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SUPREME COURT
STATE OF WASHINGTON
5/3/2024
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Court of Appeals
Division I
State of Washington
4/29/2024 2:59 PM

Case #: 1030312

Case No. 839594

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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PRINCE ERIC LUV,

Respondent,

vs.

WEST COAST SERVICING, INC.,

Appellant.

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# PETITION FOR SUPREME COURT REVIEW

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## I. NAME AND DESIGNATION OF PETITIONER

The petitioner is West Coast Servicing, Inc, "WCS". The respondent is Prince Luv.

## II. CITATION TO COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals opinion, *Prince Eric Luv, Respondent, v. West Coast Servicing, Inc., Appellant.,* No. 83959-4-I, 2024 WL 1367162, at *1 (Wash. Ct. App. Apr. 1, 2024)[1], hereafter "*Luv #3*."

## III. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals, in *Luv #3*, failed to comply with the Supreme Court's instructions in *W. Coast Servicing, Inc. v. Luv*, 536 P.3d 182 (Wash. 2023)[2].

## IV. STATEMENT OF THE CASE

### A. *Underlying facts.*

The underlying facts are not in dispute and have been repeated in

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[1] Appendix A
[2] Appendix B

multiple decisions. *See Luv v. W. Coast Servicing, Inc.*, 18 Wash. App. 2d 1049 (Wash. App. Div. 1 2021) (hereafter *Luv #1*)[3]; *W. Coast Servicing, Inc. v. Luv*, 24 Wash. App. 2d 1038 (Wash. App. Div. 1 2022) (hereafter *Luv #2*)[4]; *Luv #3*.

**B.** ***Procedural history***

As has been discussed ad nauseum (*Luv #1-3)*, in 2019, WCS lost its lien, as time-barred, in a superior court quiet title action brought by the homeowner / debtor, Mr. Luv. The loss of lien was the product of a novel statute of limitations rule manifested from some unfortunate dicta. The rule is – the statute of limitations for enforcing a lien commences when the borrower / homeowner discharges his personal obligation to pay the secured debt in bankruptcy.

WCS appealed to the Court of Appeals – *Luv #1*. Around that time, the same statute of limitations issue was also before the Court of Appeals in *Copper Creek (Marysville) Homeowners Assn. v. Kurtz*, 502

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[3] Appendix C
[4] Appendix D

P.3d 865 (Wash. App. Div. 1 2022)[5] hereafter "*Copper Creek #1*".

In August of 2021, the Court of Appeals issued *Luv #1*, affirming the quiet title judgment and rule that bankruptcy discharge commences the statute of limitations for lien enforcement. *Luv #1* includes policy discussion on why the rule is important.

Then, in January of 2022, a mere five months later, the Court of Appeals issued *Copper Creek #1,* a published case, contradicting *Luv #1* and striking the rule as an erroneous interpretation of underlying state and bankruptcy law. *Copper Creek #1* issued before *Luv #1* was remanded to the superior court (the Court of Appeals still had jurisdiction)[6]. The Court of Appeals refused to correct *Luv #1* prior to remand, on its own accord, and on request of WCS[7]. No explanation was ever given as to why the cases were treated differently [the arguments in both cases were the same].

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[5] Appendix E. The opinion was withdrawn on reconsideration and superseded on reconsideration, 508 P.3d 179 (Wash. App. Div. 1 2022).
[6] *Luv #2* (Appendix D) page 2
[7] *Luv #2* page 2

On remand to the superior court, WCS immediately moved to vacate the judgment as erroneous under published *Copper Creek #1*[8]. The motion was denied, citing certain procedural CR 60 bars to relief[9]. WCS appealed – *Luv #2*. The Court of Appeals in *Luv #2* affirmed the superior court.

Meanwhile, the Supreme Court accepted review of *Copper Creek #1*. *Copper Creek Homeowners Assn. v. Wilmington Sav. Fund Socy.*, 516 P.3d 377 (Wash. 2022)[10]. WCS petitioned the Supreme Court for review of *Luv #2*[11]. The sole basis for petition was correct application of the statute of limitations[12].

In March of 2023, the Supreme Court stayed the *Luv # 2* petition pending review of *Copper Creek #1*[13].

In July of 2023, the Supreme Court affirmed *Copper Creek #1*.

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[8] *Luv #2* page 2
[9] *Luv #2* page 2
[10] Appendix F
[11] Appendix G
[12] Appendix G
[13] Appendix H

*Copper Creek (Marysville) Homeowners Assn. v. Kurtz*, 532 P.3d 601 (Wash. 2023), hereafter "*Copper Creek #2*"[14]. Under both *Copper Creeks*, the bankruptcy discharge does not commence the statute of limitations for lien enforcement. Correct application of the statute of limitations saves WCS's lien.

In October of 2023, the Supreme Court accepted review of *Luv #2* with the following instructions to the Court of Appeals:

> That the petition for review is granted and the case is remanded to the Court of Appeals Division I for reconsideration in light of Supreme Court No. 100918-6 – *Copper Creek*, —– Wn.3d ——, 532 P.3d 601 (2023).

*W. Coast Servicing, Inc. v. Luv*, 536 P.3d 182 (Wash. 2023)[15].

In April of 2024, the Court of Appeals issued *Luv #3*, affirming the superior court's quiet title judgment against WCS for the third time. The Court of Appeals failed to follow the *Copper Creek* statute of limitations analysis, as instructed. Instead, the Court of Appeals regurgitated its *Luv #2* analysis, citing CR 60 as a bar to relief.

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[14] Appendix I
[15] Appendix J

## C. ***Review sought.***

WCS seeks review of *Luv #3* under RAP 13.4(b)(1) (decision is in conflict with a decision of the Supreme Court).

# V. ARGUMENT

## A. ***Court of Appeals failed to follow Supreme Court instruction.***

The present proceedings involve substantive law – correct application of the statute of limitations. CR 60 is not at-issue. If the Supreme Court thought CR 60 foreclosed relief, it would not have accepted review of *Luv #2*.

Furthermore, the Supreme Court expressly directed the Court of Appeals to follow *Copper Creek #2*, which is a statute of limitations case, not a CR 60 case. Nothing from *Copper Creek #2* involves procedural issues relevant to vacating judgments. The instruction from the Supreme Court – follow *Copper Creek #2* – meant: apply the statute of limitations, correctly. There is no other possible interpretation of the Supreme Court's instruction. The instruction to follow *Copper Creek #2* plainly did not mean regurgitate CR 60 analysis from *Luv #2*.

## B. ***CR 60 is not a bar to relief.***

The Court of Appeals in *Luv #3* is basically telling the Supreme Court that *Copper Creek #2* cannot be followed because CR 60 prevents any relief. The Court of Appeals does not assert CR 60 imposes an absolute bar, but rather, the circumstances are not "extraordinary" enough to justify relief. The irony! The circumstances are just about as "extraordinary" as they come, and the sole cause is the Court of Appeals. The Court of Appeals had, at the same time, two cases on the same statute of limitations issue – *Luv #1* and *Copper Creek #1* – and issued contradictory opinions. Worse, the Court of Appeals refused to correct *Luv #1* while it still had jurisdiction. The Court of Appeals remanded *Luv #1* to the superior court knowing it was wrong, and a litigant (WCS) was wrongfully losing a significant property interest.

The Supreme Court, understandably, was not concerned about CR 60 presenting a bar to relief, under the circumstances. The Supreme Court would not have accepted review of *Luv #2*, and instructed compliance with *Copper Creek #2*, if it believed CR 60 should present a bar to relief. Review of *Luv #2* was about substantive law, not CR 60.

## VI. CONCLUSION

The Court of Appeals has refused to apply the statute of limitations correctly three times, now. WCS and its attorney are exhausted. This is not how the judicial system is supposed to work (imagine trying to explain these decisions to a client). The Supreme Court understood this and accepted review to get the case decided correctly, and yet, here we are.

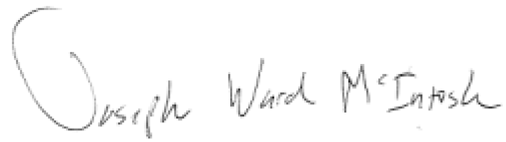
The Supreme Court should accept review and directly instruct vacation and reversal of the superior court's quiet title judgment (the Court of Appeals should be bypassed). The application of the correct law (*Copper Creek #1-2*) to the undisputed facts (*Luv #1-3*) mandates reversal.

What should absolutely *not* happen is for the Supreme Court to decline review of *Luv #3*, holding that CR 60 barred relief from the get-go (meaning that *Luv #2* review was pointless), and the instruction to follow *Copper Creek #2* actually meant just regurgitate *Luv #2*'s CR 60 analysis. That would be the "cherry on top" to a maddening experience by a litigant, WCS, in the Washington judicial system.

The system is imperfect, but can, and should, still do the right thing. Accept review; apply the law correctly; bring these proceedings to a close.

SIGNATURE(S) ON NEXT PAGE

DATED April 29, 2024



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# Appendix A

# Luv v. W. Coast Servicing, Inc.

Decided Apr 1, 2024

83959-4-I

04-01-2024

PRINCE ERIC LUV, Respondent, v. WEST COAST SERVICING, INC., Appellant.

CHUNG, J.

UNPUBLISHED OPINION

CHUNG, J.

Luv opened a home equity line of credit secured by a deed of trust against his home, and after Luv stopped making payments, West Coast Servicing, Inc. (WCS) sought to foreclose on the deed of trust. We affirmed an order quieting title in Luv because WCS's claims were precluded on statute of limitations grounds. WSC then filed a CR 60(b)(11) motion, which was denied. On appeal, we held that the trial court did not abuse its discretion in denying WCS's CR 60 motion to vacate an order quieting title in Luv. Specifically, we reasoned that our decision in *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 21 Wn.App. 2d 605, 508 P.3d 179 (2022), holding that the statute of limitations to foreclose on a deed of trust securing an installment loan accrued with each unpaid installment, even after a bankruptcy discharge, was not a change in law warranting relief under CR 60(b)(11). *2

After the Supreme Court affirmed our decision in *Copper Creek*,[1] it granted WSC's petition for review and remanded the case to this court for reconsideration in light of that decision. Having reconsidered our decision, because we conclude *Copper Creek* affirmed principles that our Supreme Court first stated in 1945,[2] it was not a change in the law. Because there are no extraordinary circumstances justifying relief from the trial court's order quieting title in Luv, we again affirm the trial court's denial of WSC's attempt to relitigate the issue through a CR 60(b)(11) motion to vacate.

1 *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 1 Wn.3d 711, 532 P.3d 601 (2023); *see also Merritt v. USAA Federal Savings Bank*, 1 Wn.3d 692, 532 P.3d 1024 (2023) (companion case).

2 *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945).

## BACKGROUND[3]

3 The underlying facts of this case are set forth in two prior appellate decisions and will be repeated here only as necessary. *See 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*, *review denied*, 198 Wn.2d 1035, 501 P.3d 135 (2022); *West Coast Servicing, Inc., v. Luv*, No. 83959-4-I (Wash.Ct.App. Nov. 28, 2022) (unpublished), *https://www.courts.wa.gov/opinions/pdf/839594.pdf.*

WSC, which holds a lien against Prince Eric Luv's real property in security for repayment of a home equity loan, initiated a nonjudicial foreclosure proceeding against Luv. *See Luv v. W. Coast Servicing, Inc.*, No. 81991-7-I at 1 (Wash.Ct.App. Aug. 2, 2021) (unpublished),

https://www.courts.wa.gov/opinions/pdf/819917.pdf., *review denied*, 198 Wn.2d 1035, 501 P.3d 135 (2022). Luv filed a quiet title action, asserting that the statute of limitations expired before WSC initiated foreclosure. *Luv*, slip op. at 2. The trial court agreed with Luv and entered an order that extinguished the deed of trust *3 and quieted title in Luv. *Id.* Relying on a prior decision of this court, *Edmundson v. Bank of Am., N.A.*, 194 Wn.App. 920, 378 P.3d 272 (2016), we upheld the trial court's decision on appeal, and the Washington State Supreme Court denied review. *Luv*, slip op. at 1.

Shortly after our decision in the direct appeal in this case, this court issued a published decision in *Copper Creek* and held that, contrary to the unpublished decision of this court in *Luv* and other state and federal decisions, bankruptcy discharge of personal liability on a promissory note does not affect the statutory limitation period to enforce a deed of trust. *Copper Creek*, 21 Wn.App. 2d at 617-18. In doing so, we explained that courts reaching contrary conclusions had misinterpreted *Edmundson*. *Id.* at 620-24.

WSC then filed a CR 60(b) motion in the trial court seeking to vacate the order extinguishing the deed of trust and quieting title in Luv. WSC claimed it was entitled to relief because *Copper Creek* was an "intervening change of law." The trial court disagreed and denied the motion, concluding 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."

We affirmed the trial court's order. We noted that while a change in the law may, in rare instances, amount to extraordinary circumstances to warrant vacating a judgment or order under CR 60(b)(11), the decision in *Copper Creek* clarified precedent, but did not change the law. *See West Coast Servicing, Inc. v. Luv*, *4 No. 83959-4-I (Wash.Ct.App. Nov. 28, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/839594.pdf.

The Supreme Court accepted review in *Copper Creek* and a related companion case, *Merritt v. USAA Fed. Sav. Bank*, No. 82162-8-I, (Wash.Ct.App. Mar. 28, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/821628.pdf. While those cases were pending, WSC petitioned for review of our decision affirming the denial of the CR 60(b)(11) motion. The Supreme Court stayed the matter pending the decisions in *Copper Creek* and *Merritt*.

In July 2023, the Supreme Court issued its decisions in *Copper Creek* and *Merritt*. Subsequently, in October 2023, the Supreme Court ordered "[t]hat the petition for review is granted and the case is remanded to the Court of Appeals Division I for reconsideration in light of [*Copper Creek*]." Thus, we reconsider the question raised previously, whether the trial court's denial of relief CR 60(b)(11) was an abuse of discretion.

DISCUSSION

"The finality of judgments is an important value of the legal system," and "CR 60 is the mechanism to guide the balancing between finality and fairness." *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn.App. 302, 313, 863 P.2d 1377 (1993). While we previously set out the applicable CR 60(b) standards in our prior opinion, we reiterate that CR 60(b)(11), the catchall provision on which WSC relies, is "intended to serve the ends of justice in extreme, unexpected *5 situations and when no other subsection of CR 60(b) applies." *Shandola v. Henry*, 198 Wn.App. 889, 895, 396 P.3d 395 (2017). *See also Shum v. Dep't of Labor & Indus.*, 63 Wn.App. 405, 408, 819 P.2d 399 (1991) (CR 60(b)(11) motions are "confined to situations involving extraordinary circumstances not covered by any other section of CR 60(b)"). "Errors of law may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal." *In re Marriage of Tang*, 57 Wn.App. 648,

654, 789 P.2d 118 (1990) (citing *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986)).

The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). We review CR 60(b) orders for abuse of discretion, and a trial court abuses its discretion when its decision is based on untenable grounds or is made for untenable reasons. *Shandola*, 198 Wn.App. at 896.

In its initial briefing in this appeal, WSC argued that this court's decision in *Copper Creek* constituted a change in the law, rather than an error in the law. We disagreed and affirmed the trial court's denial of the CR 60(b)(11) motion to vacate, holding that *Copper Creek* was not a change in the law justifying relief. WSC argues in supplemental briefing that the Supreme Court's decision in *Copper Creek* "rejected the rule[] relied-upon by the superior court." WSC makes no additional argument regarding CR 60(b)(11), and, indeed, does not even cite *6 to it.[4] Nevertheless, in keeping with our charge on remand, we will reconsider our prior decision in light of the Supreme Court's decision in *Copper Creek*.

[4] For his part, in his supplemental briefing, Luv also does not address the CR 60(b)(11) standard or the effect of the Supreme Court's decision in *Copper Creek*. Instead, he argues that this court lacks power to change or modify our decision because we issued a mandate and declined to review that decision under RAP 2.5(c)(2). Luv ignores the subsequent procedural history: the Supreme Court granted review and then remanded to this court for reconsideration.

In *Copper Creek,* the Supreme Court affirmed this court's decision and held that "a new foreclosure action on the deed of trust accrues with each missed installment payment, even after the borrower's personal liability is discharged." *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 1 Wn.3d 711, 718, 532 P.3d 601 (2023); *see also Merritt v. USAA Federal Savings Bank*, 1 Wn.3d 692, 702, 532 P.3d 1024 (2023) (bankruptcy discharge "does not trigger the statute of limitations to enforce the related deed of trust"). The Supreme Court's decisions in *Copper Creek* and *Merritt* are consistent with our analysis in *Copper Creek*. In our *Copper Creek* decision, we noted that the *Edmundson* court reached its decision on the limited issues before it by applying settled law to the facts. *Copper Creek*, 21 Wn.App. 2d at 620, 624. We observed that other courts' subsequent interpretation of additional language in *Edmundson* was unsupported by bankruptcy law, and the interpretation was inconsistent with *Edmundson*'s express rejection of the claim that bankruptcy discharge in and of itself accelerates the maturity of the debt. *Copper Creek*, 21 Wn.App. 2d at 623.

Similarly, the Supreme Court noted that while language in *Edmundson* implies that "the statute of limitations stops accruing on missed payments due *7 under an installment contract following a bankruptcy discharge," the discussion in *Edmundson* of the application of the statute of limitations to subsequent installment payments after discharge was unnecessary, as the court had already "answered the only questions actually at issue in the case." *Merritt*, 1 Wn.3d at 706-07. Thus, the Supreme Court disavowed this language in *Edmundson*, characterizing it as "dicta" and as inconsistent with established principles related to deeds of trust and bankruptcy. *Copper Creek*, 1 Wn.3d at 718; *Merritt*, 1 Wn.3d at 706-07. The court in *Merritt* also pointed out that *Edmundson* cited no authority to support the "unstated premise" that installment payments cease to become due following bankruptcy, "which runs counter to the well-established principles of contract law and bankruptcy law[.]" *Id.* at 707.

Instead, as the *Merritt* court explained, while "it is correct that following a discharge, a creditor can no longer sue a debtor personally to recover a debt," in the terms of a 1945 case, *Herzog v.*

*Herzog*, "following a bankruptcy discharge, an action can still be brought to recover on subsequent missed installments, but that action is limited to an in rem action." *Merritt*, 1 Wn.3d at 704-05 (citing *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)). Therefore, citing our analysis in *Copper Creek* with approval, the Supreme Court noted that, to the extent that a "rule" about the effect of bankruptcy discharge was attributed to *Edmundson*, that rule was "incorrect because a lien survives bankruptcy discharge; bankruptcy eliminates only the debtor's personal liability on the note, leaving 'the debt, the note, and the payment schedule . . . unchanged'; and *8 '[m]issing a payment in an installment note does not trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature.'" *Merritt*, 1 Wn.3d at 707-08 (quoting *Copper Creek*, 21 Wn.App. 2d at 625).

The recent decisions affirming our holding in *Copper Creek* do not change our analysis of the trial court's resolution of WSC's CR 60(b) motion or lead us to conclude that the trial court abused its discretion. The identified basis for the motion was our decision in *Luv*, which relied on *Edmundson*. This is a legal error that is not correctable by a CR 60(b)(11) motion.

Moreover, the fact "[t]hat relief potentially is available under CR 60(b)(11) based on a postjudgment court decision does not resolve [a] case. [The moving party] must show that under the specific facts of [its] case extraordinary circumstances exist that entitled [it] to CR 60(b)(11) relief." *Shandola*, 198 Wn.App. at 903. In *Shandola*, while there was a change in the law, the court also identified five factors that supported a finding of extraordinary circumstances and discussed each at length. 198 Wn.App. at 904-05. Similarly, as the court in *Shandola* noted, in another case involving a CR 60(b)(11) motion based on a change in the law, *In re Marriage of Flannagan*, 42 Wn.App. 214, 709 P.2d 1247 (1985), the court "focused on extraordinary circumstances other than the change in the law," and it was those extraordinary circumstances that allowed for the *9 retroactive application of new legislation that changed the applicable law. *Shandola*, 198 Wn.App. at 903 (citing *Flannagan*, 42 Wn.App. at 222).[5]

[5] The court in *Flannagan* described the extraordinary circumstances there as follows:

> [F]irst, the clear congressional desire of removing all ill effects of *McCarty* [a U.S. Supreme Court decision holding that military retirement benefits could not be distributed as community property]; second, the alacrity with which the Congress moved in passing the USFSPA [Uniformed Services Former Spouses Protection Act]; third, the anomaly of allowing division of the military retirement pay before *McCarty* and after USFSPA, but not during the 20-month period in between; and fourth, the limited number of [divorce] decrees that were final and not appealed during that period.

*Flannagan*, 42 Wn.App. at 222 (footnote omitted).

As it is appropriate to grant relief under CR 60(b)(11) only in "extreme, unexpected situations" and "extraordinary circumstances," which have not been demonstrated here, the trial court did not abuse its discretion in denying WSC's motion to vacate.

Affirmed.

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# Appendix B

No. 101505-4
Supreme Court of Washington

# W. Coast Servicing v. Luv

536 P.3d 182 (Wash. 2023) · 1 Wash.3d 1033
Decided Oct 3, 2023

No. 101505-4

10-03-2023

WEST COAST SERVICING, INC., Petitioner, v. Price Eric LUV, Respondent.

## ORDER

¶1 Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener, considered at its October 2, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

¶2 IT IS ORDERED:

¶3 That the petition for review is granted and the case is remanded to the Court of Appeals Division I for reconsideration in light of Supreme Court No. 100918-6 – *Copper Creek,* ––– Wn.3d –––, 532 P.3d 601 (2023).

For the Court

/s/ González, C.J.

CHIEF JUSTICE

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# Appendix C

18 Wash.App.2d 1049

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

Prince Eric LUV, Respondent,

v.

WEST COAST SERVICING, INC., Appellant.

No. 81991-7-I

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FILED 08/02/2021

Appeal from Snohomish Superior Court, Docket No: 19-2-03395-7, Honorable Eric A. Lucas, Judge

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UNPUBLISHED OPINION

Coburn, J.

***1** West Coast Servicing, Inc. (WCS) appeals a trial court decision on cross-motions for summary judgment quieting title in Prince Eric Luv. WCS contends that the trial court erred in ruling that the statute of limitations barred foreclosure of the deed of trust that secured Luv's home equity loan. We adhere to our decision in Edmundson v. Bank of America, 194 Wn. App. 920, 378 P.3d 272 (2016), and hold 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. Because WSC initiated foreclosure more than six years after Luv's bankruptcy discharge, the action was time barred. We therefore affirm.

FACTS

On November 18, 2005, Luv opened a home equity line of credit for $38,200 with lender Mortgageit, Inc. secured by a deed of trust against his home in Everett. The deed of trust identifies Landamerica Transnation as the trustee and Mortgage Electronic Registration Systems, Inc. (MERS) as the deed of trust beneficiary. The accompanying promissory note required Luv to repay any indebtedness in monthly installments over 20 years.

Luv filed for chapter 7 bankruptcy on December 2, 2008. The bankruptcy trustee found no value in the property above the secured debt and the homestead exemption and did not sell the property. On March 11, 2009, the bankruptcy court entered an order discharging Luv's personal liability on his debts, including the home equity loan. Luv made no payments on that debt since prior to his bankruptcy discharge.

On August 9, 2018, MERS transferred its interest in the deed of trust to WSC. WSC then initiated a non-judicial foreclosure against Luv's encumbered property.[1] On April 17, 2019, Luv filed a quiet title action against WSC arguing that the statute of limitations for enforcement of the deed of trust expired six years after the bankruptcy discharge of his personal liability for repayment of the loan under the note. On cross-motions for summary judgment, the trial court ruled in favor of Luv and entered an order extinguishing the deed of trust and quieting title in Luv. WSC appeals.

DISCUSSION

WSC argues that the trial court erred by granting Luv's motion for summary judgment and quieting title in Luv. This is so, WSC contends, because the

bankruptcy discharge did not commence the applicable statutory limitation period regarding its ability to enforce payment of Luv's loan obligation. We disagree.

We review a trial court's decision on a summary judgment motion de novo. Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When the underlying facts are undisputed, we review de novo whether the statute of limitations bars an action. Bennett v. Comput. Task Grp., Inc., 112 Wn. App. 102, 106, 47 P.3d 594 (2002).

***2** Under RCW 7.28.300, the record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose is barred by the statute of limitations. A promissory note and deed of trust are written contracts that are subject to a six-year statute of limitations. RCW 4.16.040(1); Westar Funding, Inc. v. Sorrels, 157 Wn. App. 777, 784, 239 P.3d 1109 (2010). The six-year period commences "after the cause of action has accrued." RCW 4.16.005. "For a deed of trust, the six-year statute of limitations begins to run when the party is entitled to enforce the obligations of the note." Wash. Fed. v. Azure Chelan, LLC, 195 Wn. App. 644, 663, 382 P.3d 20 (2016); Walcker v. Benson and McLaughlin, P.S., 79 Wn. App. 739, 740-41, 904 P.2d 1176 (1995) (holding a creditor's right of non-judicial foreclosure of a deed of trust does not extend beyond the limitation period for enforcement of the underlying debt).

Under an installment promissory note, the statutory limitation period is triggered by each missed monthly installment payment at the time it is due. Cedar W. Owners Ass'n. v. Nationstar Mortg., LLC, 7 Wn. App. 2d 473, 484, 434 P.3d 554 (2019); Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945) (holding that " 'when recovery is sought on an obligation payable by installments, 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.' "). In the event that an installment note is accelerated, the entire remaining balance becomes due and the statute of limitations is triggered for all installments that had not previously come due. 4518 S. 256th, LLC v. Karen L. Gibbon, PS, 195 Wn. App. 423, 434-35, 382 P.3d 1 (2016).

At issue in this case is whether Luv's bankruptcy discharge commenced the running of the statute of limitations on an action to enforce the deed of trust. Our opinion in Edmundson is controlling. In Edmundson, the debtors obtained a loan to purchase real property. The loan was documented by a promissory note payable in monthly installments, and a deed of trust secured the note. 194 Wn. App. at 923. The debtors stopped making payments and subsequently received a chapter 13 bankruptcy discharge. Id. The successor trustee sought to enforce the deed of trust approximately a year after the bankruptcy discharge. Id. The debtors then filed a quiet title action asserting that the lien to the deed of trust was no longer enforceable. 194 Wn. App. at 924. The trial court granted summary judgment to the debtors based on its conclusion that the deed of trust was unenforceable because the discharge of the debtor's personal liability in bankruptcy also discharged the deed of trust lien. 194 Wn. App. at 924.

The Edmundson court began its analysis by noting that a bankruptcy discharge extinguishes only the personal liability of the debtor, but the creditor's right to foreclose on the deed of trust survives the bankruptcy. 194 Wn. App. at 925 (citing Johnson v. Home State Bank, 501 U.S. 78, 82-84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991)). Because the right to foreclose the lien of the deed of trust on the debtors' property was not affected by the bankruptcy discharge, the appellate court held that the trial court erred in granting summary judgment to the debtors. 194 Wn. App. at 926-27.

Of particular significance to this case, the Edmundson court also held that a bankruptcy discharge commences the six-year statutory limitation period for enforcing a deed of trust for an obligation payable in installments. Edmundson, 194 Wn. App. at 930-31 (citing Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)). The court reasoned that the statute of limitations does not accrue after discharge because, at that point, no future installment payments are due and owing on the note or deed of trust. 194 Wn. App. at 931. Because the debtors' missed payments accrued within six years of the trustee's resort to remedies, the statute

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of limitations did not bar enforcement of the deed. 194 Wn. App. at 931.

***3** Washington and federal courts have followed the rule announced in Edmundson. See Jarvis v. Fed. Nat'l Mortg. Ass'n, 726 F. Appx. 666, 677 (9th Cir. 2018) ("The final six-year period to foreclose runs from the time the final installment becomes due ... [which] may occur upon the last installment due before discharge of the borrower's personal liability on the associated note."); Spesock v. U.S. Bank, No. C18-0092JLR, 2018 WL 4613163, at *4 (W.D. Wash. Sept. 26, 2018) (court order) (noting that, "[w]hen a note is discharged in a Chapter 7 bankruptcy, the statute of limitations to enforce the corresponding deed of trust runs from the date the last payment on the note was due prior to the Chapter 7 discharge"); Taylor v. PNC Bank, C19-01142-JCC, 2019 WL 4688804 (W.D. Wash. Sept. 26, 2019) (court order) (holding that "the statute of limitations on Defendant's ability to enforce the deed of trust began to accrue on the last date an installment was due prior to the discharge"); U.S. Bank v. Kendall, No. 77620-7-I, slip. op. at 9 (Wash. Ct. App. 2d July 1, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/776207.pdf (noting that although a deed of trust's lien is not discharged in bankruptcy, the limitations period for an enforcement action nonetheless "accrues and begins to run when the last payment was due" prior to discharge); Hernandez v. Franklin Credit Mgmt. Corp., C19-0207-JCC, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019) (court order) (applying Edmundson to conclude that the trustee's attempt to enforce the deed of trust was time barred).

Here, Luv received a chapter 7 discharge of his personal liability on the note on March 11, 2009. Under Edmundson, the six-year statute of limitations on the note was triggered on March 1, 2009, the date that Luv's last payment was due prior to his bankruptcy discharge. Enforcement of the deed of trust was thus time barred after March 1, 2015. As of the date of discharge, the creditor could no longer enforce Luv's personal liability, and its only remaining recourse was to foreclose on the property in rem. WSC sought to foreclose more than three years after expiration of the statute of limitations. Accordingly, the trial court did not err in extinguishing the deed of trust and quieting title in Luv.

WSC urges us to reject Edmundson and instead hold that bankruptcy discharge does not trigger commencement of the statute of limitations under an installment note. WSC argues that the Edmundson rule is not rooted in state law; rather, it is the product of inadvertent language from a federal court case that this court copied and pasted into its opinion without any legal citation or analysis. WSC further contends that the Edmundson rule contradicts existing black letter bankruptcy law because it is based on the faulty assumptions that a bankruptcy discharge eliminates or accelerates a secured debt. WSC is incorrect.

The Edmundson court based its reasoning on settled law from the Washington Supreme Court holding that "when recovery is sought on an obligation payable by installments, 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." 194 Wn. App. at 930 (quoting Herzog, 23 Wn.2d at 388). "A statute of limitation does not invalidate a claim, but rather 'deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim." Walcker, 79 Wn. App. at 743 (quoting Stenberg v. Pac. Power & Light Co., 104 Wn.2d 710, 714, 709 P.2d 793 (1985)). Edmundson cannot be read to stand for the proposition that bankruptcy discharge eliminates or accelerates the debt; rather, discharge triggers the statutory limitation period during which a creditor may enforce the deed of trust.

WSC also asserts that the Edmundson rule has been criticized by the bankruptcy courts in this state. See In re Plastino, 69 Bankr. Ct. Dec. (LRP) 177 (Bankr. W.D. Wash. Dec. 29, 2020); In re Griffith, No. 18 Bankr. Ct. Nov. (TWD) (Bankr. W.D. Wash. Nov. 2, 2020); Hernandez v. Franklin Credit Mgmt. Corp., No. C19-0207-JCC, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019) (court order) (rejecting Edmundson and holding that a bankruptcy discharge does not trigger commencement of the statute of limitations under an installment note). These courts reasoned that the Edmundson rule is dicta that need not be followed, and that the rule is inconsistent with the principle that acceleration is not automatic but requires action by the lender. However, on appeal of Hernandez, the United States District Court of the Western District of

Washington and the Ninth Circuit Court of Appeals rejected the bankruptcy court's reasoning and ruled that Edmundson is controlling. In re Hernandez, 820 Fed. Appx. 593 (September 8, 2020). The bankruptcy court cases cited by WSC do not persuade us to depart from Edmundson.[2]

***4** WSC further argues that the Edmundson rule serves no policy objective and would be disastrous for secured lending in this state. WSC contends that the rule would have broad implications that bar enforcement of a deed of trust following bankruptcy discharge. But because the statute of limitations does not operate when payments are voluntarily made or when the debtor acknowledges the debt, all mortgage debts will not automatically become uncollectible after discharge. See In re Tragopan Prop, LLC, 164 Wn. App. 268, 273, 263 P.3d 613 (2011) (noting that an untimely action may be maintained under RCW 4.16.280 by a written acknowledgment or promise signed by the debtor that recognizes the debt's existence, is communicated to the creditor, and does not indicate an intent not to pay).

Moreover, we agree with Luv that it is against public policy to allow a deed of trust to be enforced without limits. Statutes of limitations promote justice and ensure fairness by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Langlois v. BNSF Ry. Co., 8 Wn. App. 2d 845, 862, 441 P.3d 1244 (2019). "[T]hese goals are generally applicable in foreclosure proceedings, whether based on mortgages or deeds of trust." Walcker, 79 Wn. App. at 746 (stating that "the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.") Here, WSC purchased Luv's debt in 2018, nine years after his bankruptcy discharge. Public policy disfavors allowing homeowners to indefinitely face the specter of foreclosure following bankruptcy discharge.

Both parties request attorney fees under RCW 4.84.330 and the deed of trust. We may award attorney fees and expenses on appeal under RAP 18.1(a) if applicable law grants to a party the right to recover reasonable attorney fees and if the party requests the fees in compliance with RAP 18.1. RCW 4.84.330 provides:

> In any action on a contract or lease ... where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Here, the deed of trust provides that the lender "shall be entitled to collect all reasonable fees and costs actually incurred by [the lender] in proceeding to foreclosure or to public sale," including "reasonable attorneys' fees." Because Luv has prevailed on appeal, his reasonable attorney fees and costs incurred on appeal are awarded upon compliance with RAP 18.1.

Affirmed.

WE CONCUR:

Bowman, J.

Dwyer, J.

**All Citations**

Not Reported in Pac. Rptr., 18 Wash.App.2d 1049, 2021 WL 3288360

Footnotes

1 See Notice of Trustee's Sale, publicly recorded under Snohomish County Recorder's No. 201901070138.

2 WSC attached to its reply brief a draft version, though not identified as such, of a recent article summarizing recent case law on this subject. See Jason Wilson-Aguilar, Does a Bankruptcy Discharge Trigger the Running of the Statute of Limitations on Actions to Enforce a Deed of Trust? Creditor Debtor Rights Newsletter, Washington State Bar Association, summer 2019, at 3. WSC offered the draft article as persuasive authority for the proposition that subject matter expert Wilson-Aguilar disagreed

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with Edmundson. However, the final published version of the article, offered by amicus curiae Northwest Consumer Law Center, differed significantly from the draft version offered by WSC. Most notably, the final published version observed that the United States District Court's decision in Hernandez "plainly deals a serious – perhaps fatal – blow to the legal argument the bankruptcy court approved" in the cases cited by WSC. We therefore strike the draft version offered by WSC.

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# Appendix D

24 Wash.App.2d 1038

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1
Court of Appeals of Washington, Division 1.

WEST COAST SERVICING, INC., Appellant,
v.
Prince Eric LUV, Respondent.

No. 83959-4-I
|
Filed November 28, 2022

Appeal from Snohomish Superior Court, Docket No: 19-2-03395-7, Honorable Anita Farris, Judge

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UNPUBLISHED OPINION

Chung, J.

***1** 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.

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).

***2** 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 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), 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)).

***3** 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). 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.

***4** 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 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.

***5** 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. 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.

***6** 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 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.

WE CONCUR:

Birk, J.

Dwyer, J.

**All Citations**

Not Reported in Pac. Rptr., 24 Wash.App.2d 1038, 2022 WL 17246712

Footnotes

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.

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.

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).

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

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5 Nor was this court's decision in this case in the first appeal by WCS 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).

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).

**End of Document**

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# Appendix E

No. 82083-4-I
Court of Appeals of Washington, Division 1

# Copper Creek (Marysville) Homeowners Ass'n v. Kurtz

502 P.3d 865 (Wash. Ct. App. 2022)
Decided Jan 18, 2022

No. 82083-4-I

01-18-2022

COPPER CREEK (MARYSVILLE) HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation, Respondent, 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, Defendants, Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee from Pretium Mortgage Acquisition Trust, Selene Finance LP, Appellant.

Anne Marie Dorshimer, Stoel Rives LLP, 600 University St. Ste. 3600, Seattle, WA, 98101-4109, for Appellant. Marlyn Kathryn Hawkins, Barker Martin PS, 701 Pike St. Ste. 1150, Seattle, WA, 98101-3946, Samantha Jean Brown, Barker Martin, One Convention Place, 701 Pike St. Ste. 1150, Seattle, WA, 98101, for Respondent.

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Appelwick, J.

Anne Marie Dorshimer, Stoel Rives LLP, 600 University St. Ste. 3600, Seattle, WA, 98101-4109, for Appellant.

Marlyn Kathryn Hawkins, Barker Martin PS, 701 Pike St. Ste. 1150, Seattle, WA, 98101-3946, Samantha Jean Brown, Barker Martin, One Convention Place, 701 Pike St. Ste. 1150, Seattle, WA, 98101, for Respondent.

PUBLISHED OPINION

Appelwick, J.

¶ 1 Selene/Wilmington seeks reversal of summary judgment quieting title in favor of Copper Creek. Relying on Edmundson v. Bank of America, 194 Wash. App. 920, 378 P.3d 272 (2016), the trial court determined the statute of limitations rendered the Selene/Wilmington deed of trust unenforceable. This was error.

¶ 2 The statute of limitations ran against the deed of trust only to the extent it ran against the underlying debt. The underlying debt was an installment debt. The statute of limitations accrued on each individual installment as it came due. Bankruptcy discharge of the debtor did not extinguish the debt, modify the schedule of payments, or accelerate the maturity date. And, the lender did not accelerate the maturity date of the loan. The statute of limitations on each of the missed installments began running from the date they came due. Bankruptcy did not toll the statute of limitations. The discharge left intact the lender's option to enforce the debt against the property in rem.

¶ 3 However, the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3936(a), tolled the period for any action to enforce the debt until the debtor, an active duty servicemember, was relieved of personal liability on the debt by the discharge in bankruptcy. At that time, the statute of limitations began to run on any unpaid installments. Selene/Wilmington may enforce the deed of trust, except to the extent the statute of limitations has rendered any unpaid installments uncollectable.

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¶ 4 We reverse and remand for further proceedings.

FACTS

¶ 5 In 2007, Shawn and Stephanie Kurtz purchased real property with a note for $303,472.00 secured by a deed of trust (DOT).[1] Shawn was active duty in the United States military at the time and continued to be an active duty serviceman until at least September 2020. The property was within the Copper Creek (Marysville) Homeowners Association and the Kurtzes were obligated to pay annual assessments of $400.

1 CTX Mortgage Company, LLC was the original beneficiary of the DOT. CTX assigned the DOT to J.P. Morgan Mortgage Acquisition Corporation in December 2013. In December 2018, J.P. Morgan Mortgage Acquisition assigned the DOT to JPMorgan Chase Bank who immediately assigned it to Citibank N.A. as trustee for CMLTI Asset Trust. Citibank assigned the DOT to Wilmington Savings Fund Society as trustee for Pretium Mortgage Acquisition Trust in April 2019.

¶ 6 In January 2008, Shawn and Stephanie separated and Stephanie moved out of the property. The Kurtzes stopped paying on the note in 2008 or 2009. Stephanie filed for Chapter 7 bankruptcy protection in February 2010. Stephanie included the property secured by the DOT on the bankruptcy schedule of creditors holding secured claims. On the debtor's statement of intention, Stephanie noted the mortgage and her intention to surrender the property. Stephanie did not claim the property as exempt. Stephanie received a bankruptcy discharge in June 2010. The note was among the claims discharged without payment. Stephanie's bankruptcy case was closed on June 18, 2010.

¶ 7 The Kurtzes ceased payment of their annual assessment to Copper Creek in July 2010.

¶ 8 Shawn filed a separate Chapter 7 bankruptcy in March 2011. He identified the property secured by the DOT and his intention *870 to surrender it. Shawn did not claim the property as exempt. Shawn also included Copper Creek as a creditor holding a secured claim for homeowners' dues in the amount of $1,826.50. His bankruptcy was discharged on July 13, 2011 and his case closed on July 18, 2011.[2] The note was among the claims discharged without payment.

2 Because the record does not include whether the secured property was abandoned by the bankruptcy court prior to closure, we assume the protective injunction ended upon closure of the bankruptcy case. See 11 U.S.C. 362(c)(1).

¶ 9 The property sat vacant and fell into disrepair. In November 2018, Copper Creek recorded a notice of claim of lien against the property for the $15,278.68 in assessments, fees, interest, and attorney fees and costs that had accrued on the property. Copper Creek filed for judicial foreclosure to recoup the delinquent assessments.[3] Copper Creek acknowledges that it named only the Kurtzes as defendants in the judicial foreclosure, omitting the lenders because its assessment lien was junior to the lender and it was not seeking to foreclose the lender's interest. Copper Creek requested appointment of a receiver to "obtain possession of the Lot, refurbish it to a reasonable standard for rental units, and rent the Lot or permit its rental to others." In April 2019, Copper Creek and the Kurtzes entered an agreed order with the court for appointment of a custodial receiver. Copper Creek recorded the order appointing the receiver with Snohomish County Superior Court. The receiver spent $22,470.24 rehabilitating the property and began renting it at fair market value.

3 Shawn was still an active servicemember when Copper Creek filed for judicial foreclosure. He does not appear to have challenged the suit, instead he agreed to

receivership. The validity of Copper Creek's judicial foreclosure action is not before us.

¶ 10 Shortly after completion of the repairs to the property, Quality Loan Service Corporation of Washington (QLS) as Trustee commenced nonjudicial foreclosure on the property on behalf of successor beneficiary Wilmington Savings Fund Society FAB and loan servicer Selene Finance LP (together "Selene/Wilmington"). On October 30, 2019, QLS provided a notice of trustee sale of the property to Copper Creek. In February 2020, Copper Creek notified QLS that enforcement of the DOT was barred by the statute of limitations and demanded discontinuation of the sale. QLS refused and Copper Creek filed a motion to restrain the sale.

¶ 11 Copper Creek also filed a complaint against the Kurtzes, Selene/Wilmington, and QLS for lien foreclosure, restraint of the trustee sale, wrongful foreclosure, and quiet title.[4] In April 2020, Selene/Wilmington filed a CR 12(b)(6) motion to dismiss the action to quiet title for lack of standing. Prior to a ruling on that motion, Copper Creek received a deed in lieu of foreclosure from the Kurtzes that was recorded with the county on June 10, 2020.

[4] Shawn was still an active duty servicemember at the time of this lawsuit. Arguably, the SCRA barred this action as against him. The issue of the SCRA's application to these claims is not before us. Moreover, the issue became moot when Copper Creek received the deed in lieu of foreclosure and the Kurtzes were no longer party to the suit.

¶ 12 In May 2020, Selene/Wilmington contacted Shawn and Stephanie and asked if they would execute a waiver of the statute of limitations on the underlying loan: "Given that you both seem to have moved on from the Property now, executing such a document likely wouldn't impact you much, if at all, but i[t] could help my client in the underlying litigation, and we'd be willing to give you something in exchange for your trouble." Shawn refused and notified Copper Creek of the request.

¶ 13 In June 2020, Copper Creek moved to continue the sale and the motion to dismiss. The trial court granted Copper Creek's motion, continuing both the trustee sale and the motion to dismiss to allow the parties time to conduct discovery. The court entered an order compelling discovery with a deadline of July 7, 2020, and awarded attorney fees to Copper Creek. QLS then cancelled the sale.

¶ 14 Copper Creek requested and received leave to amend its complaint to reflect its *871 standing through the deed in lieu of foreclosure. Selene/Wilmington did not comply with discovery requests by the deadline. On July 10, 2020, QLS provided notice of trustee sale on the property to be conducted in October 2020. Copper Creek moved to enjoin the sale, and the trial court granted the motion.

¶ 15 Copper Creek requested an additional continuance on the motion to dismiss and moved for default judgment due to Selene/Wilmington's failure to provide discovery or file an answer to the amended complaint. In support of its motion to dismiss, Selene/Wilmington argued that because the property formerly belonged to a member of the United States military, the SCRA applied to toll the statute of limitations on the DOT. After oral argument on several competing motions, the trial court denied Selene/Wilmington's motion to dismiss and awarded Copper Creek attorney fees. The court expressed concern about Selene/Wilmington's "bad faith compliance with the rules in terms of discovery." In an attempt to force Selene/Wilmington to complete discovery, the court entered an order of default against Selene/Wilmington that would "enter on August 14, 2020 unless an order striking this default is

entered by this court before said date." Selene/Wilmington answered the complaint and the parties stipulated to strike the order of default.

¶ 16 Copper Creek then filed a motion for summary judgment. Selene/Wilmington opposed the summary judgment and filed a CR 12(c) motion for judgment on the pleadings. After oral arguments, the trial court granted the summary judgment and quieted title in Copper Creek. The court struck Selene/Wilmington's motion for judgment on the pleadings as a CR 11 sanction. The trial court also awarded reasonable attorney fees to Copper Creek under RCW 4.84.185, the contractual attorney fee provision in the DOT, and also "as a matter of equity because [of Selene/Wilmington's] bad faith and misconduct shown repeatedly throughout this case." The court subsequently entered a judgment against Selene/Wilmington for $96,779.09 in attorney fees.

¶ 17 Selene/Wilmington appeals the court's orders on summary judgment, motion to dismiss, motion for judgment on the pleadings, and the judgment for attorney fees.

DISCUSSION

¶ 18 The trial court granted summary judgment quieting title as to Copper Creek, because the statute of limitations had run on enforcement of the DOT. We review orders on summary judgment de novo. Kim v. Lakeside Adult Family Home, 185 Wash.2d 532, 547, 374 P.3d 121 (2016). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c) ). When the underlying facts are undisputed, we review de novo whether the statute of limitations bars an action. Edmundson, 194 Wash. App. at 927-28, 378 P.3d 272. The six year statute of limitations for an agreement in writing applies to enforcement of a DOT. Id. at 927, 378 P.3d 272 ; RCW 4.16.040(1).

I. Enforcement of the Deed of Trust

¶ 19 A DOT creates a security interest in real property. Brown v. Dep't of Commerce, 184 Wash.2d 509, 515, 359 P.3d 771 (2015). A note is a separate obligation from the deed of trust. Boeing Emps.' Credit Union v. Burns, 167 Wash. App. 265, 272, 272 P.3d 908 (2012). The note represents the debt, whereas the deed of trust is the security for payment of the debt. See id. The security instrument follows the note that it secures. Deutsche Bank Nat'l Trust Co. v. Slotke, 192 Wash. App. 166, 177, 367 P.3d 600 (2016). "The holder of the promissory note has the authority to enforce the deed of trust because the deed of trust follows the note by operation of law." Winters v. Quality Loan Serv. Corp. of Wash., Inc., 11 Wash. App. 2d 628, 643-44, 454 P.3d 896 (2019).

A. The SCRA Tolled the Statute of Limitations on Enforcement of the Debt

¶ 20 Selene/Wilmington tried to enforce the terms of the note as secured by the DOT through nonjudicial foreclosure which prompted Copper Creek to bring the action *872 to quiet title. The trial court concluded that the SCRA tolling provision did not apply to the foreclosure action, which allowed the statute of limitations to run on the DOT. The SCRA tolls statutes of limitations in lawsuits involving servicemembers.[5]

[5] Washington has an equivalent statute that provides, "The period of a service member's military service may not be included in computing any period limited by law, rule, or order, for the bringing of any action or proceeding in a court ... by or against the service member or the service member's dependents, heirs, executors, administrators, or assigns." RCW 38.42.090(1).

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a).

¶ 21 Shawn appears to have defaulted on the note in 2008 or 2009. The parties do not dispute that Shawn was an active duty servicemember until at least September 2020. As a result, the SCRA tolled any court action involving Shawn during his service. 50 U.S.C. § 3936(a). Bankruptcy discharge extinguished Shawn's personal liability on July 13, 2011. See Johnson v. Home State Bank, 501 U.S. 78, 82-83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). Without Shawn's personal liability, the debt, as evidenced by the note, was no longer enforceable against a servicemember. Without a servicemember's involvement, the SCRA ceased to toll the statute of limitations. As of July 14, 2011, the six year statute of limitations began running on enforcement of the unpaid installments.[6] See id. at 84, 111 S. Ct. 2150.

[6] The statute of limitations was tolled only because of the SCRA. Bankruptcy does not toll the statute of limitations. Hazel v. Van Beek, 135 Wash.2d 45, 64-66, 954 P.2d 1301 (1998) ; Merceri v. Deutsche Bank AG, 2 Wash. App. 2d 143, 148, 408 P.3d 1140 (2018). A bankruptcy petition triggers an automatic stay on "proceedings to obtain possession or exercise control of property in the bankruptcy estate." Merceri, 2 Wash. App. 2d at 148, 408 P.3d 1140 (citing 11 U.S.C. 362(a)(3) ). This stays all creditor actions to enforce liens against the debtor's property, including commencement of a foreclosure action. Id. at 148-51, 408 P.3d 1140. Actions against the debtor are stayed until the earliest of case closure, dismissal, or discharge. 11 U.S.C. 362(c)(2). The stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C. 362(c)(1). If the statute of limitations to enforce a claim expires during the bankruptcy stay, 11 U.S.C. 108(c)(2) provides a 30 day window after lifting of the bankruptcy stay in which to file the claim. Id. at 148-49, 408 P.3d 1140.

B. Bankruptcy Did Not Extinguish the Secured Debt

¶ 22 The Kurtzes both filed for Chapter 7 bankruptcy. "A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation." Id. at 82-83, 111 S. Ct. 2150. Discharge of debts in bankruptcy extinguishes the " 'personal liability of the debtor.' " Id. at 83, 111 S. Ct. 2150 (quoting 11 U.S.C. § 524(a)(1) ). So, the Kurtzes no longer had liability for the monthly installment payments on the note, past due or future, as of their respective discharge dates. But, the discharge extinguishes only the right of action against the debtor in personam, leaving intact the option to enforce a claim against a debtor in rem. Id. at 84, 111 S. Ct. 2150. The Bankruptcy Code provides that a creditor's right to foreclose on secured property survives the bankruptcy. Id. at 83, 111 S. Ct. 2150 ; 11 U.S.C. 522(c)(2). A lien on real property passes through bankruptcy unaffected. Dewsnup v. Timm, 502 U.S. 410, 418, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992). However, a stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C. 362(c)(1).

C. The Statute of Limitations Application to Promissory

¶ 23 The ability to enforce a breach of a promissory note depends on whether it is a demand or installment note. A demand promissory note is mature at its inception and is enforceable at

873 any time. *873 Cedar W. Owners Ass'n v. Nationstar Mortg., LLC, 7 Wash. App. 2d 473, 483, 434 P.3d 554 (2019). Therefore, the statute of limitations on a demand note runs from date of execution. 4518 S. 256th, LLC v. Karen L. Gibbon, PS, 195 Wash. App. 423, 434, 382 P.3d 1 (2016). By contrast, an installment note is payable in installments and matures on a future date. Merceri v. Bank of New York Mellon, 4 Wash. App. 2d 755, 759, 434 P.3d 84 (2018). "[T]he 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 Wash.2d 382, 388, 161 P.2d 142 (1945). A separate statute of limitation accrues and runs for each individual installment. Edmundson, 194 Wash. App. at 931, 378 P.3d 272. The note holder has six years from default on an installment to enforce payment of that installment. See Merceri, 4 Wash. App. 2d at 759-60, 434 P.3d 84. The final six year period to take action related to the debt begins to run at the date of full maturity. Id. at 760, 434 P.3d 84.

¶ 24 An installment note or the DOT securing it may include an option to accelerate the maturation date in case of breach of the contract. See 4518 S. 256th, 195 Wash. App. at 441, 382 P.3d 1. Upon acceleration, the entire balance becomes due and triggers the statute of limitations for all remaining installments. Id. at 434-35, 382 P.3d 1. Acceleration of the maturity date of a promissory note requires an affirmative action that is clear, unequivocal, and effectively notifies the borrower of the acceleration. Id. at 435, 382 P.3d 1. Default alone does not accelerate the note. Id. "[E]ven if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note." A.A.C. Corp. v. Reed, 73 Wash.2d 612, 615, 440 P.2d 465 (1968).

¶ 25 Deed of trust remedies are subject to RCW 4.16.040, the six year statute of limitations. Merceri, 4 Wash. App. 2d at 759, 434 P.3d 84. A debtor facing foreclosure can raise the statute of limitations as a defense to the sale. Walcker v. Benson & McLaughlin, PS, 79 Wash. App. 739, 746, 904 P.2d 1176 (1995) ; RCW 7.28.300. Applying the statute of limitations defense to nonjudicial foreclosure of a deed of trust based upon past due installments, we held that recovery was allowed for the actionable installments but not for those made unenforceable by the six year statute of limitations. Cedar W., 7 Wash. App. 2d at 489-90, 434 P.3d 554. To 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. See Walcker, 79 Wash. App. at 740-1, 904 P.2d 1176.

D. Bankruptcy Discharge of Personal Liability on an Installment Note Does Not Modify the Payment Schedule or Accelerate the Maturity Date of the Note

¶ 26 The trial court concluded that Selene/Wilmington 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.[7] 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.[8] To the extent that unpublished state appellate cases have repeated the federal interpretation, they are also in error.

874 *874 ¶ 27 The Edmundsons signed an installment note secured by a DOT in July 2007. Edmundson, 194 Wash. App. at 923, 378 P.3d 272. They failed to pay the November 1, 2008 installment, and never made another payment. Id. The Edmundsons filed for Chapter 13 bankruptcy in June 2009. Id. Their bankruptcy plan was confirmed, and they were discharged on December 31, 2013. Id. The lender filed a notice

of default on October 23, 2014 and a trustee sale was scheduled to satisfy the unpaid monthly obligations under the note and DOT. Id.

[7] The trial court referenced Hernandez v. Franklin Credit Management Corporation, which relied on Edmundson as discussed below. No. BR 18-01159-TWD, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020).

[8] These cases were also questioned in an article published by the Creditor Debtor Rights Section of the Washington State Bar Association. Jason Wilson-Aguilar, Does A Bankruptcy Discharge Trigger the Running of the Statute of Limitations on Actions to Enforce a Deed of Trust?, 37 Creditor Debtor Rts. News Letter , no. 1, Summer 2019, at 3-6, https://wsba.org/docs/default-source/legal-community/sections/cd/resources/creditor-debtor-rights-section-summer-2019-newsletter.pdf?sfvrsn=af5e0cf1_4#:~:text=In%20contrast%20to%20Edmundson%20and,limitations%20under%20an%20installment%20note [https://perma.cc/7MPA-GE24].

¶ 28 The Edmundsons sought to restrain the trustee's sale and quiet title to the property. Id. at 924, 378 P.3d 272. They argued the bankruptcy discharge of their personal liability on the note rendered the deed of trust unenforceable. Id. This court rejected the premise that the lien was discharged, stating, "In sum, nothing in this record and nothing under either federal or state law supports the conclusion that the discharge of personal liability on the note also discharges the lien of the deed of trust securing the note. The deed of trust is enforceable." Id. at 927, 378 P.3d 272.

¶ 29 The Edmundsons also argued under the Walcker case that the statute of limitations had begun to run on the deed of trust as of their first missed payment on the note on November 1, 2008. Id. at 929, 378 P.3d 272. And, since the statute of limitations had run before the lender attempted to enforce the note, the DOT was no longer enforceable. Id. However, we rejected the Edmundsons' and the trial court's reliance on Walcker for the proposition that the statute of limitations had run. Id. at 928, 378 P.3d 272. The Walcker case concerned failure to pay on a demand note. 79 Wash. App. at 741, 904 P.2d 1176. We noted that Walcker applied the six year statute of limitations, running from the date of execution of the note, and found the lender's efforts to foreclose on the deed of trust were barred as untimely. Edmundson, 194 Wash. App. at 928-29, 378 P.3d 272. But, because the Edmundsons' debt was an installment note, Walcker was inapplicable. Id. at 929, 378 P.3d 272.

¶ 30 We also rejected the Edmundsons' argument that no resort to remedies under the deeds of trust act, ch. 61.24 RCW, had occurred before the statute of limitations had run. Id. at 930, 378 P.3d 272. We concluded that the October 23, 2014 written notice of default was evidence of resort to remedies under the act. Id. Under the Edmundsons' theory, the statute of limitations began running November 1, 2008 and would have expired on October 31, 2014. Id. Thus, even under their timeline, the action on the deed of trust was not untimely. Id. at 931, 378 P.3d 272.

¶ 31 And, we rejected the Edmundsons' premise that the statute of limitations began to run on the full amount of the note from the first missed payment. Id. at 931-32, 378 P.3d 272. That argument contradicted settled law from the Washington Supreme Court: " '[W]hen recovery is sought on an obligation payable by installments, 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.' " Id. at 930, 378 P.3d 272 (quoting Herzog, 23 Wash.2d at 388, 161 P.2d 142 ). Missing a payment in an installment note does not

trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature.

¶ 32 We then applied this rule to the individual payments the Edmundsons missed beginning with the November 1, 2008 payment and every successive payment due prior to the bankruptcy discharge that ended their personal liability on the note. Id. at 931, 378 P.3d 272. Because the nonjudicial foreclosure commenced October 23, 2013, "each of these missed payments accrued within six years of the resort to the remedies under the deeds of trust act. The statute of limitations did not bar enforcement of the deed of trust for these missed payments." Id. at 931, 378 P.3d 272. Therefore, in the pending in rem nonjudicial foreclosure action, no portion of the debt was rendered unenforceable by the statute of limitations.

¶ 33 The trial court apparently believed that either the lender or the Edmundsons' bankruptcy had accelerated the note and triggered the statute of limitations on the entire debt. Id. But, "[d]efault in payment alone does not work an acceleration." 875 *875 Id. at 932, 378 P.3d 272. While acceleration of the maturity of the note was an option for the creditor under the Edmundsons' DOT, we determined "there was no evidence that the lender had accelerated the maturity date of the note," and "to the extent that the trial court ruled that some event during the bankruptcy proceeding triggered [the acceleration] provision, the court is wrong." Id. at 931-32, 378 P.3d 272. "Accordingly ... the statute of limitations for each monthly payment accrued as the payment became due." Id.

¶ 34 The Edmundson opinion addressed the various issues through application of settled law. But, subsequent courts have interpreted Edmundson as announcing a new rule. The first manifestation of a new rule of law attributed to Edmundson came in Jarvis v. Federal National Mortgage Association, No. C16-5194-RBL, 2017 WL 1438040 (W.D. Wash. Apr. 24, 2017), aff'd, 726 F. App'x 666 (9th Cir. 2018). It observed,

> The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation.

Id. at 2. This much is settled Washington law. The decision goes on to say,

It also occurs at the payment owed immediately prior to the discharge of a borrower's personal liability in bankruptcy, because after discharge, a borrower no longer has forthcoming installments that he must pay.[ 9 ] See Edmundson, 194 Wash. App. at 931 *272 ; see also Silvers v. U.S. Bank Nat['l] Ass'n, [No. 15-5480 RJB], 2015 WL 5024173, at *4.

....

Because the Edmundsons owed no future payments after the discharge of their liability, the date of their last-owed payment kickstarted the deed of trust's final limitations period. ...

....

The Court agrees with Silvers'[s] and Edmundson's holdings. The discharge of a borrower's personal liability on his loan—the cessation of his installment obligations—is the analog to a note's maturation. In both cases, no more payments could become due that could trigger RCW 4.16.040 's limitations period. ...

....

... The court's conclusion was not dicta [because] it was necessary to deciding whether the creditor could foreclose on the Edmundsons' home, or whether they could sustain an action for quiet title.

9 The mistaken idea that bankruptcy starts the clock on enforcement of the DOT appears to have originated with a lender's argument to the court in Silvers. No. 15-5480 RJB, 2015 WL 5024173, at *4. In its motion to dismiss, U.S. Bank acknowledged "there can be no doubt that the Deed of Trust lien survived the Chapter 7 bankruptcy." Without citation to supporting law, U.S. Bank made the assertion that the statute of limitations "began running the last time any payment on the Note was due," which was the payment immediately prior to discharge in bankruptcy. The court accepted U.S. Bank's argument and concluded,

> The statute of limitations on the right to enforce the Deed of Trust began running the last time any payment on the Note was due. The Plaintiffs remained personally liable on the Note (and successive payments continued to be due) until January 1, 2010, when they missed that payment; they received their Chapter 7 discharge on January 25, 2010. Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run on January 1, 2010.

Silvers, No. 15-5480 RJB, 2015 WL 5024173, at *4. Silvers was cited to in briefing in the Edmundson case, but not mentioned, let alone adopted in Edmundson. And, Silvers could not have established new law as federal courts have no authority to decide Washington law. In re Estate of Stoddard, 60 Wash.2d 263, 270, 373 P.2d 116 (1962).

Id. at 2-3 (some internal citations omitted).

¶ 35 However, 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 Wash. App. at 931, 378 P.3d 272. 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 *876 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.[10] Such a rule only exists in the inferences drawn and stated in the federal decisions.

10 Nor did we discuss the policy implications of such a rule in Edmundson. Such a rule implicates a number of policies that do not arise from nonpayment in a nonbankruptcy setting. The debtor may benefit by a shorter window in which the lien may be extinguished, or by living in the property for free while the lender foregoes foreclosure. As title holder, the debtor may be able to take advantage of market changes to sell the property for more than the lien amount if the lender is not forced for foreclose rapidly. The stability of land title records may be a concern. The debtor remains on the title pending foreclosure. The debtor can execute a deed in lieu of foreclosure to remove themselves from title. The sanctity of contract is raised by determining that discharge of personal liability on the installment note eliminates the lender's contraction option, it is a choice to accelerate or not to accelerate the maturity of the debt. The lender may find changing economic conditions make it more favorable to ultimate recovery to delay enforcement, though some portion of the debt may become uncollectable. This is not exhaustive of potential policy concerns. The important point is that we undertook no such policy analysis in Edmundson as would have been expected when announcing a new rule.

¶ 36 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.

¶ 37 Moreover, Jarvis's explanation of the rule is totally at odds with our rejection of the notion that the maturity of the loan was accelerated by the lender or by bankruptcy discharge. Edmundson 194 Wash. App. at 932, 378 P.3d 272. Our opinion did not announce an "analog" rule. Rather, the federal district court arrived at this result through its misinterpretation of Edmundson.[11]

11 The next case chronologically, cites to Jarvis and Edmundson for the rule, but does not comment on it. Taylor v. PNC Bank, Nat'l Ass'n, No. C19-1142-JCC, 2019 WL 4688804, at *2 (W.D. Wash. Sept. 26, 2019) ("the six-year statute of limitations period for enforcing a deed of trust payable in installments begins to accrue on each date that a borrower defaults on a payment until the borrowers' personal liability is discharged in a bankruptcy proceeding, as after that point no future installment payments will be due.").

¶ 38 In 2019 another federal district court case added to the error. Hernandezv. Franklin Credit Mgmt. Corp., No. BR 18-01159-TWD, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020). It observed,

In Edmundson, the Washington State Court of Appeals ruled that the six-year statute of limitations for enforcing a deed of trust payable in installments begins to accrue on each month that a borrower defaulted on a payment, until the borrowers' personal liability is discharged in a bankruptcy proceeding. The court of appeals reasoned that the statute of limitations does not continue to accrue after discharge because, at that point, installment payments are no longer due and owing under either the note or deed of trust. Several courts have adopted this legal rule from *Edmundson* . See U.S. Bank NA v. Kendall, [No. 77620-7-I] slip. op. at 4 *2750171 (Wash. Ct. App. [July 1,] 2019) [(unpublished), http://www.courts.wa.gov/opinions/pdf/776207.pdf] (noting that although a deed of trust's lien is not discharged in bankruptcy, the limitations period for an enforcement action "accrues and begins to run when the last payment was due" prior to discharge); Jarvis v. Fed. Nat'l Mortg. Ass'n, [ ]No. C16-5194-RBL, [ ]at 6 *1438040 (W.D. Wash. 2017), aff'd mem., 726 Fed. App'x. 666 (9th Cir. 2018) ("The final six-year period to foreclose runs from the time the final installment becomes due ... [which] may occur upon the last installment due before discharge of the borrower's personal liability on the associated note").

877 *877

Id. at *3 (emphasis added) (some internal citations omitted). Hernandez 's source for the rule is clearly Jarvis, but the emphasized language is its own addition to the error.[12] No such statement is found in the Edmundson opinion.

[12] Notably, two unpublished Court of Appeals cases have picked up on the interpretation given to Edmundson by the federal district court. The first in time cited to Jarvis for the rule. U.S. Bank v. Kendall, No. 77620-7-I, slip. op. at 9, 2019 WL 2750171 (Wash. Ct. App. July 1, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/776207.pdf (noting that a deed of trust's lien is not discharged in bankruptcy but the limitations period for an enforcement action "accrues and begins to run when the last payment was due" prior to discharge), review denied, 194 Wash.2d 1024, 456 P.3d 394 (2020). The parties accepted that Edmundson stated the appropriate statute of limitations rule. Ultimately, the decision in the case did not turn on the issue.

The second cited to Jarvis and Hernandez and incorporated language from those cases purporting to explain the rule. Luv v. W. Coast Servicing, Inc, No. 81991-7-I, slip. op at 4-5, 2021 WL 3288360 (Wash. Ct. App. 2d August 2, 2021) (unpublished) https://www.courts.wa.gov/opinions/pdf/819917.pdf ("the six-year statute of limitations on the note was triggered on March 1, 2009, the date that Luv's last payment was due prior to his bankruptcy discharge"). The outcome of that opinion is contrary to the outcome here.

¶ 39 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 Wash. App. at 931, 378 P.3d 272.

¶ 40 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.

¶ 41 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.

E. The Statute of Limitations in this Case

¶ 42 Under Herzog and Edmundson, the statute of limitation on Kurtz's installment debt would have begun to run on each payment individually from its due date. Bankruptcy would not toll the statute of limitations. Hazel v. Van Beek, 135 Wash.2d 45, 64-66, 954 P.2d 1301 (1998) ; Merceri, 2 Wash. App. 2d at 148, 408 P.3d 1140. Here, the SCRA applied and tolled the statute of limitations until Shawn no longer had personal liability on the note. That occurred on July 13, 2011, the date of the discharge of his personal liability on the debt. The statute of limitation began to run on all of the past due installments from that date.

¶ 43 There is no evidence the lender exercised an option and accelerated the installment note. The trial court erroneously relied on Edmundson to conclude that Shawn's bankruptcy accelerated the note or triggered the statute of limitations on enforcing the DOT. The bankruptcy eliminated only Shawn's personal liability on the note. The debt, the note, and the payment schedule remain unchanged. The notice of nonjudicial foreclosure was given on October 20, 2019 prior to the November payment coming due. Any outstanding installments prior to November 2013, are not enforceable in the foreclosure action due to the six year statute of limitations. But, enforcement of the DOT was not barred as to the remainder due under the note.

¶ 44 The trial court erred by quieting title in Copper Creek.

II. Attorney Fees

¶ 45 The trial court awarded Copper Creek attorney fees and costs for the summary *878 judgment and quieting title under multiple rules: RCW 4.84.185 for frivolous defenses advanced without reasonable cause, the contractual attorney fee provision in the DOT ( RCW 4.84.330 and RCW 4.28.328 for prevailing in a defense of a lis pendens), and equity based on Selene/Wilmington's "bad faith and misconduct shown repeatedly and throughout this case." Selene/Wilmington argues the trial court erred by awarding attorney fees and costs to Copper Creek for its defense of the case and for responding to the motions to dismiss.

¶ 46 "Under Washington law, a trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity." Gander v. Yeager, 167 Wash. App. 638, 645, 282 P.3d 1100 (2012). The question of whether there is a legal basis for award of attorney fees is an issue of law we review de novo. Id. at 646, 282 P.3d 1100.

¶ 47 The DOT contains a mandatory attorney fee provision, "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security instrument." RCW 4.84.330 makes this provision reciprocal: "[T]he prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

¶ 48 As a result of our decision, Copper Creek is no longer the prevailing party and cannot recoup attorney fees under the terms of the DOT. The court's additional reasons for the attorney fee award— RCW 4.84.185, 4.28.328, and bad faith and misconduct—also fail based on our decision in favor of Selene/Wilmington.

¶ 49 Copper Creek acquired its interest from Kurtz through the deed in lieu of foreclosure and is subject to the terms of the DOT. Selene/Wilmington is entitled to attorney fees as

the prevailing party under the DOT. A contractual provision for an award of attorney fees at trial also supports an award of attorney fees on appeal. Edmundson, 194 Wash. App. at 920, 378 P.3d 272. Therefore, we award attorney fees to Selene/Wilmington as prevailing party in this appeal.

¶ 50 Reversed and remanded for proceedings consistent with this opinion.

WE CONCUR:

Hazelrigg, J.

Smith, J.

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# Appendix F

200 Wash.2d 1001
(This disposition is referenced
in the Pacific Reporter.)
Supreme Court of Washington.

COPPER CREEK HOMEOWNERS ASSOCIATION, Petitioner,
v.
WILMINGTON SAVINGS FUND SOCIETY et al., Respondents.

No. 100918-6
|
DATED at Olympia,
Washington, September 7, 2022.

Court of Appeals No. 82083-4-I

**ORDER**

¶1 Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its September 6, 2022, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

¶2 IT IS ORDERED:

¶3 That the petition for review is granted. Review of the issue of the trial court's attorney fee award contingently raised in the answer to the petition for review is also granted. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

For the Court

/s/ González, C.J.
CHIEF JUSTICE

**All Citations**

200 Wash.2d 1001, 516 P.3d 377 (Table)

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# Appendix G

FILED
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STATE OF WASHINGTON
12/1/2022
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FILED
Court of Appeals
Division I
State of Washington
12/1/2022 8:00 AM

101505-4

Case No. 839594

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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WEST COAST SERVICING, INC.,

Appellant,

vs.

PRINCE ERIC LUV,

Respondent.

---

# PETITION FOR SUPREME COURT REVIEW

---

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*West Coast Servicing, Inc., v. Luv*, 83959-4-I, 2022 WL 17246712 (Wash. Ct. App. Nov. 28, 2022) ........................................................................................... 1

## 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.

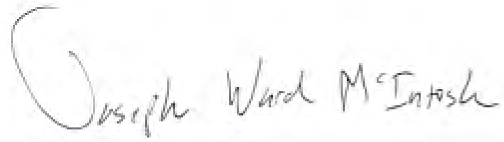
## IV. STATEMENT OF THE CASE

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*.

SIGNATURE(S) ON NEXT PAGE

DATED November 29, 2022



Joseph Ward McIntosh, WSBA #39470
Attorney for Petitioner

FILED
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.,<br>Appellant,<br>v.<br>PRINCE ERIC LUV,<br>Respondent. | No. 83959-4-I<br><br>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

## Transmittal Information

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| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 83959-4 |
| **Appellate Court Case Title:** | Prince Eric Luv. Respondent v. West Coast Servicing Inc., Appellant |
| **Superior Court Case Number:** | 19-2-03395-7 |

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

I certify that on November 30, 2022, I caused a copy of PETITION FOR SUPREME COURT REVIEW to be served by e-service via Washington State Appellate Courts' Secure Portal e-filing system on the following specified below:

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Ken@kenschneider.com

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing Certificate of Service is true and correct and that this Declaration was executed in San Diego, California.

Dated: November 30, 2022

Walter Babst
Paralegal

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# Appendix H

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# THE SUPREME COURT OF WASHINGTON

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|---|---|
| WEST COAST SERVICING, INC., Petitioner, v. PRICE ERIC LUV, Respondent. | No. 101505-4 **O R D E R** Court of Appeals No. 83959-4-I |

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener (Justice Johnson sat for Justice Whitener), considered at its March 7, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That consideration of this matter is stayed pending final decisions in Supreme Court No. 100918-6 - *Copper Creek Homeowners Association v. Wilmington Savings Fund Society et al.* and Supreme Court No. 100728-1 - *Gary L. Merritt and Jeanette A. Merritt v. USAA Federal Savings Bank.*

DATED at Olympia, Washington, this 8th day of March, 2023.

For the Court

# Appendix I

**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, Defendants,**

**Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee from Pretium Mortgage Acquisition Trust; Selene Finance, LP, Respondents.**

**No. 100918-6**

Supreme Court of Washington,
En Banc.

Argued February 16, 2023

Filed July 20, 2023

**Background:** After borrowers, one of whom was an active duty serviceman, purchased real property within homeowners association with note secured by deed of trust, separated, commenced separate Chapter 7 bankruptcy cases, and moved out of the property, association recorded a notice of claim of lien against the property for unpaid annual assessments, filed for judicial foreclosure against borrowers, and had custodial receiver appointed to rehabilitate the property. Following commencement of nonjudicial foreclosure on the property by deed of trust trustee on behalf of successor beneficiary, association filed complaint against borrowers, trustee, successor beneficiary, and loan servicer for lien foreclosure, restraint of trustee sale, wrongful foreclosure, and quiet title. Successor beneficiary and loan servicer filed motion to dismiss, and later for judgment on the pleadings. Association moved for summary judgment. The Superior Court, Snohomish County, Eric Z. Lucas, J., 2020 WL 7019066, denied the motion to dismiss, struck the motion for judgment on the pleadings as a sanction, determined that the statute of limitations rendered the deed of trust unenforceable, entered summary judgment quieting title in favor of association, and awarded attorney fees to association. Successor beneficiary and loan servicer appealed, and Court of Appeals, 21 Wash.App.2d 605, 508 P.3d 179, reversed and remanded. The Supreme Court granted petitions for review.

**Holdings:** The Supreme Court, Yu, J., held that:

(1) as a matter of first impression, six-year statute of limitations to foreclose on a deed of trust securing an installment loan accrues with each unpaid installment, even after the borrower's personal liability has been discharged in bankruptcy; abrogating *Luv v. W. Coast Servicing, Inc.*, 2021 WL 3288360, *Edmundson v. Bank of Am., NA*, 194 Wash. App. 920, 378 P.3d 272, and *Silvers v. U.S. Bank Nat'l Ass'n*, 2015 WL 5024173;

(2) court sufficiently explained the legal basis for award of attorney's fees to homeowners association;

(3) court sufficiently explained the factual basis for award of attorney's fees to homeowners association;

(4) evidence was sufficient to support finding that servicer and beneficiary committed violations of the duty of candor;

(5) evidence was sufficient to support finding that servicer and beneficiary "refused to cooperate" with discovery and continued to engage in "obstruction" after the court intervened; and

(6) evidence was sufficient to support finding that servicer and beneficiary filed a repetitive motion for judgment on the pleadings.

Affirmed.

**1. Bankruptcy ⚷3411**
**Limitation of Actions ⚷44(5)**

Six-year statute of limitations to foreclose on a deed of trust securing an in-

stallment loan accrues with each unpaid installment, even after the borrower's personal liability has been discharged in bankruptcy; abrogating *Luv v. W. Coast Servicing, Inc.*, 2021 WL 3288360, *Edmundson v. Bank of Am., NA*, 194 Wash. App. 920, 378 P.3d 272, and *Silvers v. U.S. Bank Nat'l Ass'n*, 2015 WL 5024173.

**2. Costs, Fees, and Sanctions ⚷1195, 1207**

Both Rule 11 and the court's inherent equitable powers authorize an award of attorney fees in cases of bad faith. Wash. Super. Ct. Civ. R. 11.

**3. Appeal and Error ⚷3713**

Supreme Court reviews an equitable attorney fee award for abuse of discretion.

**4. Costs, Fees, and Sanctions ⚷889**

When awarding attorney fees, a trial court must enter findings of fact and conclusions of law to establish an adequate record on review.

**5. Appeal and Error ⚷717**

In the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue.

**6. Costs, Fees, and Sanctions ⚷1352**

Trial court sufficiently explained the legal basis for award of attorney's fees to homeowners association, in quiet title and wrongful foreclosure action against loan servicer and successor beneficiary under deed of trust, to enable review, where association explicitly sought CR 11 sanctions, court at oral argument confirmed that association was "still asking for the CR 11 sanctions," and then "grant[ed] the CR 11 request," trial court's written order specified that the fee award was made "as a matter of equity" due to "bad faith and misconduct shown repeatedly and throughout this case," and, when servicer and beneficiary sought to stay the fee award pending appeal, the trial court rejected their request and reiterated that it had made an equitable fee award due to improper behavior. Wash. Super. Ct. Civ. R. 11.

**7. Costs, Fees, and Sanctions ⚷1352**
**Pretrial Procedure ⚷44.1**

Trial court sufficiently explained the factual basis for award of attorney's fees to homeowners association, in quiet title and wrongful foreclosure action against loan servicer and successor beneficiary under deed of trust, to enable review, where court listed multiple instances of improper behavior in its oral ruling, including "violations of the duty of candor to the tribunal," "refus[ing] to cooperate" with discovery despite court intervention, and (3) bringing "the same motion that the Court [had] already ruled on" and attempting to "disguise" a "motion for partial summary judgment" as a motion for judgment on the pleadings. Wash. Super. Ct. Civ. R. 11, 12(c).

**8. Costs, Fees, and Sanctions ⚷1275**

Evidence in homeowners association's quiet title and wrongful foreclosure action against loan servicer and successor beneficiary under deed of trust was sufficient to support finding that servicer and beneficiary committed violations of the duty of candor, which supported award of equitable attorney's fees to association; court found that while servicer and beneficiary were arguing to the trial court that the statute of limitations had not expired as a matter of law, their counsel was directly e-mailing borrowers seeking a waiver of the statute of limitations, and failed to disclose that email to the court, and court explained that the attempt to "cut a deal" with borrowers directly contradicted their court filings which alleged their position was unassailable. Wash. Super. Ct. Civ. R. 11.

**9. Pretrial Procedure ⚷44.1**

Evidence in homeowners association's quiet title and wrongful foreclosure action against loan servicer and successor beneficiary under deed of trust was sufficient to support finding that servicer and beneficiary "refused to cooperate" with discovery and continued to engage in "obstruction" after the court intervened, which supported award of equitable attorney's fees to association; servicer's and beneficiary's counsel asserted in an e-mail that the statute of limitations restarted when borrowers allegedly request-

ed a short sale, but refused to provide support for assertion of a short sale request, which prompted a motion to compel discovery, and eventually admitted that there was no short sale request, and instead of complying with the motion to compel, they filed separate motions for reconsideration and a protective order. Wash. Super. Ct. Civ. R. 11.

**10. Costs, Fees, and Sanctions ⚷1256**

Evidence in homeowners association's quiet title and wrongful foreclosure action against loan servicer and successor beneficiary under deed of trust was sufficient to support finding that servicer and beneficiary filed a repetitive motion for judgment on the pleadings, supporting an award of equitable attorney's fees to association; respondents argued repeatedly that the statute of limitations was tolled by the federal Servicemembers Civil Relief Act (SCRA), and raised the SCRA in a supplemental brief supporting their motion to dismiss for failure to state a claim, which was denied in part because court stated it should have been brought in a summary judgment motion, respondents then raised the SCRA in opposition to association's motion for summary judgment, and, while summary judgment was still pending, filed a motion for judgment on the pleadings making the same SCRA argument. 50 U.S.C.A. § 3901 et seq.; Wash. Super. Ct. Civ. R. 11, 12(b)(6), 12(c), 56.

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Appeal from Snohomish County Superior Court, Docket No: 19-2-00052-8, Honorable Eric A. Lucas, Judge

Samantha Jean Brown, Marlyn Kathryn Hawkins, Barker Martin PS, One Convention Place, 701 Pike St. Ste. 1150, Seattle, WA, 98101-3946, Jacob D. Degraaff, Henry & DeGraaff, P.S., 301 Prospect St., Bellingham, WA, 98225-4001, Christina Latta Henry, Henry & Degraaff, P.S., 119 1st Ave. S. Ste. 500, Seattle, WA, 98104-3400, for Petitioner.

Anne Marie Dorshimer, Stoel Rives LLP, 600 University St. Ste. 3600, Seattle, WA, 98101-4109, Amy Edwards, Stoel Rives LLP, 760 Sw 9th Ave. Ste. 3000, Portland, OR, 97205-2584, for Respondent.

Amanda Nicole Martin, Northwest Consumer Law Center, 936 N. 34th St. Ste. 300, Seattle, WA, 98103-8869, for Amicus Curiae on behalf of Northwest Consumer Law Center.

Lisa Marie Von Biela, Attorney at Law, 1420 Nw Gilman Blvd. #2274, Issaquah, WA, 98027-5333, Thomas William McKay, Attorney at Law, Catherine Schur, 401 2nd Ave. S. Ste. 407, Seattle, WA, 98104-3811, for Amicus Curiae on behalf of Northwest Justice Project.

Nathan Alexander King, Arnold & Porter LLP, 250 W. 55th St., New York, NY, 10019-7639, Amici Curiae on behalf of Federal Housing Finance Agency, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation.

Anthony L. Rafel, Rafel Law Group PLLC, 4126 E. Madison St., Suite 202, Seattle, WA, 98112, Erin A. Maloney, Fiore, Racobs & Powers, 6820 Indiana Avenue, Suite 140, Riverside, CA, 92506, for Amicus Curiae on behalf of Community Associations Institute Cai Washington Chapter.

YU, J.

¶1 This case concerns the statute of limitations to foreclose on a deed of trust securing an installment loan after the borrower receives an order of discharge in bankruptcy. As detailed in *Merritt v. USAA Federal Savings Bank*, No. 100728-1, 1 Wash.2d 692–, 532 P.3d 1024 (Wash. July 20, 2023), we hold that a new foreclosure action on the deed of trust accrues with each missed installment payment, even after the borrower's personal liability is discharged. Actions on written contracts are subject to a six-year statute of limitations. Therefore, the nonjudicial foreclosure action on the deed of trust in this case was timely commenced as to all unpaid installments within the preceding six years, regardless of the borrowers' bankruptcy discharge orders.

¶2 On cross review, respondents (the lender and the loan servicer) challenge the trial court's attorney fee award. We hold that the trial court properly exercised its discretion to award fees as an equitable sanction for respondents' litigation misconduct. Therefore,

although respondents are entitled to their appellate attorney fees as the prevailing parties on appeal, we uphold the trial court's equitable fee award. The Court of Appeals is affirmed.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. Shawn and Stephanie Kurtz purchase a home in 2007

¶3 The property at issue in this case is a residential home that was purchased in 2007 by Shawn and Stephanie Kurtz, who are not parties on review. The Kurtzes financed their purchase with a home loan evidenced by a promissory note. The loan was to be repaid in installments with a final maturity date of June 1, 2037.

¶4 The promissory note is secured by a deed of trust. The current trustee is Quality Loan Service Corporation of Washington (QLS), which is not a party on review. The current beneficiary is respondent Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust. The current loan servicer is respondent Selene Finance LP.

¶5 The house is located in a subdivision, which requires property owners to pay homeowners association (HOA) assessments to petitioner Copper Creek (Marysville) Homeowners Association. The HOA assessments "shall be a continuing lien upon the Lot against which each such assessment is made." Clerk's Papers (CP) at 793. If the assessments are not paid, then Copper Creek is entitled to foreclose on its lien. However, Copper Creek's lien is "subordinate to any security interest perfected by a first deed of trust or mortgage granted in good faith and for fair value upon such Lot." *Id.* at 753. Thus, it is undisputed that the deed of trust securing the Kurtzes' home loan is senior to Copper Creek's lien for HOA assessments.

### B. The Kurtzes file for bankruptcy and move out; after years of vacancy, a custodial receiver is appointed for the property

¶6 Stephanie[1] moved out of the house in January 2008 and made no further payments on the home loan. The Kurtzes became legally separated later that year, and their divorce was finalized in June 2011. The Kurtzes stopped paying their HOA assessments in July 2010. Shawn stopped making payments on the home loan sometime around 2010, but he could not recall the "exact date" of his last payment. *Id.* at 893.

¶7 Stephanie petitioned for Chapter 7 bankruptcy on February 24, 2010, and received an order of discharge on June 14, 2010. *Id.* at 916, 864; *see* 11 U.S.C. § 727. Shawn petitioned for Chapter 7 bankruptcy on March 25, 2011, and received an order of discharge on July 13, 2011. CP at 966-67, 872. Shawn moved to Hawaii sometime in 2011. Neither of the Kurtzes subsequently returned to the house, nor did they make any further payments toward their home loan or their HOA assessments. However, there was no attempt to foreclose on the deed of trust. As a result, the house sat vacant for years and fell into disrepair. The Kurtzes remained the property owners of record and HOA assessments continued to accrue in their names.

¶8 In November 2018, Copper Creek recorded a notice of claim of lien for unpaid HOA assessments, fees, costs, and interest. In January 2019, Copper Creek filed a complaint against the Kurtzes in Snohomish County Superior Court, seeking foreclosure on the lien and a custodial receiver for the property.

¶9 The trial court signed an agreed order appointing a receiver with authority to "obtain possession" of the house, "refurbish it for rental up to a reasonable standard," and "rent it to third parties" to recoup the costs of the receivership and the unpaid HOA assessments. Suppl. CP at 1723 (citing RCW 64.34.364(10)). The receiver observed that the house "needed substantial repairs and ap-

1. We refer to the Kurtzes by their first names in order to distinguish between them. We intend no disrespect.

peared to have been uninhabited for many years." *Id.* at 1180. The repairs took "nearly five months" to complete, at a cost of $22,470.24. *Id.* The house was rented out at the end of September 2019.

C. QLS initiates nonjudicial foreclosure; the trial court ultimately quiets title in favor of Copper Creek

¶10 In October 2019, approximately one month after the house was rented out, QLS initiated nonjudicial foreclosure proceedings by mailing, posting, and recording a notice of trustee's sale. Copper Creek requested that QLS cancel the sale, asserting that it was barred by the statute of limitations. QLS declined.

¶11 In February 2020, Copper Creek amended its complaint to add claims against QLS and respondents for restraint of the trustee's sale, wrongful foreclosure, treble damages, quiet title, and declaratory relief. Thereafter, the litigation became highly contentious. Additional details are set forth as relevant to our analysis of the trial court's equitable fee award, below.

¶12 Ultimately, the trial court granted summary judgment and quieted title to Copper Creek. The trial court ruled that the foreclosure was time barred, reasoning that respondents "had six years from the date [of] Mr. and Ms. Kurtz['s] bankruptcy discharge orders to bring a foreclosure action on the debt secured by their [deed of trust] and failed to do so." CP at 251. The trial court also awarded Copper Creek attorney fees "as a matter of equity" based on respondents' "bad faith and misconduct shown repeatedly and throughout this case." *Id.* at 21. Respondents appealed.

¶13 In a published opinion, the Court of Appeals reversed the order quieting title, holding that the Kurtzes' bankruptcy discharge orders did not affect the statute of limitations to foreclose on the deed of trust because "[t]he debt, the note, and the payment schedule remain unchanged." *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 21 Wash. App. 2d 605, 625, 508 P.3d 179 (2022). Therefore, the Court of Appeals held that the October 2019 notice of trustee's sale was timely as to any unpaid installments within the preceding six years, as well as "the remainder due under the note." *Id.* Nevertheless, the Court of Appeals affirmed the trial court's fee award, holding that "[t]he change of prevailing party does not require vacating that equitable award" because "an independent basis in equity justified the award of attorney fees." *Id.* at 627, 508 P.3d 179.

¶14 Copper Creek sought review on the statute of limitations issue, supported by an amicus memorandum filed by the Northwest Consumer Law Center. Respondents opposed review but contingently sought cross review of the trial court's fee award. We granted review of both issues and accepted for filing three amici briefs on the statute of limitations issue: the Federal Housing Finance Agency, Federal National Mortgage Association, and Federal Home Loan Mortgage Corporation filed a joint amici brief supporting respondents, and the Northwest Justice Project and the Washington chapter of the Community Associations Institute each filed an amicus brief supporting Copper Creek.

## ISSUES

A. Is respondents' nonjudicial foreclosure action on the deed of trust securing the Kurtzes' home loan barred by the statute of limitations?

B. Did the trial court abuse its discretion in awarding attorney fees as an equitable sanction against respondents?

## ANALYSIS

A. Bankruptcy discharge does not affect the statute of limitations to foreclose on a deed of trust securing an installment loan

¶15 The statute of limitations to foreclose on a deed of trust after personal liability for the underlying debt has been discharged in bankruptcy is a matter of first impression in our court. However, this issue has arisen numerous times in the Court of Appeals and in federal courts applying Washington law.

¶16 From 2015 to 2021, nearly every court to consider the issue held, implied, or stated

in dicta that "the statute of limitations does not accrue after discharge because, at that point, no future installment payments are due and owing." *Luv v. W. Coast Servicing, Inc.*, No. 81991-7-I, slip op. at 5, 2021 WL 3288360 (Wash. Ct. App. Aug. 2, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/819917.pdf, *review denied*, 198 Wash.2d 1035, 501 P.3d 135 (2022); *see, e.g.*, *Edmundson v. Bank of Am., NA*, 194 Wash. App. 920, 931, 378 P.3d 272 (2016); *Silvers v. U.S. Bank Nat'l Ass'n*, No. 15-5480 RJB, 2015 WL 5024173, at *4 (W.D. Wash. 2015) (court order). *But see In re Plastino*, 69 Bankr. Ct. Dec. 177, 2020 WL 7753628, at *3-4 (Bankr. W.D. Wash. 2020) (mem. decision).[2]

**[1]** ¶17 For the reasons stated in *Merritt*, No. 100728-1, 532 P.3d 1024, we now reject such a rule. The six-year statute of limitations to foreclose on a deed of trust securing an installment loan accrues with each unpaid installment, even after the borrower's personal liability has been discharged in bankruptcy. We therefore affirm the Court of Appeals, reverse the trial court's order quieting title, and remand for further proceedings consistent with this opinion. As the prevailing parties on appeal, respondents are entitled to their appellate attorney fees in accordance with the fee provision in the deed of trust. *See* CP at 1042.

B. The trial court properly awarded attorney fees to Copper Creek as an equitable sanction against respondents

¶18 As noted above, in addition to quieting title, the trial court granted Copper Creek "an attorneys' fees award as a matter of equity" due to respondents' "bad faith and misconduct shown repeatedly and throughout this case." *Id.* at 21. Despite the change in prevailing party on appeal, the Court of Appeals affirmed the trial court's equitable fee award. *Copper Creek*, 21 Wash. App. 2d at 627, 508 P.3d 179. We affirm the Court of Appeals.

1. Additional procedural history

¶19 As indicated above, the litigation became highly contentious after Copper Creek amended its complaint to add claims against respondents in late February 2020. Initially, respondents moved to dismiss pursuant to CR 12(b)(6), arguing that Copper Creek did not have standing because it was not the property owner of record. However, with the assistance of a Washington attorney, the Kurtzes granted Copper Creek a statutory warranty deed in lieu of foreclosure, which was signed in April 2020 and recorded in June 2020. As a result, Copper Creek opposed respondents' motion to dismiss and moved for leave to file a second amended complaint.

¶20 Respondents argued in June 2020 that amending the complaint would be futile because "the statute of limitations was tolled from origination of the loan through at least February 2020, due to Mr. Kurtz's active duty [military] status" pursuant to the federal Servicemembers Civil Relief Act (SCRA) and its Washington counterpart.[3] CP at 701. Respondents raised the same SCRA tolling argument in a supplemental brief supporting their CR 12(b)(6) motion, which was filed in July 2020.

¶21 Meanwhile, between March and June 2020, respondents' counsel was communicating via e-mail with counsel for Copper Creek and, separately, with the Kurtzes. These e-mail exchanges ultimately factored into the trial court's equitable fee award.

¶22 First, in a March 2020 e-mail to counsel for Copper Creek, respondents' counsel asserted that the statute of limitations to foreclose on the deed of trust had not expired because "[t]he borrowers requested a short sale in 2013." Suppl. CP at 1665. Respon-

2. Unpublished court orders and opinions are cited only as "necessary for a reasoned decision." GR 14.1(c).

3. 50 U.S.C. §§ 3901-4043; RCW 38.42.090. The Court of Appeals held that "the SCRA ceased to toll the statute of limitations" once Shawn received his bankruptcy discharge order because "[w]ithout Shawn's personal liability, the debt, as evidenced by the note, was no longer enforceable against a service member." *Copper Creek*, 21 Wash. App. 2d at 614, 508 P.3d 179. Neither party sought review of any issue relating to the SCRA in this court. Therefore, we express no opinion regarding the proper application of the SCRA to the facts of this case.

dents did not raise that issue in any of their motions to the trial court.

¶23 A request for a short sale *might* have restarted the statute of limitations as a "written acknowledgment" of the debt, although we express no opinion as to whether it necessarily would have done so. *In re Receivership of Tragopan Props., LLC*, 164 Wash. App. 268, 270, 263 P.3d 613 (2011) (citing RCW 4.16.280); *see also U.S. Bank NA v. Kendall*, No. 77620-7-I, slip op. at 13-15, 2019 WL 2750171 (Wash. Ct. App. July 1, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/776207.pdf.[4] Thus, Copper Creek recognized that the Kurtzes' alleged request for a short sale might be dispositive of Copper Creek's statute of limitations argument. However, the Kurtzes "stated they never did a short sale," so Copper Creek asked for documentation from respondents and offered to obtain "authorization" from the Kurtzes if necessary. Suppl. CP at 1673, 1675.

¶24 Respondents refused to provide any documentation, stating only that they were "not interested in entering into a release or disclosing loan file documents." *Id.* at 1677. Copper Creek made a formal discovery request, but respondents refused to provide any information about any alleged "acknowledgement of the debt," arguing instead that Copper Creek lacked standing, that the discovery request was "premature," and that the statute of limitations was tolled by the SCRA. *Id.* at 1077-78. As a result, in June 2020, Copper Creek filed a motion to compel discovery, seeking "documentation regarding a short sale or other acknowledgement of the debt." *Id.* at 1687. In opposition, respondents argued that they had already "produced substantive responses." CP at 697.

¶25 While this discovery dispute was developing, respondents' counsel also attempted to contact the Kurtzes. In May 2020, respondents' counsel e-mailed the Kurtzes directly (not through counsel), asking if they would "waive the statute of limitations on the underlying loan" and offering "something in exchange for [their] trouble." Suppl. CP at 1570. Shawn forwarded the e-mail to his attorney and counsel for Copper Creek, stating, "I do not wish to waive anything and don't like how they are trying to bribe me into the waiver." *Id.* Counsel for Copper Creek brought the e-mail to the trial court's attention. The Kurtzes never waived the statute of limitations.

¶26 In June 2020, the trial court granted Copper Creek leave to amend its complaint. In a separate order filed the same day, the trial court also granted Copper Creek's motion to compel discovery and ordered respondents to provide "good faith responses." *Id.* at 1070. Respondents moved for reconsideration of the order compelling discovery, reiterating the argument that they had "already served substantive responses." CP at 640. On the same day, respondents filed a separate motion for a protective order on a different judicial officer's calendar. Both of respondents' motions were ultimately heard, and denied, by the same judge who had granted the order compelling discovery.

¶27 Respondents subsequently provided supplemental responses to Copper Creek's discovery requests. Respondents admitted that there was no short sale request, nor were there any other "events [that] resulted in the acknowledgement of the debt." *Id.* at 341. This admission was made in August 2020—approximately five months after Copper Creek had initially requested documentation of the alleged short sale request.

¶28 In August 2020, the trial court issued a temporary restraining order halting the trustee's sale and denied respondents' CR 12(b)(6) motion. In its oral ruling on the CR 12(b)(6) motion, the trial court determined that respondents had improperly attempted to "file a CR 56 [motion for summary judgment] under the guise of a [CR] 12(b) (6)"

4. A "short sale" generally occurs when there is "a written agreement for the purchase and sale of owner-occupied residential real property," but the "sale proceeds" would be "insufficient to pay in full the obligation owed to a senior beneficiary of a deed of trust encumbering the residential real property." RCW 61.24.026(1)(a); *see also Kendall*, No. 77620-7-I, slip op. at 13-15. The property owner may offer "the entire net proceeds of the sale" to the senior beneficiary, who "may determine, in its sole discretion, whether to accept, reject, or counter-offer the seller's written offer." RCW 61.24.026(1)(b).

motion to dismiss for failure to state a claim. 1 Verbatim Tr. of Proc. (VTP) (Aug. 4, 2020) at 23.

¶29 After their CR 12(b)(6) motion was denied, respondents filed an answer to Copper Creek's second amended complaint. Copper Creek subsequently moved for summary judgment to quiet title, arguing that foreclosure on the deed of trust was time barred due to the Kurtzes' bankruptcy discharge orders. In response, respondents explicitly *agreed* "that the statute of limitations begins to 'accrue' upon a bankruptcy discharge."[5] CP at 388. However, respondents argued that the statute of limitations was tolled pursuant to the SCRA—just as they had previously argued in their unsuccessful CR 12(b)(6) motion and in their unsuccessful opposition to Copper Creek's motion to amend its complaint.

¶30 A few days after responding to Copper Creek's summary judgment motion, respondents filed a separate motion for judgment on the pleadings pursuant to CR 12(c). Respondents' CR 12(c) motion argued, again, that the statute of limitations was tolled pursuant to the SCRA. Copper Creek requested CR 11 sanctions, arguing that its pending summary judgment motion already covered "the entirety of the issues" raised in respondents' CR 12(c) motion. *Id.* at 281.

¶31 Following oral argument, the trial court struck respondents' CR 12(c) motion, granted Copper Creek's motion for summary judgment, and awarded Copper Creek "its reasonable attorney's fees, costs, and expenses incurred in this action, in an amount to be determined by future motion." *Id.* at 253. Nevertheless, when Copper Creek moved to set the amount of the fee award at $113,437.80, respondents argued that the request for fees should be denied in its entirety because there was "no basis in law for an award of attorneys' fees." *Id.* at 140. The trial court reaffirmed that it had already awarded attorney fees to Copper Creek "as a matter of equity because [of respondents'] bad faith and misconduct shown repeatedly and throughout this case," and awarded $96,779.09 in attorney fees to Copper Creek. *Id.* at 21.

¶32 On appeal, respondents challenged both the order quieting title and the trial court's fee award. However, respondents recognized that even if the order quieting title was reversed, the fee award could be affirmed "if the Court [of Appeals] determines that . . . [respondents] still acted in bad faith at the trial court level." Appellants' Reply at 21-22 (Wash. Ct. App. No. 82083-4-I (2021)) (citing *Andren v. Dake*, 14 Wash. App. 2d 296, 472 P.3d 1013 (2020)). The Court of Appeals did precisely that, reversing the order quieting title but affirming the trial court's fee award because "an independent basis in equity justified the award of attorney fees." *Copper Creek*, 21 Wash. App. 2d at 627, 508 P.3d 179.

**[2, 3]** ¶33 On cross review in this court, respondents argue that (1) the trial court did not make sufficient findings and conclusions to support its fee award and (2) respondents did not engage in any bad faith or misconduct warranting sanctions.[6] "Both CR 11 and [the court's] inherent equitable powers authorize the award of attorney fees in cases of bad faith." *In re Recall of Pearsall-Stipek*, 136 Wash.2d 255, 266-67, 961 P.2d 343 (1998). We review an equitable fee award for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 858 P.2d 1054 (1993).

2. The fee award was supported by adequate findings and conclusions

¶34 Respondents primarily argue that the trial court did not make "sufficient findings of fact and conclusions of law" supporting its equitable fee award. Resp'ts' Answer to Pet. for Rev. at 19. We disagree.

**5.** Copper Creek does not argue that respondents are estopped or otherwise barred from taking the contrary position on appeal.

**6.** At the Court of Appeals, respondents also challenged the amount of the fee award. *See* Appellants' Opening Br. at 40-45 (Wash. Ct. App. No. 82083-4-I (2021)); Appellants' Reply at 22-23 (Wash. Ct. App. No. 82083-4-I (2021)). They do not raise that issue in their answer to the petition for review, so we do not consider it. *See* RAP 13.7(b).

**[4, 5]** ¶35 When awarding attorney fees, a trial court must enter "findings of fact and conclusions of law to establish 'an adequate record on review.' " *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wash.2d 389, 393 n.1, 325 P.3d 904 (2014) (quoting *Mahler v. Szucs*, 135 Wash.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998)). "In the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue." *In re Marriage of Booth*, 114 Wash.2d 772, 777, 791 P.2d 519 (1990). Although the trial court's written fee order contains little detail, the trial court's oral rulings clearly specify the legal and factual basis for its fee award.

**[6]** ¶36 As to the legal basis for fees, respondents claim that the trial court failed to "state that attorney fees were being awarded to [Copper Creek] as a sanction against [respondents]." Resp'ts' Answer to Pet. for Rev. at 18. The record directly contradicts this claim.

¶37 Copper Creek explicitly sought CR 11 sanctions. At oral argument, the trial court confirmed that Copper Creek was "still asking for the CR 11 sanctions," and then "grant[ed] the CR 11 request." 2 VTP (Oct. 9, 2020) at 98, 100. The trial court's written order specifies that the fee award was made "as a matter of equity because [of respondents'] bad faith and misconduct shown repeatedly and throughout this case." CP at 21. Moreover, when respondents sought to stay the fee award pending appeal, the trial court rejected their request and reiterated that it had made "an equitable fee award granted to [Copper Creek] due to [respondents'] [i]mproper [b]ehavior." Suppl. CP at 1098. Thus, the trial court explicitly and repeatedly stated that attorney fees were being awarded to Copper Creek as a sanction against respondents.

**[7]** ¶38 As to the factual basis for fees, respondents claim that "[t]he trial court did not describe any 'improper behavior.' " Resp'ts' Answer to Pet. for Rev. at 18. To the contrary, the trial court listed multiple instances of improper behavior in its oral ruling: (1) "violations of the duty of candor to the tribunal," (2) "refus[ing] to cooperate" with discovery despite court intervention, and (3) bringing "the same motion that the Court [had] already ruled on" and attempting to "disguise" a "motion for partial summary judgment" as a CR 12(c) motion. 2 VTP (Oct. 9, 2020) at 98-100. These findings provide a sufficient basis for appellate review.

3. The trial court did not abuse its discretion in awarding fees

¶39 In a footnote, respondents argue that the trial court could not "have found a factual basis for an equity fee award" because respondents "took positions that [they] reasonably thought were justified under the law, and when the court denied the relief sought, [they] promptly complied with all court orders." Resp'ts' Answer to Pet. for Rev. at 19 n.5. We hold that each of the trial court's stated reasons for awarding fees is fully supported by the record.

a. Lack of candor

**[8]** ¶40 First, the trial court found that respondents committed "violations of the duty of candor to the tribunal." 2 VTP (Oct. 9, 2020) at 98. This finding was well within the trial court's discretion. The most egregious example of respondents' lack of candor relates to their attempt to purchase a waiver of the statute of limitations from the Kurtzes.

¶41 As discussed above, while respondents were arguing to the trial court that the statute of limitations had not expired as a matter of law, their counsel was directly e-mailing the Kurtzes seeking a waiver of the statute of limitations. Respondents did not disclose that e-mail to the trial court. However, respondents argue that cannot justify sanctions because (1) the e-mail was "irrelevant" and did not need to be disclosed and (2) Copper Creek's "hands are 'unclean' " due to Copper Creek's communications with the Kurtzes to obtain a statutory warranty deed in lieu of foreclosure. Appellants' Opening Br. at 40, 39 (Wash. Ct. App. No. 82083-4-I (2021)); *see also* Appellants' Reply at 13 (Wash. Ct. App. No. 82083-4-I (2021)). We reject both arguments.

¶42 The trial court reasonably found that respondents' e-mail to the Kurtzes was rele-

vant and should have been disclosed. As the trial court explained, respondents' attempt "to cut a deal" with the Kurtzes showed that respondents "obviously didn't believe that [their] position was [unassailable]," thereby directly contradicting their own court filings. 1 VTP (Aug. 4, 2020) at 43, 42. Furthermore, respondents do not show that Copper Creek has unclean hands because, unlike respondents, Copper Creek did not attempt "to cover both sides of the ball at the same time." *Id.* at 43. To the contrary, when respondents initially challenged Copper Creek's standing, Copper Creek worked with the Kurtzes (through counsel, not directly) to obtain a deed in lieu of foreclosure *before* moving to amend its complaint.

¶43 Thus, the trial court properly found that respondents' violations of the duty of candor to the tribunal warranted equitable sanctions.

b. Refusal to cooperate with discovery

**[9]** ¶44 Next, the trial court found that respondents "refused to cooperate" with discovery and continued to engage in "obstruction" after the court intervened. 2 VTP (Oct. 9, 2020) at 99. Respondents argue that "they acted entirely properly during the discovery dispute." Appellants' Reply at 20-21 (Wash. Ct. App. No. 82083-4-I (2021)). The record shows otherwise.

¶45 As detailed above, respondents' counsel asserted in an e-mail to Copper Creek's counsel that the statute of limitations restarted when the Kurtzes allegedly requested a short sale in 2013. However, respondents refused to provide supporting documentation or answer discovery requests about the alleged short sale request, prompting Copper Creek's motion to compel discovery. Eventually, respondents admitted that there was no short sale request.

¶46 At the Court of Appeals, respondents claimed that they "were completely transparent about their position on debt-reacknowledgement." *Id.* at 11. Respondents further argued that they did not act in "bad faith" because Copper Creek's "counsel understood [respondents'] re-acknowledgment argument solely arose out of the deed-in-lieu application," rather than a short sale request. Reply in Supp. of Mot. & Obj. to Trial Ct. Supersedeas Decision at 1 n.1 (Wash. Ct. App. No. 82083-4-I (2020)). To the extent that respondents maintain the same position in this court, we reject it.

¶47 As shown by respondents' own citations to the record, counsel for both parties exchanged e-mails discussing an alleged "short sale," not a "deed in lieu." *See id.* (citing Resp't's App. in Supp. of Trial Ct.'s Supersedeas Decision (Wash. Ct. App. No. 82083-4-I (2020)) at 155, ¶ 5, 191); *see also* Suppl. CP at 1665, 1668-71, 1673-74. If respondents' counsel simply made a mistake by referring to a "short sale" in their March 2020 e-mail, then they had about three months to correct their mistake before Copper Creek moved to compel discovery. They did not do so. As a result, Copper Creek was forced to file a motion to compel discovery, seeking documentation of a short sale request that never occurred.

¶48 In addition, respondents did not "promptly compl[y]" with the trial court's discovery order, as their briefing claims. *Contra* Resp'ts' Answer to Pet. for Rev. at 19 n.5. Instead, they filed separate motions for reconsideration and a protective order before two different judicial officers based on the same arguments they had already raised in opposition to Copper Creek's motion to compel. In denying both motions, the trial court ruled that respondents' initial discovery response "was evasive on its face," and that respondents' "extended motion practice" appeared to be "a tactic that is interposed to cause difficulty." 1 VTP (Aug. 4, 2020) at 12, 14. This ruling is fully supported by the record.

¶49 Thus, the trial court did not abuse its discretion in finding that respondents' failure to cooperate with discovery warranted sanctions.

c. Bringing a repetitive, "disguised" summary judgment motion

**[10]** ¶50 Finally, the trial court found that respondents' CR 12(c) motion for judgment on the pleadings raised matters "that the Court [had] already ruled on" and was, in fact, "a motion for partial summary judg-

ment" in "disguise." 2 VTP (Oct. 9, 2020) at 99-100. These findings are fully supported by the record.

¶51 As discussed above, respondents argued repeatedly that the statute of limitations was tolled by the SCRA. Respondents raised the SCRA in opposition to Copper Creek's motion for leave to amend its complaint, but the trial court granted Copper Creek's motion. Respondents also raised the SCRA in a supplemental brief supporting their CR 12(b)(6) motion. The trial court considered the "[s]upplemental [b]riefing by the parties" and denied the CR 12(b)(6) motion. CP at 518. Undeterred, respondents raised the SCRA in opposition to Copper Creek's motion for summary judgment, thereby ensuring that the SCRA would be addressed by the trial court once more. Nevertheless, while Copper Creek's summary judgment motion was still pending, respondents filed a CR 12(c) motion making the same SCRA argument.

¶52 Respondents argue that "[t]he CR 12(c) motion was proper" because they "believed the trial court had not resolved the SCRA tolling issue." Appellants' Reply at 18 (Wash. Ct. App. No. 82083-4-I (2021)). Respondents made the same claim to the trial court, and the trial court did not "believe" them. 2 VTP (Oct. 9, 2020) at 88. We have no basis to disturb the trial court's credibility determination on review. Moreover, even if respondents honestly believed the SCRA issue had not yet been resolved, their CR 12(c) motion was unjustified.

¶53 As noted above, the trial court rejected the SCRA claim in respondents' CR 12(b)(6) motion, in part, because it should have been brought as a CR 56 motion for summary judgment. Respondents do not explain why they disregarded the trial court's clear instructions and chose to file a CR 12(c) motion instead of a motion for summary judgment. Moreover, the CR 12(c) motion was entirely unnecessary. Respondents had already raised the SCRA in opposition to Copper Creek's pending motion for summary judgment, and they explicitly acknowledged that "the ruling on the motion for summary judgment would be dispositive" of the SCRA issue. *Id.* at 94-95. On this record, we cannot discern any reasonable justification for respondents' CR 12(c) motion. The trial court did not abuse its discretion in finding that respondents' conduct warranted sanctions.

¶54 In sum, the record amply supports the trial court's decision to award attorney fees to Copper Creek as an equitable sanction based on respondents' repeated misconduct and bad faith throughout this litigation. We therefore affirm the Court of Appeals and uphold the trial court's equitable fee award.

## CONCLUSION

¶55 Respondents' nonjudicial foreclosure action on the deed of trust was timely commenced as to all missed installment payments within the preceding six years. As the prevailing parties on appeal, respondents are entitled to their appellate attorney fees. Nevertheless, the trial court properly awarded attorney fees to Copper Creek as an equitable sanction based on respondents' repeated misconduct. Therefore, the Court of Appeals is affirmed, and we remand to the trial court for further proceedings consistent with this opinion.

WE CONCUR:

González, C.J.

Johnson, J.

Madsen, J.

Stephens, J.

Gordon McCloud, J.

Montoya-Lewis, J.

Whitener, J.

## TOMLINSON BOMSZTYK RUSS

## April 29, 2024 - 2:59 PM

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| **Superior Court Case Number:** | 19-2-03395-7 |

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