving its prior appeal is "obsolete and wrong," and that the "law favors correct legal decisions" and "treating similarly situated parties equally." But WCS's claim that the underlying decision by the trial court and the affirmance by this court are legally incorrect does not advance its argument that the trial court was required to vacate the trial court's order. It is well

settled that errors of law do not constitute extraordinary circumstances correctable through CR 60(b)(11). Shum v. Dep't of Labor & Indus., 63 Wn. App. 405, 408, 819 P.2d 399 (1991) (abuse of discretion to grant CR 60(b)(11) motion based on claim of error in denial of prejudgment interest on widow's pension); In re Marriage of Tang, 57 Wn. App. 648, 654, 789 P.2d 118 (1990) (abuse of discretion to grant CR 60(b) motion to vacate dissolution decree based on legal errors in the original decree). Indeed, for at least a century, our courts have adhered to specified limits on the authority to vacate under CR 60(b):

> "The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion."

In re Est. of Jones, 116 Wash. 424, 428, 199 P. 734 (1921) (emphasis added) (quoting 1 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 329, at 506 (2d ed. 1902)); see Philip A. Trautman, Vacation and Correction of Judgments in Washington, 35 WASH. L. REV. 505, 515 (1960) ("An error of law is committed when the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make."). Without something more, errors of law are correctable only through the appellate process,[4] not CR 60(b).

[4] WSC has fully utilized the appellate process to raise this legal error. It appealed to this court, resulting in a decision on appeal; moved for reconsideration of that decision,

Burlingame v. Consol. Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986).

On the other hand, a change in the law may, in rare instances, constitute extraordinary circumstances to warrant vacating an order or judgment under CR 60(b)(11). Union Bank, NA v. Vanderhoek Assocs., LLC, 191 Wn. App. 836, 848, 365 P.3d 223 (2015) (trial court acted within its discretion by granting motion to vacate based on change of law created by appellate court decision creating a divisional split); see also In re Marriage of Flannagan, 42 Wn. App. 214, 221-22, 709 P.2d 1247 (1985) (change in federal law pertaining to dividing military retirement pay pursuant to state community property constituted extraordinary circumstances to warrant vacating dissolution decrees). Here, WCS alleges legal error, and CR 60(b) does not allow the trial court to grant relief on that basis; only a change in law would allow the requested relief.

WCS alternatively argues that Copper Creek "unquestionably" changed the law because its holding is in direct conflict with Luv, and because Copper Creek, a published decision, controls over Luv. According to WCS, the "mechanics" of why we reached different conclusions in the two cases are irrelevant. But in fact, it is necessary to engage with our analysis in Copper Creek to determine whether that case changed the law.

Copper Creek involved homeowners who defaulted on assessments. Copper Creek, 21 Wn. App. 2d at 610. The homeowners' association sought to

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which was denied; and sought review in the Washington Supreme Court, which was denied.

extinguish a senior security interest held by the lender, arguing that the statute of limitations barred enforcement of the deed of trust. Id. at 610-11. The trial court granted summary judgment and quieted title as to the association, concluding that under Edmundson, the six-year statute of limitations accrued on the entire note on the date of the homeowners' bankruptcy discharge, even though a significant amount of the debt was not yet due by the date of discharge. Id. at 612-13, 617. Based on a disagreement with the trial court's interpretation of Edmundson, this court reversed, stating:

> The trial court concluded that [the lender] was precluded from enforcing its deed of trust by the statute of limitations. It reached this conclusion by relying on Edmundson for the proposition that the statute of limitations runs against enforcement of a deed of trust from the date of the last payment due prior to the debtor's discharge in bankruptcy. This was error. Edmundson did not establish such a rule. No Washington Supreme Court case has established such a rule. It is not the law in Washington. The federal cases, which are the source of that interpretation of Edmundson, are in error. To the extent that unpublished state appellate cases have repeated the federal interpretation, they are also in error.

Id. at 617-18 (footnotes omitted).

In order to explain its rejection of the trial court's interpretation of Edmundson, the Copper Creek court described in detail the facts and analysis of Edmundson. As described in Copper Creek, the Edmundson court rejected the debtors' argument that "the statute of limitations began to run on the full amount of the note from the first missed payment." Id. at 619. To do so, the Edmundson court relied on Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945), for the proposition that as to an obligation due in installments, the statute of limitations begins to run as to each installment payment from the due date. See Copper

Creek, 21 Wn. App. 2d at 619 (discussing Edmundson). According to Copper Creek, the Edmundson court then applied this rule to the individual missed payments, beginning from the first missed payment and each successive missed payment that was "due prior to the bankruptcy discharge that ended their personal liability on the note." Id. at 619 (citing Edmundson, 194 Wn. App. at 931). Finally, the Copper Creek court explained how subsequent cases, beginning with a federal district court decision in Jarvis v. Federal National Mortgage Ass'n, No. C16-5194-RBL, 2017 WL 1438040 (W.D. Wash. Apr. 24, 2017), aff'd, 726 F. App'x 666 (9th Cir. 2018), misinterpreted this aspect of Edmundson's analysis and wrongly attributed to Edmundson a "new rule of law"—that the final six-year limitation period to enforce a deed of trust commences on the due date of the last missed payment before a bankruptcy discharge of the debtor's personal liability. Id. at 620-22.

In Copper Creek, we explained that despite the subsequent cases relying on Edmundson and attributing to it a "new rule,"

> we did not purport to announce such a rule in Edmundson. We merely applied Herzog to the facts of the case. The Edmundsons missed monthly payments from November 1, 2008 through December 31, 2013 when their personal liability to make the payments ceased. Edmundson, 194 Wn. App. at 931. . . . Our decision focused on whether any of those payments was no longer enforceable in the foreclosure action. The Edmundsons had not asserted that the bankruptcy discharge triggered the running of the statute of limitations on the entire debt. It would have done them no good. The foreclosure was commenced less than a year after the discharge in bankruptcy. It simply was not an issue before the court. And, we did not decide the issue expressly nor in dicta. Such a rule only exists in the inferences drawn and stated in the federal decisions.

Id. at 622 (footnote omitted).

Thus, according to the court in Copper Creek, the trial court had erred because it misinterpreted Edmundson and adopted unwarranted inferences drawn by federal courts. And, as the trial court here explained when it denied WCS's CR 60(b) motion, it is clear from the analysis in Copper Creek that any error in the trial court's order "was an error of law at the time it was rendered and has not since become wrong due to a change in law." In other words, any legal error in the trial court's decision in September 2020 granting judgment in favor of Luv, as well as this court's decision on appeal[5] in August 2021, was based on a misreading of Edmundson and predated the 2022 decision in Copper Creek. The decisions in this case did not become wrong as a result of the decision in Copper Creek.[6]

WCS cites no authority in support of its position that a decision clarifying precedent changes the law. The facts under which our court has reversed a trial court's discretionary decision on a motion to vacate based on a change in the law do not resemble those here. For instance, in Shandola, the trial court abused its discretion in denying a motion to vacate based on a Washington State Supreme Court decision that invalidated a former anti-SLAPP[7] statute, which was the entire basis for monetary judgments entered against a prisoner. 198 Wn. App. at 895.

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[5] Nor was this court's decision in this case in the first appeal by WSC a precedent that Copper Creek "changed" or with which it conflicted, as that opinion was unpublished. See GR 14.1.

[6] To be clear, nothing can be read into the Supreme Court's grant of review in Copper Creek. It may be that review was granted because of the decisional conflict among appellate opinions created by Copper Creek. It may be that the Supreme Court granted review in order to affirm Copper Creek. Or it may be that the Supreme Court granted review in order to reverse Copper Creek and make clear that the federal decisions at issue were correctly decided and that accordingly, the Supreme Court rightfully denied review of the state appellate decisions that adopted the federal courts' approach.

[7] See Washington Act Limiting Strategic Lawsuits Against Public Participation, former RCW 4.24.525 (2010).

And recently in Dzaman v. Gowman, 18 Wn. App. 2d 469, 483, 491 P.3d 1012 (2021), an unlawful detainer action, Division Two applied the CR 60(b) standard[8] and held that the trial court was required to rescind a writ of restitution because enforcement of eviction orders was barred by a statewide eviction moratorium issued after the trial.

WCS argues that this court should issue a "corrective opinion," that we should dismiss Luv's quiet title complaint, and that we are not bound to apply the law of the case as set forth in our prior decision on appeal. See RAP 2.5(c)(2) (outlining circumstances when it may be appropriate to review the propriety of a prior appellate decision when the same case is before the appellate court on remand). But this case is not before us on remand; it is before us on review of the trial court's ruling on WCS's post-judgment CR 60(b) motion. And, as explained above, the scope of our review does not include the merits of the underlying judgment, including any legal error, absent a change in the law.[9] See Bjurstrom, 27 Wn. App. at 450-51.

II. Attorney Fees

Finally, WCS challenges the attorney fees previously awarded to Luv in the initial appeal under a provision of the deed of trust, and both parties request an

[8] The motion was a "motion to rescind the writ of restitution" and lacked reference to CR 60; nonetheless, the court analyzed the motion as a CR 60(b) motion, as it was a motion for relief from judgment. Dzaman, 18 Wn. App. 2d at 477.

[9] WCS also appears to assert a due process claim related to the "courts' treatment" of WCS in this litigation. However, this argument is limited to a single citation, without elaboration or meaningful argument. WCS's passing treatment of this issue is insufficient to warrant judicial consideration. RAP 10.3(a); Graves v. Dep't of Emp't Sec., 144 Wn. App. 302, 311-312 182 P.3d 1004 (2008) (declining to address insufficiently briefed due process issue); West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (passing treatment of issue does not merit judicial consideration).

award of fees on this appeal. Based on the limited scope of our review and because WCS was not the prevailing party on the initial appeal, we do not disturb the prior fee award to Luv, and we deny WCS's request for fees on this appeal. See Bjurstrom, 27 Wn. App. at 450-51; Judges of the Benton & Franklin Counties Superior Court v. Killian, 195 Wn.2d 350, 363, 459 P.3d 1082 (2020) (this court may award attorney fees on appeal if authorized by contract, statute, or recognized ground in equity and the party substantially prevails).

Luv requests fees on appeal under the "security instrument" pursuant to RCW 4.84.330. While we referred to the language of the attorney fee provision in the deed of trust in our opinion in Luv, see Luv, slip op. at 9, the deed of trust is not included in the appellate record for the present appeal. And Luv fails to specifically explain why the deed of trust provision, which appears to provide for reasonable attorney fees and costs incurred "in proceeding to foreclosure or to public sale," applies in the context of WCS's motion to vacate.

RAP 18.1(b) requires more than a bald request for attorney fees on appeal. Boyle v. Leech, 7 Wn. App. 2d 535, 542, 436 P.3d 393 (2019). "The party requesting fees on appeal is required by RAP 18.1(b) to argue the issue and provide citation to authority in order to advise the court as to the appropriate grounds for an award of attorneys' fees and costs." Blueberry Place Homeowner's Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 363 n.12, 110 P.3d 1145 (2005). Luv's argument is inadequate to establish his entitlement to attorney fees and costs on appeal. We decline to award fees to either party.

Affirmed.

Chung, J.

WE CONCUR:

Birk, J.

Dwyer, J.

MCCARTHY & HOLTHUS, LLP

November 30, 2022 - 8:06 PM

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

PRINCE ERIC LUV, Plaintiff, v. WEST COAST SERVICING, INC., Defendant.	Case No.: 19-2-03395-31 Div. 1 Appeal No. 83959-4 CERTIFICATE OF SERVICE

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