NO. 70004-9-I
NO. 69791-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WASHINGTON FEDERAL, a federally chartered savings association,

Appellant,

vs.
KENDALL D. GENTRY and NANCY GENTRY,

Respondents.

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and

WASHINGTON FEDERAL, a federally chartered savings association,

Appellant,

vs.

LANCE HARVEY, individually and the marital community comprised of
LANCE HARVEY and "JANE DOE" HARVEY, husband and wife,

Respondents.

BRIEF OF AMICI CURIAE WASHINGTON BANKERS ASSOCIATION AND UNION BANK, N.A.

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I. <u>INTRODUCTION</u>

As stated in Amici's motion, Amici address in this brief Division II's December 3, 2013 published decision *First Citizens Bank & Trust Company v. Cornerstone Homes & Development, LLC, and Daniel L. Allison and Jean Allison*, Cause No. 43619-1-II ("*First-Citizens*") (Appendix A). Respondents Harvey advised this Court of *First-Citizens* in a Citation of Additional Authorities filed December 5, 2013. The parties' briefing does not address *First-Citizens*.

II. <u>INTEREST OF AMICI CURIAE</u>

Amici's interest lies in the right of banks and other lenders to bring actions for deficiency judgments against guarantors of commercial loans following a non-judicial foreclosure under the Deed of Trust Act. The deeds of trust and guaranties at issue in this case, which are identical to standard form documents used in the industry, represent important security instruments banks use when making commercial loans to Washington businesses. In both cases before this Court, the lender provided the borrower with financing for real estate development projects based on a bargain that the lender could recover from a commercial guarantor if the borrower and the borrower's property failed to satisfy the debt. When trustee's sales of the properties did not satisfy each borrower's debt, the

lender properly brought suit against the guarantors for the deficiencies.

The trial courts failed to enforce the guaranties. This was error. These failures resulted from incorrect construction of the deeds of trust and incorrect interpretation of the Deed of Trust Act. Finally, the trial courts should have enforced the waivers by these sophisticated parties.

The Washington Bankers Association ("WBA") is a non-profit association serving the interests of Washington banks. Through advocacy, comprehensive programming, and information exchange, the WBA protects, develops, and advances the business of banking in Washington. The WBA represents commercial banks operating in every county of the State, ranging in size from large financial institutions to smaller, family-owned and community-based banks. The WBA seeks to foster a healthy banking industry, which is vital to Washington's economic interests. The issues before the Court impact many WBA members.

Union Bank, N.A. is a National Banking Association authorized to do business in Washington. Union Bank, along with other members of the WBA, possesses rights under deeds of trust and guaranties that are identical or similar to the loan documents at issue in this case. Union Bank has pending lawsuits in Washington state courts concerning the interpretation of similar documents and proper construction of the Deed of

Trust Act.[1] This Court's decision likely will influence the outcome of those cases and the practices of Union Bank and other lenders generally.

III. STATEMENT OF THE CASE

Amici incorporate the Statements of the Case in the parties' briefing. In addition, as noted above, many banks and lenders including Union Bank are signatories to and/or have rights under deeds of trust that are identical or similar to the Construction Deeds of Trust at issue here, which are based on a so-called "Laser Pro" form document. In similar litigation, like Respondents here, other guarantors have asserted defenses based on the language of the deeds of trust and the Deed of Trust Act to the effect that non-judicial foreclosure of security granted by the ***borrower*** also prevents a lender from bringing an action against a ***guarantor*** for a deficiency judgment.

The defaulted loans in all of these other cases, like those before this Court, are commercial. In all cases known to Amici, also like these, the loans are real estate development or construction loans. With these kinds of loans, banks often obtain additional credit support in the form of

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[1] Union Bank is appellant in three appeals in Division I involving similar issues: *Union Bank v. Lyons*, et al., (Cause No. 70327-7-I) (briefing complete), *Union Bank v. F.R. McAbee* (Cause No. 70497-4-I) (no briefs filed), and *Union Bank v. Deyo* (Cause No. 71168-7-I) (appealed November 25, 2013). Union Bank also is respondent in multiple appeals pending in Division II involving some of the same issues. Results in the trial courts throughout Washington on these similar issues have been mixed.

guaranties, because the undeveloped real property the borrower offers as collateral does not have sufficient value to secure the loan at loan origination. Without an additional source of repayment, such as personal guaranties, banks are unwilling to lend the capital and, in turn, Washington borrowers are unable to pursue important development and construction projects.

To Amici's knowledge, in neither of the cases before this Court have the guarantors asserted that, at the time the loan documents were signed, these guarantors intended or understood that the deeds of trust secured their obligations or that the lender's right to pursue a deficiency judgment was anything less than absolute. That is true in the other similar cases, too. The guarantors' after-the-fact, strained construction of the deeds of trust is contrary to the parties' intent, undermines the purpose of the commercial guaranties and the Deed of Trust Act, and would have a detrimental effect on Washington commerce.

The cases before the Court were decided on summary judgment. Gentry CP 765-771; Harvey CP 186-87, 273-76. The record contains additional context evidence in both *Gentry* and *Harvey* than was present in *First-Citizens*. The *Gentry* record includes a modification of the deed of trust stating that the modified deed of trust secures "all obligations, debts and liabilities" "of either Grantor or Borrower," making no reference to

obligations of any guarantor. Gentry CP 192. The *Harvey* record includes a Resolution by borrower Kaydee Gardens authorizing it to encumber its property "as security for the payment of any loans . . . of the Company to the Lender," failing to express any authorization to secure obligations of any guarantor. Harvey CP 362-63.

IV. ARGUMENT

This Court should reverse the trial court rulings that Washington Federal is not entitled to deficiency judgments on the commercial guaranties against Respondents Harvey and Gentry. When construing the deeds of trust and interpreting the Deed of Trust Act, Title 61.24 RCW, this Court should reach a different outcome than that reached in *First-Citizens*. The additional context evidence supports Washington Federal's construction. An independent analysis by this Court should avoid flaws in the analyses in *First-Citizens*. The *First-Citizens* decision failed to account for the commercial realities of the transaction and legislative intent to permit deficiency judgments against commercial guarantors.

A. This Court Should Reach a Different Result Than That Reached by Division II in *First-Citizens v. Cornerstone Homes.*

This Court should reverse on *de novo* review. The context evidence in these cases supports factual distinction of the result reached in *First-Citizens*. This Court also should reach a different result based on its

independent legal analysis.[2] In *First-Citizens*, Division II incorrectly interpreted the Deed of Trust Act by ignoring Subsection (3), subverting the structure of the statute, ignoring conflicts that its reading created, and failing correctly to apply the legislature's *quid pro quo* rationale supporting the trade-offs in the statute.

In its construction analysis, Division II overlooked important details in the documents supporting the conclusion that the deed of trust does not secure the guarantor's obligations. Division II read out of that deed of trust the "Payment and Performance" provision and effectively re-wrote the central provision on which it relied. Washington Federal's construction correctly harmonizes the documents and does not lead to absurd results in the commercial context of these transactions.

1. These Cases Present Additional Context Evidence

These cases are positioned differently and present additional evidence of intent beyond the evidence of record in *First-Citizens*. In *First-Citizens*, the appellate court reviewed a judgment on the pleadings. *First-Citizens* at 3. Here, reviewing summary judgments, this Court has more context evidence from which to draw.

[2] The Rules of Appellate Procedure contemplate that different panels of the Court of Appeals may reach holdings in conflict. RAP 13.4(b)(2) (grounds for Supreme Court review include conflict between decisions of the Court of Appeals). No authority compels this panel to follow *First-Citizens* if it were to disagree with its analysis. *See, e.g.*, Title 2.06 RCW.

The Harvey record includes a Resolution by borrower Kaydee Gardens, LLC, authorizing it to encumber its property "as security for the payment of any loans . . . of the Company to the Lender." Harvey CP 362-63. The Resolution defines "Company" as Kaydee Gardens, LLC. This resolution demonstrates a lack of intent to secure the obligations of third parties like the guarantors. Instead, this Resolution reinforces the language in the deed of trust demonstrating Kaydee Gardens' intent to encumber its property as security for the payment of its own obligations.

Similarly, the Gentry record demonstrates that the original deed of trust was modified; the modified deed of trust described the obligations secured as "all obligations, debts and liabilities" "of either Grantor or Borrower," making no reference to obligations of any guarantor. Gentry CP 192. This supports reversal as to that specific debt, and supports Washington Federal's reading of the original deed of trust language based on this additional context evidence not present in *First-Citizens*.

2. <u>Analysis of the Deed of Trust Act Demonstrates that the Legislature Did Not Intend that Subsection (10) Bar Deficiencies in These Circumstances</u>

Washington Federal argues that the Deed of Trust Act permits its actions for deficiency judgments even if the deeds of trust secured the guarantors' obligations. *Brief of Appellant (Harvey)* at 8-20; *Brief of Appellant (Gentry)* at 9-23. This is correct. Division II incorrectly

concuded that Subsection (10) of the Deed of Trust Act prevents deficiency judgments where a guarantor's performance is secured by a foreclosed deed of trust offered *by the borrower*. *See First-Citizens* 7-10.

The *First-Citizens* court concluded that Subsection (10) of RCW 61.24.100 "is an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure by allowing the lender to sue a commercial guarantor if the guaranty was not secured by the foreclosed deed of trust." *First-Citizen's* 8. Amici believe this conclusion is demonstrably wrong. The "general prohibition" does not apply to commecial guarantors in the first place. Subsection (1) makes this eminently clear right out of the gate. RCW 61.24.100(1) ("Except to the extent permitted in this section for deeds of trust securing commercial loans. . . ."). The prominent exception for commercial loans stated in Subsection (1) refers to **Subsection (3)(c),** *not* to Subsection (10). *First-Citizens* only addresses Subsection (3)(c) as an aside. *First-Citizens* 9 fn 16. But Subsection (3)(c) is the operative provision.

Subsection (3)(c) expresses the legislature's intent—where a commercial loan is involved—**not** to preclude "an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042." This is the plainest expression of legislative intent regarding deficiency judgments and commercial guarantors.

Application of the statutory construction principle *expressio unius est exclusio alterius* to Subsection (3)(c) results in the conclusion that so long as the guarantor is timely given notices, an action for a deficiency judgment against a commercial guarantor is permitted. This reading is consistent with Subsection (6), which again **permits**, in certain circumstances, a deficiency judgment against a commercial guarantor who herself grants a deed of trust.

In *First-Citizens,* Division II only discusses the critical Subsections (3) and (6) in footnotes. *First-Citizens* 7-10, fn 14, 16. Division II rests its conclusions on Subsection (10), a permissive—not prohibitive—provision that does not refer to a "deficiency judgment." Division II ignores these facts regarding its plain language. The analysis inverts the structure of the statute to make Subsection (10) preeminent and disregards the general rule in favor of deficiencies against commercial guarantors that Subsection (3)(c) establishes. It also places Subsection (10) in direct conflict not only with Subsections (3)(c) and (6) regarding commercial guarantors, but with Subsection 3(a)(i)[3] regarding borrowers.

[3] Division II also refers in error to RCW 61.24.100(3)(a)(i) as allowing "a deficiency judgment against a **guarantor** who caused a decrease in the **judicially** foreclosed property's fair value by waste or who wrongfully retained proceeds from the property." *See First-Citizens* 9-10 fn 16 (emphasis added). To the contrary, the provision allows a deficiency judgment against a **borrower**—not a guarantor—who permitted waste or wrongfully retained proceeds in cases of **nonjudicial**—not judicial—

By this Amici means that if Subsection (10) "implies" based on *expressio unius est exclusio alterius* a blanket rule that where an obligation "*was* secured by the foreclosed deed of trust, the lending bank cannot sue" for a deficiency, that rule conflicts not only with the entire premise of Subsection (3)(c), but also with Subsection (6) as to guarantors and with Subsection 3(a)(i) as to borrowers. Subsection 3(a)(i) expressly permits suit against *a borrower* for a deficiency limited to waste, wrongful retention or the like. See *First-Citizens* 9. Division II's construction of Susection (10) conflicts with it. And, unlike Subsection 3(c), neither it nor Subsection (6) contain the language "subject to this section." "[S]ubject to this section" does not have the import Division II assumed. *See First-Citizens* 9 fn 16. The conflict created by Division II's interpretation of Subsection (10) is not ameliorated in Subsections 3(a)(i) or (6) where the legislature did not include "subject to this section" language.

Subsection (10) makes clear that if a borrower or guarantor owes obligations separate from the underlying loan, such as environmental indemnities, the lender's ability to enforce those obligations remains unaffected by nonjudicial foreclosure. In short, Subsection (10) is not a

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foreclosure. Subsection 3(a)(i) does not relate at all to guarantors. It is Subsection (6) that creates similar rules permitting a limited deficiency against commercial guarantors who granted deeds of trust. Whether Division II misunderstood the statute or merely was careless in this footnote is unclear.

limitation on Subsection (3)(c).

This Court also should consider the *quid pro quo* upon which the legislature premised any deficiency bars. This *quid pro quo* "between lenders and borrowers"—not guarantors—is premised on the borrower giving up certain rights attendant to judicial foreclosure to allow a speedy nonjudicial foreclosure procedure in exchange for a deficiency bar. *See Thompson v. Smith*, 58 Wn. App. 361, 793 P.2d 449 (1990); *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). In the cases at bar, the borrowers each offered property through a deed of trust, relinquished their redemption rights and the right to a judicially-imposed upset price, and received the benefit of the deficiency bar when their properties were nonjudicially foreclosed.

Guarantors, on the other hand, did **not** offer property. They did not relinquish any rights in exchange for the benefit of a deficiency bar.[4] A bar in these circumstances is unjustified and incompatible with legislative intent. When a commercial guarantor herself offers property, she benefits from a limitation on the deficiency. *See* RCW 61.24.100(6). Only in that circumstance—a circumstance expressly addressed by the legislature—does a guarantor participate in any *quid pro quo*.

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[4] Further, the Deed of Trust Act gives commercial guarantors the right to establish in deficiency actions the fair value of the property. *See* RCW 61.24.100(5).

To be faithful to the intent of the Deed of Trust Act, this Court should hold that Subsection (3)(c) permits the actions.

3. The "Payment and Performance" Provision in the Deeds of Trust, Together With Extrinsic Evidence and the Commercial Context, Show That the Deeds of Trust Do Not Secure the Guarantors' Obligations

Washington Federal argues that the deeds of trust do not secure the guarantors' obligations in any event. *Brief of Appellant (Harvey)* at 20-26; *Brief of Appellant (Gentry)* at 23-32. This provides another basis for reversal, even if the Court agrees with Division II's interpretation of the Deed of Trust Act.

After performing a short construction analysis overlooking salient details in the documents, Division II failed to construe the deed of trust in its commercial context. *First-Citizens* 4-7. Its analysis fails to address the effect of the "Payment and Performance" provision *together with* the provision in all capital letters upon which the guarantors relied. *See First-Citizens* 5 citing CP 22 (paragraph in all capital letters on page two of deed of trust). When this Court considers this provision, the meaning should be apparent that the deeds of trust secure payment and performance *by Grantor*.

The deeds of trust read:

> **THIS DEED OF TRUST**, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL

> PROPERTY, **IS GIVEN TO SECURE** (A) ***PAYMENT*** OF THE INDEBTEDNESS AND (B) ***PERFORMANCE*** OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. ***THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS***:
>
> . . . .
>
> **PAYMENT AND PERFORMANCE**. Except as otherwise provided in this Deed of Trust, **Borrower and Grantor shall pay** to Lender all Indebtedness secured by this Deed of Trust as it becomes due, **and Borrower and Grantor shall strictly perform all their respective obligations** under the Note, this Deed of Trust and the Related Documents.

Gentry CP 138, 179 (emphasis added). *See also* Harvey CP 855 (substantially similar). Thus, the "(A) PAYMENT" and "(B) PERFORMANCE" that the Deed of Trust "is given to secure" is explained in the "PAYMENT AND PERFORMANCE" section as that of the Borrower/Grantor.[5] The two paragraphs together compel the conclusion that the deeds of trust secure Grantor's obligations of payment and performance "under" any "Related Document." The Harvey's and Gentry's construction, like the one accepted by Division II, fails to account for this content.

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[5] "It is a well-known principle of contract interpretation that 'specific terms and exact terms are given greater weight than general language.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) (quoting 2 RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981)). Here, the "PAYMENT" and "PERFORMANCE" stated in the paragraph in all capital letters immediately and specifically is explained as the payment and performance of Borrower/Grantor in the "PAYMENT AND PERFORMANCE" paragraph.

Guarantors ask this Court to read out of the deeds of trust the words "(A) PAYMENT" and "(B) PERFORMANCE" and the paragraph "PAYMENT AND PERFORMANCE." They insist that the Deed of Trust should be read as if it stated,

> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) ~~***PAYMENT*** OF~~ THE INDEBTEDNESS AND (B) ~~***PERFORMANCE*** OF~~ ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. ~~***THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS*:**~~
>
> . . . .
>
> ~~**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, **Borrower and Grantor shall pay** to Lender all Indebtedness secured by this Deed of Trust as it becomes due, **and Borrower and Grantor shall strictly perform all their respective obligations** under the Note, this Deed of Trust and the Related Documents.~~

But it does not. Neither does the "Payment and Performance" provision include payment and performance by any other party such as the Guarantors, such as by stating:

> **PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Borrower and Grantor and Guarantor shall pay to Lender all Indebtedness secured by this Deed of Trust as it becomes due, and Borrower and Grantor and Guarantor shall strictly perform all their respective obligations under the Note, this Deed of Trust and the Related Documents.

These phrases are absent. This Court should not read them **into** the document to suit the guarantors' construction.[6] The parties expressed their intent that the "Payment and Performance" obligations that the Deed of Trust secures are those of Borrower/Grantor. This resolves the issue.

As noted, the additional context evidence not present in *First-Citizens* also supports the construction that the deeds of trust do not secure the guarantors' obligations.

The *First-Citizens* court failed to heed *Wilson Court Ltd. P'ship v. Tony Maroni's*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998), when it construed the deed of trust. In *Wilson Court*, the Supreme Court instructed that when construing commercial documents, a court must recognize "the commercial context" and reach "a commercially reasonable construction." *Id.* Here, the parties intended the guaranties to provide security for the loans that was *additional* to the security that each borrower offered, i.e. the properties. The lending bank had determined that the properties alone did not warrant the extensions of credit the borrowers sought. The bank required a remedy *independent* of the deeds of trust in the form of the

[6] Further, the direct object of what the Deed of Trust "is given to secure" is "PAYMENT" and "PERFORMANCE," subject to "the following terms" defining these words. The direct object is not "Indebtedness," "Note," "Deed of Trust," or "Related Documents." But this is how the guarantors, and Division II, read the document.

guaranties by the guarantors. The *First-Citizens* court accepted this as the commercial context, see *First-Citizens* at 6 fn 10, but failed to make a commercially reasonable construction in light of this context. The parties would not have secured the "additional" guaranty obligations by the very same deeds of trust for which the guaranties were—in essence—back-up security. Such a construction cannot be reconciled with the structure of the transaction and the role of the guaranties.

The *First-Citizens* court also avoided any discussion of the striking absence in the guaranty of a provision stating that the deed of trust secured the guaranty. In contrast, the borrower's promissory note contained an explicit provision titled "COLLATERAL" that stated that the deed of trust secured the note. These same provisions—and telling absences—are present in the documents before this Court. The *First-Citizens* court also ignored the FULL PERFORMANCE clause in the deed of trust providing for reconveyance when "Grantor" "pays" and "performs," conspicuously omitting any requirement of reconveyance upon guarantor's payment and performance. *See* Gentry CP 141, 182; Harvey CP 858. The failure of the *First-Citizens* court to address these provisions undermines the adequacy of its construction analysis. This Court should account for these provisions

in its construction.[7]

Washington Federal also argues that the Harvey's and Gentry's specific guaranties are not part of "Related Documents" because the deeds of trust defined "Guaranty" as the specific guaranties signed by the guarantors, and then omitted the defined term from the definition of "Related Documents." *Brief of Appellant (Harvey)* at 24-25; *Brief of Appellant (Gentry)* at 27-29. The *First-Citizens* court also ignored this same argument, which, when considered with all the other context evidence, further shows that the parties did not intend the deeds of trust to secure these guarantors' obligations.

This Court should hold that the deeds of trust do not secure the guarantors' obligations but secure only the borrowers' obligations to pay and perform.

B. <u>Guarantors' Waivers Prevent Successful Assertion of their Anti-Deficiency Defense.</u>

In *First Citizens*, Division II did not rule on waiver. *First-Citizens*

[7] The *First-Citizens* court also erroneously relied on the maxim to construe against the drafter. *First-Citizens* 4, 6 fn 10. No authority shows that the construction maxim applies to benefit *strangers* to the deeds of trust like the guarantors who are not signatories. Further, this maxim is a doctrine of last resort. *Kwik-Lok Corp. v. Pulse*, 41 Wn. App. 142, 148, 702 P.2d 1226 (1985) (*Contra proferentum* is a rule of "last resort."). Here, the Court's objective is to determine as a matter of law the meaning of the document based on Washington's context rule. *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990) (disapproving plain meaning rule and adopting context rule for contract interpretation). Reliance on the maxim is unwarranted.

5 fn 5 (First-Citizens "expressly does not claim" waiver). The issue of waiver by these sophisticated parties in these multi-million dollar business transactions squarely is before this Court as a matter of first impression. *See Brief of Appellant (Gentry)* 32-37; *Brief of Appellant (Harvey)* 27-33. This Court should enforce the guarantors' waivers and reverse.

V. CONCLUSION

Amici urge reversal. The Gentrys and the Harveys induced these commercial loans by agreeing to guaranty them for commercial profit. This Court should enforce the rights and obligations for which the parties bargained. Washington Federal's actions for deficiency judgments are supported by the facts, the documents and the law. A result enforcing the guaranties would be just.

That banks in the future may self-protect against this defense by avoiding nonjudicial foreclosure is no reason to affirm. Such a result is inconsistent with Washington law and would undermine the commercial purposes of the transactions. Additionally, many similar transactions already have resulted in litigation based on nonjudicial forecloses that occurred before guarantors asserted the creative defense on review here. Millions of dollars in deficiency judgments will turn on the appellate

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resolutions of these issues. The defense is inconsistent with the purpose of the Deed of Trust Act and the commercial transactions at issue.

Respectfully submitted on this 16th day of December, 2013.

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APPENDIX TO BRIEF OF AMICI CURIAE

First Citizens Bank & Trust Company v. Cornerstone Homes & Development, LLC, and Daniel L. Allison and Jean Allison, Cause No. 43619-1-II (Washington Court of Appeals Division II December 3, 2013)

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DIVISION II

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STATE OF WASHINGTON

BY ________
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FIRST-CITIZENS BANK & TRUST COMPANY, Respondents, v. CORNERSTONE HOMES & DEVELOPMENT, LLC, a Washington Corporation; and its Guarantor DANIEL L. ALLISON and JEANNE ALLISON, individually and the marital community composed thereof, Appellants.	No. 43619-1-II PUBLISHED OPINION

HUNT, J. — Daniel L. and Jeanne Allison, guarantors of three commercial promissory notes issued by Cornerstone Homes & Development, LLC, appeal the superior court's judgment on the pleadings, ordering them to pay a deficiency following a nonjudicial trustee's sale of Cornerstone's properties that secured the notes with construction deeds of trust. The Allisons argue that (1) these construction deeds of trust also secured their commercial guaranty obligations; and (2) the anti-deficiency provisions of the "Washington Deed of Trust Act"[1] prohibit a deficiency judgment against a guarantor when, as here, the underlying deeds of trust secured the guaranty. We agree. We hold that RCW 61.24.100(10) prohibited First-Citizens Bank & Trust Company from obtaining a deficiency judgment against the Allisons because the deeds of trust that First-Citizens non-judicially foreclosed to satisfy Cornerstone's underlying

[1] Ch. 61.24 RCW.

debt also secured the Allisons' commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by First-Citizens' predecessor. Accordingly, we reverse the superior court's deficiency judgment against the Allisons and its award of attorney fees to First-Citizens. We also grant attorney fees to the Allisons on appeal.

FACTS

In 2003, commercial developer Daniel L. Allison,[2] managing member of Cornerstone Homes & Development, LLC, signed a commercial guaranty, prepared and presented by Venture Bank, for all subsequent loans from Venture Bank to Cornerstone. The language of this guaranty stated that it encompassed all other "related" documents "executed in connection with the indebtedness" then or in the future. Clerk's Papers (CP) at 33.

Three years later, from 2006 to 2007, Venture Bank made several commercial loans to Cornerstone, for which Cornerstone signed three promissory notes, prepared and presented by Venture Bank. As security for these promissory notes, Venture Bank took three separate construction deeds of trust, also prepared and presented by Venture Bank, for three Cornerstone properties. In 2009, Cornerstone defaulted on all three loans and ceased its business operations.

The Washington State Department of Financial Institutions closed Venture Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The FDIC sold to First-Citizens most of Venture Bank's assets, including its loans to Cornerstone. On October 2 and November 20, 2009, First-Citizens nonjudicially foreclosed on the Cornerstone properties secured by the deeds of trust. Following these sales, there remained a $4,240,424.11 deficiency.

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[2] This guaranty also obligated Daniel Allison's wife, Jeanne Allison.

First-Citizens sued guarantors the Allisons for this deficiency[3] and moved for judgment on the pleadings. The superior court granted the motion and awarded judgment in favor of First-Citizens for the full deficiency amount and $31,370.00 in attorney fees. The Allisons appeal.

ANALYSIS

I. GUARANTY & DEEDS OF TRUST

The Allisons argue that (1) their obligations under their guaranty were discharged when First-Citizens nonjudicially foreclosed on Cornerstone's deeds of trust, which also expressly secured their guaranty; and (2) thus, RCW 61.24.100 did not allow First-Citizens to obtain a judgment against them for the loan deficiency that remained after the trustee's sale of Cornerstone's property. We agree.

A. Standard of Review

We review de novo a trial court's order granting judgment on the pleadings. *N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 858, 974 P.2d 1257 (1999). Interpretation of a contract is a question of law, which we also review de novo. *Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 769, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). Washington follows the "objective manifestation theory of contracts"; our primary goal in interpreting a contract is to ascertain the parties' intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Thus, we determine intent by focusing on the parties' objective manifestation of their intent in the written contract rather than on the unexpressed subjective intent of either party; in other words, "We do not interpret what was *intended* to be

[3] First-Citizens also sued Cornerstone, but it later withdrew this action.

written but what *was* written." *Hearst*, 154 Wn.2d at 503, 504 (emphasis added) (citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944)).

The rules that apply to contracts also govern interpretation and construction of a guaranty. *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760, 766, 469 P.2d 969 (1970).[4] By signing a guaranty, the guarantor promises a creditor to perform if the debtor fails to repay the loan. *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 306, 748 P.2d 652 (1988). Nevertheless,

> [a] guarantor is *not* to be held *liable beyond the express terms* of his or her engagement. If there is a question of meaning, the guaranty is *construed against the party who drew it up* or against the party benefited.

Matsushita Elec. Corp. of Am. v. Salopek, 57 Wn. App. 242, 246–47, 787 P.2d 963, *review denied* 114 Wn.2d 1029 (1990) (emphasis added). Here, it is undisputed that Venture Bank drafted the Allisons' commercial guaranty and Cornerstone's deeds of trust.

B. Cornerstone's Deeds of Trust Secured the Allisons' Guaranty

First-Citizens argues that the deeds of trust securing Cornerstone's promissory notes to Venture Bank did not secure the Allisons' guaranty because they contained no such operative

[4] *See also Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

language.[5] This argument fails.

Contrary to First-Citizens' argument, these deeds of trust, drafted by its predecessor, Venture Bank, expressly stated that they were

> . . . GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF *ANY AND ALL OBLIGATIONS* UNDER THE NOTE, *THE RELATED DOCUMENTS*, AND [THE] DEED[S] OF TRUST.

CP at 22 (emphasis added). These deeds of trust defined (1) "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note or *Related Documents*"; and (2) "Related Documents" to include any "*guaranties* . . . whether *now* or hereafter *existing*, executed in connection with the indebtedness." CP at 28 (emphasis added). A plain reading of this language includes the Allisons' earlier guaranty among the "now . . . existing"[6] "Related Documents"[7] that these deeds of trust secured.

Similarly, the Allisons' guaranty, also drafted by Venture Bank, used the same "Related Documents" language as follows:

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[5] The Allisons' guaranty also contained a provision purporting to waive "any and all rights or defenses" under any law "which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor." CP at 32. But in this appeal, First-Citizens expressly does not claim that the Allisons waived protection under the deed of trust statute; instead, it argues that "the anti-deficiency exception to guarantor liability simply does not apply in the first place." Br. of Resp't at 10. *See*, in contrast, *First-Citizens Bank & Trust Co. v. Reikow*, No. 43181-5-II, 2013 WL 6008624, at *7, n.4 (Wash. Ct. App. June 27, 2013) (noting, in response to First-Citizens' argument that the guarantor waived protection in that case: (1) the Washington Supreme Court's reluctance to enforce a contractual provision waiving statutory requirements governing nonjudicial foreclosure, and (2) that "'intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive.'" (quoting *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008))).

[6] CP at 28.

[7] CP at 28.

> This Guaranty, *together with any Related Documents*, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty.
> [. . .]
> "*Related Documents*" mean all *promissory notes*, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, *deeds of trust*, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or *hereafter existing, executed in connection with the Indebtedness.*

CP at 32-33 (emphasis added). This plain language expressly incorporates future "Related Documents," which unambiguously includes future "deeds of trust" as well as "promissory notes" "executed in connection with the indebtedness," "now or hereafter existing," namely Cornerstone's promissory notes and deeds of trust later executed to obtain this contemplated loan.[8] CP at 33.

Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness,"[9] in both the deeds of trust and the Allisons' guaranty, to refer to Cornerstone's construction loans from Venture bank, secured by the deeds of trust.[10] Thus, we agree with the

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[8] First-Citizens does not dispute that Daniel Allison executed his guaranty in contemplation of Venture Bank's future construction loans to Cornerstone, for which Cornerstone later signed promissory notes secured by the deeds of trust on Cornerstone's properties. Instead, First-Citizens and amici curiae, Washington Bankers Association and Washington Federal and Union Bank (WBA), argue that the deeds of trust could not have also secured the Allisons guaranty because they did not own the land that Cornerstone provided as security for the deeds of trust.

That the Allisons did not own Cornerstone's property used to secure its deeds of trust does not undermine the plain language of the deeds of trust, which also secure the Allisons' guaranty. Moreover, even if the language of the deeds of trust describing what they secured were arguably ambiguous, we would have to construe it against First-Citizens, which stands in the shoes of the guaranty's drafter, Venture Bank. *See Matsushita*, 57 Wn. App. at 246–47.

[9] CP at 33.

[10] Amici banks make a compelling argument that accepting the Allisons' argument here would (1) call into question many similar documents securing and guaranteeing commercial loans; and (2) run contrary to the general purpose that personal guaranties serve in the banking industry,

Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons' guaranty in addition to Cornerstone's construction loan.[11]

II. Anti-Deficiency Statute RCW 61.24.100

Having determined that the deeds of trust secured the Allisons' guaranty, we next determine whether First-Citizens can obtain a deficiency judgment against the Allisons for the remaining amount due on Cornerstone's loan following the trustee's sale of Cornerstone's property by nonjudicial foreclosure. To make this determination, we address whether RCW 61.24.100 offers the same anti-deficiency judgment protections to commercial guarantors that it provides to borrowers. Again, we discern the statute's plain meaning from the ordinary meaning of the language at issue, the context in which that statutory provision is found, related provisions, and the statutory scheme as a "whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

Washington's anti-deficiency statute, RCW 61.24.100, categorically prohibits a deficiency judgment against any *borrower* or *guarantor* following a nonjudicial foreclosure, subject to certain exceptions for deeds of trust securing commercial loans[12]:

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namely to assure an additional source of payment to lenders when borrowers default and their securities are insufficient to satisfy the debt. Here, however, we confront specific language that Venture Bank selected for inclusion in these documents and which we must construe against the drafting bank, even if the bank's specific language choice subverts this general guaranty purpose.

[11] Even if these documents were ambiguous, their interpretation presents an issue of first impression in Washington. A Michigan appellate court, however, addressed identical contract language in *Greenville Lafayette, LLC v. Elgin State Bank*, 296 Mich. App. 284, 818 N.W.2d 460 (2012), concluding that the "plain language" of the deed of trust "specifically include[d] guaranties in the indebtedness secured by the mortgage." *Greenville*, 296 Mich. App. at 291.

[12] *See, e.g.*, RCW 61.24.100(10), *infra*.

> Except to the extent permitted in this section for deeds of trust securing commercial loans, *a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against* any borrower, grantor, or *guarantor* after a trustee's sale under that deed of trust.

RCW 61.24.100(1) (emphasis added). *See also Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990). Under this statute a creditor sacrifices its usual right to a deficiency judgment when the creditor elects the "inexpensive and efficient" nonjudicial foreclosure procedure to satisfy a defaulted loan.[13] *Thompson*, 58 Wn. App. at 365.

Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure by allowing the lender to sue a commercial loan guarantor if the guaranty was *not* secured by the foreclosed deed of trust:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to . . . enforce any obligation of a . . . guarantor if that obligation . . . *was not secured by the deed of trust.*

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[13] Amici WBA argue that it would "accomplish nothing" to have a deed of trust securing a guaranty. Br. of Amici Curiae WBA at 9. We note that First-Citizens triggered the ultimate protections afforded by the anti-deficiency statute when it voluntarily elected to avail itself of the relatively "inexpensive and efficient" nonjudicial foreclosure option. *Thompson*, 58 Wn. App. at 365. Moreover, RCW 61.24.100(9) specifically contemplates a party's ability to forego its contractual right to recover any portion or all of a deficiency, which First-Citizens did when its predecessor, Venture Bank, drafted the deeds of trust in such a manner as to secure the Allisons' guaranty. As the Allisons correctly note,

> First-Citizens had a variety of remedies available to it to collect on the Cornerstone debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Cornerstone and the guarantor. It could have sued on the Guaranty first, leaving the foreclosure option available as a later remedy. Or it could (and did) choose the efficient remedy of a Trustee's sale pursuant to the Deed of Trust Act without judicial oversight.

Br. of Appellant at 24.

RCW 61.24.100(10)[14] (emphasis added). Under the statutory construction principle expressio unius est exclusio alterius[15], the above language implies that (1) this express exception to the anti-deficiency judgment statute is the only exception under these circumstances; and (2) therefore, further implies that where a guaranty *was* secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank *cannot* sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.[16]

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[14] *See also* RCW 61.24.100(6), which addresses a lender's ability to obtain a deficiency judgment against a guarantor who granted a deed of trust to secure its guaranty of a commercial loan (which is not the case here):

> A *guarantor granting a deed of trust* to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i).

(Emphasis added). Under its plain language, this statutory provision does not apply here, however, because guarantor Allisons did *not* grant the foreclosed deeds of trust on Cornerstone's property. Instead, it was Cornerstone that granted these deeds of trust, to secure its commercial loan.

[15] "Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate." *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (statute's exception of some weapons listed in firearm enhancement statute shows legislative intent that crimes involving *other* weapons not on the list are *not* to be excepted) (citing *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003), which similarly explained: "'Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.'" (quoting *In re Det. of Williams,* 147 Wn.2d 476, 491, 55 P.3d 597 (2002))).

[16] Amici contend that this statutory interpretation conflicts with RCW 61.24.100(6), *see* n.14 and with RCW 61.24.100(3)(c), which provides:

> This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> [. . . .]
>
> (c) *Subject to this section,* an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

(Emphasis added). We disagree.

By its express language, RCW 61.24.100(3)(c) is "Subject to" other subsections of RCW 61.24.100, such as RCW 61.24.100(10), which limits RCW 61.24.100(3)(c) by allowing a

As we have already held, the nonjudicially foreclosed deeds of trust secured the Allisons' guaranty, in addition to securing Cornerstone's promissory notes to Venture Bank. This security triggered the statutory limitation in RCW 61.24.100(10), which prohibits a deficiency judgment action against a guarantor in the Allisons' situation: The Allisons' guaranty was secured by Cornerstone's deeds of trust under the plain language of these deeds of trust and other "Related documents,"[17] all drafted by Venture Bank in contemplation of Cornerstone's construction loan. In short, the general statutory prohibition against deficiency judgments applies to prohibit deficiency judgments against deed-of-trust-secured guarantors like the Allisons, despite their role as guarantors of a commercial loan, when the lender elects nonjudicial foreclosure to obtain repayment of a defaulted commercial loan secured by deeds of trust that secure not only the loan but also the guaranty. RCW 61.24.100(10).

We hold that RCW 61.24.100's anti-deficiency protections prohibit a lender from obtaining a deficiency judgment against a guarantor whose guaranty was secured by a non-judicially foreclosed deed of trust that also secured the guaranty. Based on this statute and the plain language of the guaranty and the deeds of trust, both drafted by the lender, we further hold that the superior court erred in awarding First-Citizens a deficiency judgment against the Allisons after the nonjudicial foreclosure sales of the properties secured by the deeds of trust.

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deficiency judgment action against a guarantor where the nonjudicially foreclosed deeds of trust did *not* also secure the guaranty, along with securing the commercial loan; because the Allisons' guaranty was secured by the deeds of trust, this subsection does not apply here. *See also* RCW 61.24.100(3)(a)(i), which allows a deficiency judgment action against a guarantor who caused a decrease in the judicially foreclosed property's fair value by waste or who wrongfully retained proceeds from the property; because there were no allegations of waste or wrongful retention of proceeds here, this subsection also does not apply.

[17] CP at 33.

ATTORNEY FEES

Both parties request attorney fees under RAP 18.1 and the terms of the Allisons' guaranty. Although this commercial guaranty expressly purports to entitle only the lender to attorney fees,[18] RCW 4.84.330[19] provides that such unilateral attorney fee provisions give reciprocal rights to all parties to the contract. Because the Allisons are parties to the guaranty that First-Citizens sought to enforce and they are also the prevailing party, we award them attorney fees on appeal.

We reverse the superior court's deficiency judgment and attorney fee award to First-Citizens and remand to the superior court. We also award the Allisons attorney fees on appeal.

Hunt, J.

We concur:

Worswick, C.J.

Johanson, J.

[18] The Allisons' guaranty stated: "Guarantor agrees to pay upon demand all of Lender's . . . attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty." CP at 32.

[19] RCW 4.84.330 provides:

> In any action on a contract or lease entered into after September 21, 1977, 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.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2013, I caused to be served by hand delivery the foregoing BRIEF OF AMICI CURIAE WASHINGTON BANKERS ASSOCIATION AND UNION BANK, N.A. on the following parties at the following addresses:

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